

EXPLANATORY GUIDE

to Proposed Aged Care Reforms as reflected in the Aged Care Amendment (Security and Protection) Bill 2007

Including:

Requirements for compulsory reporting of assaults

Protections for people making compulsory reports of assaults

New processes for the handling of complaints

The role of the Aged Care Commissioner

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GLOSSARY OF TERMS AND ACRONYMS

Act	<i>Aged Care Act 1997</i>
aged care	Care of one or more of the following types, as defined in the <i>Aged Care Act 1997</i> : <ul style="list-style-type: none">• Residential care• Community care• Flexible care
aged care service	An undertaking through which aged care is provided under the <i>Aged Care Act 1997</i>
Agency	Aged Care Standards and Accreditation Agency Ltd
approved provider	A provider approved under the <i>Aged Care Act 1997</i>
Bill	Aged Care Amendment (Security and Protection) Bill 2007
care recipient	A person approved under the <i>Aged Care Act 1997</i> to receive aged care who has been assessed by an Aged Care Assessment Team.
Commissioner	the Aged Care Commissioner
Department	Department of Health and Ageing
Office	Office of Aged Care Quality and Compliance
Principles	Aged Care Principles
resident	a care recipient within a residential aged care service
Secretary	Secretary to the Department of Health and Ageing

INTRODUCTION

In 2006 the Australian Government provided over \$100 million over 4 years to strengthen the protection of care recipients from sexual and physical assault.

The reforms include:

- the requirement for police background checks for aged care workers and certain volunteers in Australian Government-subsidised aged care services. This legislation came into effect on 21 December 2006 and will be implemented progressively from 1 March 2007;
- more frequent unannounced visits to aged care homes by the Aged Care Standards and Accreditation Agency Ltd (the Agency) to ensure they comply with care and safety standards for care recipients. The Agency's program of increased unannounced visits commenced on 1 July 2006;
- a regime of compulsory reporting of certain types of assault in Australian Government-subsidised residential aged care services;
- legislative protections for people who make disclosures as part of the compulsory reporting requirements;
- the replacement of the current Commissioner for Complaints with a new Aged Care Commissioner (the Commissioner); and
- new complaints investigation procedures.

The purpose of this Explanatory Guide is to describe the amendments to the *Aged Care Act 1997* (the Act) (as proposed by the Aged Care Amendment (Security and Protection) Bill 2007) (the Bill) which give effect to the last four of the reforms detailed above.

The proposed amendments to the Act set the general framework for the reforms. As is the case with most legislation, much of the day-to-day detail about the practices and processes that give effect to the reforms is included in subordinate legislation.

In this case, the operational detail will be included in Aged Care Principles made under the *Aged Care Act 1997* (the Act). The proposed amendments to the Principles cannot be finalised until the amendments to the Act have been made.

In order to ensure that all stakeholders have a clear picture of what is proposed, this Guide describes not only the Act amendments but also the details that are proposed to be included in the Principles made under the Act.

CHAPTER 1: COMPULSORY REPORTING OF CERTAIN ASSAULTS

Part A: Summary of proposed changes

The Aged Care Amendment (Security and Protection) Bill 2007 inserts a new section (section 63-1AA) into the Act, describing new responsibilities of approved providers in relation to compulsory reporting of certain alleged, or suspected, assaults in residential aged care services.

In summary, from 1 April 2007, an approved provider will be responsible for:

- reporting reportable assaults;
- requiring staff members to report reportable assaults;
- ensuring that these staff members are not victimised; and
- protecting informants' identities.

These changes will also be underpinned by protections for both approved providers and their staff who report assaults – this is discussed further in Chapter 2.

It is important to note that:

- these responsibilities are in addition to any responsibilities that an approved provider may already have with regard to reporting certain matters under State or Territory law; and
- the new requirements do not prevent an approved provider, or anyone else, from reporting any assault (regardless of whether it is defined as a reportable assault under the new arrangements) to the police or to the Office.

Part B: Detailed description of proposed changes

(i) Definition of reportable assaults

Proposed section 63-1AA sets out the responsibilities of an approved provider of residential aged care in relation to an allegation or suspicion of a “reportable assault”.

In summary, a “reportable assault” means:

- unlawful sexual contact with a recipient of residential aged care;
- unreasonable use of force on a recipient of residential aged care; or

- assault specified in the Accountability Principles (and constituting an offence against a law of the Commonwealth or a State or Territory) on a recipient of residential aged care.

(ii) Approved provider responsibility to report reportable assaults

In summary, if an approved provider receives an allegation of, or starts to suspect on reasonable grounds, a reportable assault, the approved provider is responsible for reporting the allegation or suspicion as soon as reasonably practicable, and in any case within 24 hours. The report must be made to a police officer and to the Office of Aged Care Quality and Compliance (the Office) within the Department of Health and Ageing. The one exception to this requirement, where there is a discretion not to report a reportable assault, is described below.

Circumstances where there is a discretion not to report a reportable assault

The only exception to the requirement for an approved provider to report an assault is in the circumstances specified in the *Accountability Principles 1998*. This exception is intended to deal with very specific and sensitive circumstances – such as assaults carried out by residents with a mental impairment.

The aged care sector has advised that assaults by residents with mental impairments are not uncommon, and in such cases, the focus should be on behaviour management of the resident with the mental impairment and protection of residents, and not police involvement, which can be traumatic for all involved.

Recognising these concerns, provision has been made for the Principles to describe alternative arrangements for these very specific circumstances, where the focus is on effective behaviour management and safety of all residents.

While approved providers would still be expected to report serious assaults (consistent with their general obligations as approved providers), it is proposed that the *Accountability Principles 1998* would provide approved providers with the discretion not to report a reportable assault to the police and the Office if the following three circumstances all exist:

- the approved provider must have reasonable grounds for believing that the person who carried out the reportable assault is a resident. The approved provider must form this view within the 24 hours after the allegation of the reportable assault or after starting to suspect on reasonable grounds that a reportable assault has occurred;
- a medical diagnosis of mental impairment must have been made in respect of the resident and documentation must exist showing that the resident is mentally impaired. Both the diagnosis and the documentation

must exist prior to the allegation of the reportable assault or the approved provider starting to suspect on reasonable grounds that the reportable assault occurred. If this is not the case, then a report must be made to the police and the Office, within 24 hours of the allegation or suspicion; and

- the approved provider has a behaviour management plan in relation to the particular resident who is suspected to have carried out the assault.

It is also proposed that section 19.5 of the *Records Principles 1997* be amended to require that the approved provider keeps a record of all such incidents where assaults are not reported because of reliance on these alternative requirements.

This proposed approach enables cases involving residents who are mentally impaired to be clinically managed by the approved provider where this is the most appropriate response.

The Aged Care Standards and Accreditation Agency (the Agency) will monitor compliance with these requirements through its regular audit and accreditation processes in order to ensure behaviour is being managed appropriately and that other care recipients are protected.

(iii) Approved provider responsibility to require staff members to report reportable assaults

The proposed amendments to the Act define “staff member” to mean an individual who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care or other services.

The approved provider is responsible for taking reasonable measures to require each of its staff members (who suspects on reasonable grounds that a reportable assault has occurred) to report the suspicion as soon as reasonably practicable to one or more of the following people, as chosen by the staff member:

- the approved provider;
- one of the approved provider’s key personnel;
- another person authorised by the approved provider to receive reports of suspected reportable assaults;
- a police officer with responsibility relating to an area including the place where the assault is suspected to have occurred;
- the Office.

The provision makes it clear that the staff member can report to any of these people (and may choose to report to more than one person). In particular,

staff members are given the option of reporting directly to the police or to the Office. This may occur where, for example, a staff member does not feel comfortable reporting alleged incidents to their employer.

(iv) Approved provider responsibility to ensure staff member informants are not victimised

The proposed amendments to the Act set out the approved provider's responsibility for ensuring, as far as reasonably practicable, that:

- any staff member who makes a disclosure does not have contractual remedies enforced or exercised against them because they made a protected disclosure;
- any contract with a staff member who makes a disclosure is not terminated on the grounds that the staff member made the protected disclosure;
- a person does not cause detriment to another person because they have made a protected disclosure. Responsibility covers not only compliance by the approved provider itself with the provision but extends to the approved provider ensuring as far as reasonably practicable that there is also compliance by others, such as other staff members of the approved provider and other parties with whom the approved provider contracts (for example, an employment agency); and
- any staff member who makes a disclosure does not suffer threats because they made a protected disclosure.

(v) Approved provider responsibility for protecting informants' identities

The proposed amendments to the Act provide that if a person reports a suspected reportable assault to the approved provider, the provider is responsible for taking reasonable measures to ensure that the fact that the person was the maker of the report is not disclosed, except to one or more of the following:

- a police officer with responsibility relating to an area including the place where the assault is suspected to have occurred;
- the Office;
- a person, authority or court to which the approved provider is required by a law of the Commonwealth or a State or Territory to disclose the fact;
- the approved provider's key personnel.

If a person reports a suspected reportable assault to someone (the report recipient) who is one of the approved provider's key personnel (or a staff

member authorised by the provider to receive reports of suspected reportable assaults), the provider is responsible for taking reasonable measures to ensure that the report recipient does not disclose the fact that the person was the maker of the report, except to the people specified above.

(vi) Implementation timeframes

Subject to the passage of the legislation, approved providers will be expected to comply with these new requirements from 1 April 2007.

From 1 April 2007, approved providers will have to report any reportable assaults that come to their attention.

This includes assaults that may have occurred before 1 April 2007, but were not reported to the approved provider until after 1 April 2007.

For example:

- there could be an allegation made on 5 April 2007 in relation to a reportable assault that is alleged to have occurred in December 2006; or
- the approved provider might start suspecting a reportable assault on 5 April 2007 but may be unsure when the actual assault occurred.

In either of these cases, the approved provider must report the incident within 24 hours of the allegation being made or the provider starting to suspect that a reportable assault occurred, regardless of when the assault occurred.

From 1 April 2007, the approved provider must also have in place systems to alert staff to the reporting requirements. The approved provider must also have systems in place to protect the identity of staff that make disclosures and also to protect such staff from victimisation.

CHAPTER 2: PROTECTION FOR REPORTING REPORTABLE ASSAULTS

Part A: Summary of proposed changes

The Aged Care Amendment (Security and Protection) Bill 2007 inserts a new section (section 96-8) into the Act setting out:

- the disclosures that qualify for protection;
- the immunities for disclosure; and
- the prohibitions on victimisation for disclosure (subsections 96-8(6) and (7))

The section is based on the protected disclosure provisions contained within the *Corporations Act 2001* and the *Workplace Relations Act 1996*.

Recognising that people will be more likely to report incidents of assault where they do not fear reprisal from their employer, or other staff, these protections are proposed to accompany the compulsory reporting requirements.

In summary, from 1 April 2007, approved providers will be required to have policies and procedures in place to ensure that the identity of staff who make disclosures is protected, and that staff are not unfairly treated as a result of making a report in accordance with the compulsory reporting requirements.

As indicated in Chapter 1, the legislation expressly provides that staff members who make disclosures about assaults, must have their identities protected, and must not be victimised. The legislation also protects disclosers from civil and criminal liability in relation to the disclosure and, amongst other things, enables a court to order that an employee be reinstated or paid compensation if their employment is terminated because of the fact that they made a protected disclosure.

Approved providers will also be protected by the proposed immunities for disclosure.

Part B: Detailed description of proposed changes

(i) Types of disclosures that are protected

In summary, a disclosure of information by a person (the discloser) qualifies for protection if:

- the discloser is an approved provider of residential care, or a staff member of the approved provider. “Staff member” is defined in section 63-1AA and includes any person who is employed, hired, retained or contracted by an approved provider (whether directly or through an employment or recruitment agency) to provide care or other services; and
- the disclosure is made to:
 - a police officer;
 - the Office; or
 - the approved provider, or one of the approved provider’s key personnel, or another person authorised by the approved provider to receive reports of alleged or suspected reportable assaults; and
- the discloser informs the person to whom the disclosure is made of the discloser’s name before making the disclosure; and
- the discloser has reasonable grounds to suspect that the information indicates that a reportable assault has occurred; and
- the discloser makes the disclosure in good faith.

(ii) Protections afforded to people who make a protected disclosure

In summary, the approved provider or staff member who makes a protected disclosure is:

- ***protected from any civil or criminal liability for making the disclosure.*** The discloser also has qualified privilege in proceedings for defamation relating to the disclosure, and is not liable to an action for defamation relating to the disclosure. It is important to note that this provision does not exempt a person from any civil or criminal liability for conduct of the person that is revealed by the disclosure. For example, if a person themselves assaulted a care recipient and told the Office that they did so, this would not protect the person from prosecution for the assault. The person is only protected from liability in relation to the making of the disclosure, as opposed to the conduct that the disclosure reveals.
- ***protected from someone enforcing a contractual or other remedy against the person on the basis of the disclosure.*** A contract to which the discloser is a party cannot be terminated on the basis that the disclosure constitutes a breach of the contract. For example, if a staff member is a party to a contract of employment that specifies that the staff member must not discuss issues that arise in a residential aged care service with anyone outside the service, a disclosure by the staff member that qualifies for protection under this section would not give the employer the right to terminate the contract. However, a disclosure to a person who is not specified in the list of people to whom a qualified disclosure may be made might potentially expose the staff member to termination of their employment contract.

- ***protected from victimisation.*** A person must not:
 - cause detriment (by act or omission) to another person because the other person makes (or may make) a disclosure that qualifies for protection. If the other person is a staff member of an approved provider, the provider has a responsibility to ensure, as far as reasonably practicable, compliance with this requirement. Sanctions may be imposed on the provider if the provider does not comply with this responsibility.
 - threaten another person (whether expressly, impliedly, conditionally or unconditionally) because the other person makes a protected disclosure (or may make such a disclosure).

If a court is satisfied that an employee has made a protected disclosure and the employer (be it the approved provider or a recruitment agency who employs the person on behalf of the approved provider) has terminated the discloser's contract of employment on the basis of the disclosure, the court may:

- order that the employee be reinstated in that position, or a position at a comparable level; or
- order the employer to pay the employee an amount instead of reinstating the employee.

CHAPTER 3: NEW PROCESSES FOR INVESTIGATIONS OF MATTERS (INCLUDING COMPLAINTS)

Part A: Summary of proposed changes

A new Office of Aged Care Quality and Compliance (the Office) has been established within the Department of Health and Ageing with responsibility for investigating any information about possible non-compliance by approved providers of Australian Government-subsidised aged care service under the *Aged Care Act 1997*.

Subject to the passage of the Aged Care Amendment (Security and Protection) Bill 2007 and the making of detailed Investigation Principles under the Act (expected to occur by 1 April 2007), the new Office will have:

- the power to investigate all complaints and information;
- senior, specifically-trained staff to receive and prioritise all information provided; and
- the power to determine whether a breach of the approved provider's responsibilities has occurred. Where a breach is identified, the Office will have the power to require that the approved provider take appropriate action to ensure the breach is remedied. Importantly, the Office will have the capacity to issue Notices of Required Action to providers who have breached their responsibilities, and take compliance action where the provider fails to remedy the issue.

These reforms significantly enhance the Government's capacity to deal with information and complaints about the quality of care and services, including abuse, in aged care services that are directly subsidised by the Australian Government. The reforms are consistent with the Government's objective of encouraging continuous improvement in aged care.

The proposed amendments to the Act establish the power to make Investigation Principles setting out the detail of the new complaints and investigation scheme. The purpose of this Chapter is to describe some of the matters that are proposed to be addressed in the detailed Investigation Principles (which can only be made following the passage of the Bill).

In summary, it is proposed that the new Investigation Principles will:

- shift the current focus from the resolution of "complaints" to a new system whereby the Office receives information from various sources (which may include complaints) for investigation by the Office. The focus will not only be on attempting to resolve the complainant's specific issue, but also on using the information to enable investigation of whether or not there has

been a breach of the approved provider's responsibilities under the Act. The approved provider will have an opportunity to respond to issues identified by the Office and to take steps to address the issues. If necessary, the Department will also have the power to issue a Notice of Required Action (NRA) where a breach has been identified and action is required to be taken by the approved provider to address this breach;

- describe the different means by which the Office may receive information for investigation. For example, information may be provided by way of a "complaint", from other external agencies, or the Office may itself identify an issue for investigation (own motion investigation);
- describe the range of investigative tools available to the Office for investigating an issue. The existing Complaints Resolution Committees and Determination Review Panels will be replaced with new processes and the Commissioner for Complaints will be replaced by a new Aged Care Commissioner;
- describe the opportunities for the person who provided the information to receive feedback and, in some cases, seek reconsideration of decisions made as part of an investigation; and
- ensure that all relevant parties, including approved providers, are afforded natural justice during the course of investigations. The Principles will also describe the opportunities for the approved provider to seek reconsideration of certain decisions and describe a process whereby they will be able to seek an independent examination of certain decisions by the new Aged Care Commissioner. The role of the Commissioner is discussed in more detail in Chapter 4.

Part B: Detailed description of proposed changes

It is proposed that the new Investigation Principles will provide that anyone may provide information (by way of complaint or otherwise) to the Office in relation to anything that may be a breach of an approved provider's responsibilities under the legislation.

Under the new investigation scheme the Office will be responsible for:

- ***Deciding whether or not the information provided relates to an approved provider's responsibilities under the Act or the Principles.*** If it does not, then the information does not give rise to an investigation by the Office, but may be referred to another agency.
- ***Identifying the source of the information.*** For example, information may be provided by a care recipient, a care recipient's representative, an approved provider's staff, an anonymous source or another government agency. While not changing the nature of the investigation, the source of the information will influence the notification requirements, and options for

the informant to seek reconsideration of certain decisions made by the Office.

- ***Undertaking a preliminary investigation.*** Following acceptance and classification of the information, the Office may undertake a preliminary investigation. The preliminary investigation will be undertaken relatively quickly, as the purpose of a preliminary investigation is to determine, if possible: the potentially affected services and potential impacts on care recipients; the seriousness of the allegation and urgency of any investigation; and the type or nature of investigation that may be needed (including whether any further investigation is necessary at all) and whether there is scope to resolve the issue through a conciliation process.
- ***Undertaking a detailed investigation.*** Following a preliminary investigation, the Office may determine not to investigate further. If the Office decides to investigate further, a detailed investigation is undertaken. The investigative process will be a fluid one and it is proposed that the Investigation Principles will detail a non-exhaustive list of actions available to the Office for undertaking an investigation. For example, an investigation may include, but is not limited to:
 - an analysis of written information (i.e. a review of documents);
 - a visit to an aged care service;
 - meetings with the person who provided the information which gave rise to the investigation, or with the approved provider, or any other person;
 - meetings or discussions between the informant, the approved provider and any other affected person;
 - requesting information from the informant, the approved provider or any other person; and/or
 - the exercise of monitoring powers as detailed in the Act.
- ***Taking appropriate action based on the investigation.*** Once any investigation has been completed, the Office will decide whether or not there has been a breach of the approved provider's responsibilities under the Act or the Principles. If the investigation identifies that there has been:
 - a breach of the approved provider's responsibilities, the Office may issue a written Notice of Required Action (NRA) detailing the steps that the approved provider must take in order to address the breach. If the approved provider fails to comply with the NRA within the specified time then the Office may initiate compliance action under Part 4.4 of the Act; or
 - no breach of the approved provider's responsibilities, then no further action is taken by the Office (other than the provision of feedback as described below).
- ***Providing appropriate feedback to approved providers and informants.*** The nature of the feedback will depend, in part, on the informant. For example, if the information was originally provided by a

care recipient (or their representative) and the information was in relation to that care recipient, then the Office would provide more detailed feedback to that person than they might to a person who made a more general complaint. The Office will also take into account relevant privacy and related issues.

- ***Providing opportunities for approved provider's and care recipients to seek reconsideration and examination of decisions made by the Office.*** It is proposed that if an approved provider or a care recipient is dissatisfied with certain decisions made by the Office, they may request a reconsideration of the decision. After reconsidering the decision, the Office may confirm the decision, vary the decision or set aside the decision and substitute a new decision. If the person continues to be dissatisfied with the outcome of any reconsideration, the person may seek independent examination of the matter by the Aged Care Commissioner.

The Department is working with the Office of Legislative Drafting and Publishing to identify the most appropriate way to “transition” complaints made under the old scheme into the new scheme.

CHAPTER 4: ROLE OF THE AGED CARE COMMISSIONER

Part A: Summary of proposed changes

The Aged Care Amendment (Security and Protection) Bill 2007 inserts a new Part (Part 6.6) into the Act which:

- establishes the Aged Care Commissioner (Commissioner);
- describes the functions of the Commissioner;
- describes the process for appointment of the Commissioner, the remuneration of the Commissioner, and the terms and conditions of the Commissioner; and
- sets out the annual reporting requirements of the Commissioner.

In summary, the Commissioner will replace the existing Commissioner for Complaints and will have powers to hear complaints about action taken by the new Office of Aged Care Quality and Compliance in relation to its investigation role, and also about the conduct of the Aged Care Standards and Accreditation Agency and its assessors.

The Commissioner will also have a capacity to undertake “own motion” reviews.

While the changes to the Act establish the position of Commissioner, Investigation Principles (to be made under the Act) will need to detail certain information about the means by which the Commissioner examines matters and carries out its functions.

The purpose of the following Part is to not only summarise the matters that are included in the Bill in relation to the Commissioner but also describe the types of matters that are expected to be included in Principles made under the Act.

Part B: Detailed description of proposed changes

(i) Functions of the Aged Care Commissioner

In summary, the functions of the Commissioner will be:

- to examine certain decisions made by the Office under the Investigation Principles. It is proposed that the Investigation Principles will detail which decisions of the Office a person may request the Commissioner to

examine. Following an examination, the Commissioner may make recommendations to the Office arising from the examination;

- to examine complaints made to the Commissioner about the Office's processes for handling matters under the Investigation Principles, and make recommendations to the Office arising from the examination;
- to examine, on the Commissioner's own initiative, the Office's processes for handling matters under the Investigation Principles, and make recommendations to the Office arising from the examination;
- to examine complaints made to the Commissioner about: the conduct of an accreditation body (currently the Aged Care Standards and Accreditation Agency) relating to its responsibilities under the Accreditation Grant Principles; or the conduct of a person carrying out an audit, or making a support contact, under those Principles. The Commissioner may also make recommendations to the accreditation body, arising from the examination. The functions of the Commissioner expressly exclude examination of a complaint about the merits of a decision under those Principles. This recognises that such decisions are subject to review by the Administrative Appeals Tribunal and the Federal Court;
- to examine, on the Commissioner's own initiative: the conduct of an accreditation body relating to its responsibilities under the Accreditation Grant Principles; and the conduct of persons carrying out audits, or making support contacts, under those Principles; and make recommendations to the accreditation body concerned arising from the examination. The Commissioner will not examine the merits of any particular decision made by the Agency but may examine the conduct of the Agency and its auditors;
- to advise the Minister, at the Minister's request, about matters relating to any of the matters described above; and
- the functions (if any) specified in the Investigation Principles. This power provides some flexibility in terms of the functions of the Commissioner, yet also ensures that there is appropriate Parliamentary scrutiny of any additional functions of the Commissioner that might be proposed in the future.

(ii) Aged Care Commissioner processes

It is proposed that the Investigation Principles will set out some of the key processes and powers of the Commissioner. For example, it is proposed that the Investigation Principles will provide that:

- any person may make a complaint to the Commissioner in relation to a matter that falls within the functions of the Commissioner. A complaint may be made orally or in writing;

- the Commissioner will have some discretion not to deal with a complaint. For example, where a complaint has been made to the Commissioner, the Commissioner may decide not to investigate the complaint if the complaint is frivolous or vexatious or was not made in good faith or if the matter is already being reviewed by a court or by a tribunal;
- the Commissioner may adopt such processes as the Commissioner considers appropriate. The Commissioner (including anyone to whom powers are delegated by the Commissioner) will be made a “representative” under the Accountability Principles, which means that the Commissioner will have a range of powers as specified in the existing legislation and consistent with those of the existing Commissioner for Complaints;
- the Office will also be able to give the Commissioner protected information, just as the Office can provide such information to the Agency.

CHAPTER 5: FURTHER INFORMATION

Subject to the passage of the legislation through Parliament, and the making of Principles, it is proposed that the changes detailed in this guide will take effect from 1 April 2007.

Prior to that time, the Office will be developing detailed implementation guidelines and will be providing these to all approved providers.

Additional information about the reforms can also be accessed through:

- the Department's website at www.health.gov.au/OACQC
- the Aged Care Information Line 1800 500 853.

The *Aged Care Act 1997* and the Aged Care Amendment (Security and Protection) Bill 2007, along with the updated Principles 1997 will also be able to be downloaded from www.health.gov.au/OACQC.