

# ***Public Authority Liability in the Wake of Ipp - Confusion Confounded***

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*Public authority liability for negligence has long been a vexed question in tort law. Following the Ipp Review of 2002, it has been further complicated by the introduction in most Australian states of a form of 'policy defence', designed to reduce authorities' exposure to liability through lowered standards of care modelled on public law concepts. This article analyses the disparate provisions in the light of their recent judicial interpretation, highlighting the problems and uncertainties they create, their wide variation in form and their infidelity to the original proposals on which they are based. It advocates a return to the drawing board and canvases two potential solutions that now merit more detailed consideration – either a wholesale reversion to the common law; or the enactment in Uniform Legislation of a single, cautiously deferential approach to liability for discretionary public body decisions, which mimics the approach to other types of specialised, expert decision in private law.*

## **I. INTRODUCTION**

Public authority liability for negligence has long been a complex area of the common law, but its convolution has been further exacerbated in recent years by the raft of statutory provisions enacted in Australia in the wake of the Ipp Review of 2002.<sup>1</sup> The Review itself was commissioned by Commonwealth, State and Territory governments as a reaction to the spiraling cost of liability insurance - a phenomenon that was itself (not uncontroversially)<sup>2</sup> attributed to the unpredictability of negligence law. The Review Panel was tasked with finding ways to curtail the problem by 'developing consistent national approaches'<sup>3</sup> to negligence liability as a whole. Within this remit, one of its more specific terms of reference was to 'address the principles applied in

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<sup>1</sup> Ipp D et al, *Review of the Law of Negligence: Final Report* (September 2002) Commonwealth Treasury ('Ipp Review').

<sup>2</sup> Doubts are now expressed about the extent to which the Australian insurance crisis was ever really a product of negligence liabilities as opposed to canny political lobbying. See, eg, K Burns, 'Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective' (2007) 15 *TLJ* 195; R Davis, 'The Tort Reform Crisis' (2002) 25(3) *UNSW Law Journal* 865; H Luntz, 'Reform of the Law of Negligence: Wrong Questions – Wrong Answers' (2002) 25(3) *UNSW Law Journal* 836. Since the implementation of the reforms, public liability insurance premium rates have certainly dropped (Australian Prudential Regulation Authority, *Overview of Professional Indemnity and Public and Product Liability Insurance* (June 2013)), but it is unclear whether this is due to lower tort liabilities, or simply a more general recovery of insurance markets.

<sup>3</sup> Helen Coonan, Minister for Revenue and Assistant Treasurer (2001-2004), *Joint Communique Ministerial Meeting on Public Liability* (30 May 2002).

negligence to limit the liability of public authorities’.<sup>4</sup>

The Panel’s ultimate recommendation was for the introduction of a so-called statutory ‘policy defence’<sup>5</sup> for public authorities throughout all Australian jurisdictions. The proposed ‘defence’ was not intended to provide complete immunity against civil liability, but instead to lower the standard of care required of authorities in respect of certain types of ‘policy’ decision; that is, conscious decisions based substantially on ‘financial, economic, political or social factors’, made in the performance or non-performance of their public functions. The standard proposed borrowed its terminology from the public law concept of *Wednesbury* unreasonableness,<sup>6</sup> so that liability for a policy decision would arise only if the decision was so unreasonable that no reasonable public authority could have made it.<sup>7</sup>

This recommendation proved to be the catalyst for a subsequent wave of uncoordinated and inconsistent law reform across Australia, much of which has showed little fidelity to the spirit or detail of the Panel’s original proposals. The result is that not only is there now no single approach to the question of public body negligence liability in Australia, but such legislative provisions as have been introduced bear little resemblance to the proposals on which they were apparently based. In some jurisdictions (South Australia and the Northern Territory), no special policy defence has been enacted at all and the negligence liability of public authorities continues to be regulated exclusively<sup>8</sup> by common law principles. The result is an unpalatable farrago of disparate norms.

Some might regard this hodgepodge of rules as understandable in a federal system, but it is clearly not in accord with the proclaimed preferences of governments in the run-up to the Ipp Review. At best, the random result can be regarded as a pragmatic sacrifice of original preferences to the exigencies of the time and to the perceived need for governments to make swift, unilateral, visible, public responses to ‘crisis.’ At worst, however, it is irrational for governments to emphasise the importance of national consistency on the one hand, and then to legislate multilaterally, without regard to this aim, on the other. In our view, it is also undesirable as a matter of moral principle that the private interests of Australian citizens which are as basic as the integrity of their person, property and economic welfare should receive radically different protection in negligence law from State to State. It is not, however, strictly necessary to take this view for one to react sceptically to the recent wave of reforms, as we intend to show. Sadly, they contain sufficient deficiencies and interpretive difficulties to justify independent criticism in their own right.

In this article, we explore the problems inherent in the various statutory provisions now governing public body liability in Australia and recommend a return to the drawing-board. We argue that, whilst the negligence liability of public bodies was certainly never straightforward at common law, the recent reforms have further confused, convoluted and fragmented matters to an unacceptable degree - to such an

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<sup>4</sup> Ipp Review, ix.

<sup>5</sup> In jurisdictions implementing the recommendation, it has not been construed as providing a defence as such, but rather an additional statutory hurdle that must be overcome in order to establish liability: see, eg, *Road and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd* [2009] NSWCA 263 at [360] per Campbell JA (McColl JA and Sackville AJA agreeing).

<sup>6</sup> Ipp Review [10.25]-[10.29]; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680.

<sup>7</sup> *Ibid* [10.26], Rec 39.

<sup>8</sup> In SA, there is one exception that is specific to public bodies, relating to the liability of road traffic authorities under *Civil Liability Act 1936* (SA) s 42. Other statutes also affect public bodies in the same way that they affect the liability of private parties – eg the limitation acts.

extent, indeed, that we should now seriously consider either discarding them entirely; or re-engaging with the field in a concerted way that is likely to produce a more uniform, rational solution.

Part II of the article describes the common law background against which the Ipp proposals and subsequent statutory reforms are set. The purpose here is to identify some of the difficulties, but also some of the sophistications of the original, common law approach to public body liability. This serves as a backdrop to our discussion of the Ipp Review's proposed 'policy defence' in Part III. Part IV then critically appraises the various legislative responses to the Review in the light of their recent judicial interpretation. It details the extent of the legislation's inconsistencies, interpretive difficulties and infidelities to the Ipp vision and illustrates the problematic state of the current law when viewed from either the microscopic, or macroscopic point of view.

Part V advocates a return to the drawing-board. Our aim in this, final, concluding part is not to set out a fully-developed proposal for reform, but to state clearly the reasons why there is a need for change, and to canvas two possible solutions that now merit further, serious consideration. Without a proper dénouement of the problems of the field as it stands, there is little prospect of governments making any change, not least because their own interests are captured. The first option for reform involves a more concerted and careful process of uniform legislation that would endorse a single, cautiously deferential approach to negligence liability for discretionary public decisions, mimicking the approach that courts currently take toward other types of specialised, expert decision in private law. This approach assumes a Diceyan view of the relationship between citizen and State and therefore sits comfortably with the traditions of Australian private law.<sup>9</sup> It also, however, assumes the possibility of national consensus between governments on matters of liability that affect their budgets and behaviour, which is a weaker premise. The second, more pragmatic solution is to completely abolish all existing versions of the 'policy defence' and return the question of public body liability for negligence entirely to the wardship of the common law. This may seem an extreme and startling suggestion – one that returns us, full-circle, to our starting point – but it is one that may well be warranted, we suggest, by the difficulties that the legislation currently presents.

## II. PUBLIC AUTHORITY NEGLIGENCE – THE COMMON LAW BACKGROUND

Prior to the Ipp Review, the negligence liability of public authorities<sup>10</sup> in Australia was regulated almost entirely by the common law. This remains the case in South Australia and the Northern Territory.<sup>11</sup> Furthermore, the common law remains relevant even in those jurisdictions where statutory reform has occurred, because the reforms do not codify the law, but merely supplement and modify the common law approach.

One point that does not seem to have been fully appreciated by the governments that commissioned the Review is that public authority liability for negligence has always

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<sup>9</sup> The basic vision appears in AV Dicey, *The Law of the Constitution* (7<sup>th</sup> ed, 1908) esp 189-191, 198-199. For reference to some of the necessary exceptions that finesse the base principle of equality, see Hogg and Monahan, *Liability of the Crown* (3<sup>rd</sup> ed, 2000), [1.2]. The Diceyan view strongly underpins the form of most statutes abolishing Crown Immunities in Australia. For the history, see PD Finn, 'Claims against the Government Legislation' in PD Finn, *Essays on Law and Government* (LBC, 1996) vol 2, 25.

<sup>10</sup> See generally, C Booth & D Squires, *The Negligence Liability of Public Authorities* (Oxford, OUP, 2006); H Wade, C Forsyth, *Administrative Law* (10<sup>th</sup> ed), (Oxford, OUP, 2009), 648-662; P Cane, *Administrative Law* (Oxford, Clarendon, 2011) 201-210.

<sup>11</sup> See n 8 above.

been limited to a significant degree by the traditional requirements that a plaintiff prove the existence and breach of a duty of care. In fact, courts' willingness to impose legal duties of care on public authorities has historically been constrained by a number of serious judicial concerns attending an authority's status and functions. These relate to: (i) the 'justiciability' of certain types of discretionary public policy decision involving the allocation of resources between competing social ends; (ii) the fact that a body's failure may consist in a 'pure omission' to prevent harm more immediately caused by a third party or natural hazard; (iii) the potential incompatibility of any duty of care with the intentions and purposes of a statute under which the public body acts; (iv) the apprehension that the duty may induce 'defensive practices', or place decision-makers in impossible positions of legal or ethical conflict between competing responsibilities; (v) worries that 'indeterminate' or 'massive' liabilities might result from a single, wrong decision; (vi) the need to ensure that negligence law develops coherently with other legal principles (including other principles of private law, but also public law processes for the review of decisions through statutory appeals and judicial review); and (vii) a concern - increasingly strongly voiced by the High Court in recent years - that an appropriate balance is struck between the responsibility of public agencies to protect individuals and the latter's duty<sup>12</sup> to look out for themselves.<sup>13</sup>

Limiting public body liabilities so as coherently to incorporate respect for all of these concerns has admittedly not been without its difficulties. The appropriateness of some of them has been questioned<sup>14</sup> and their influence upon courts' reasoning on duty questions can produce law with soft edges. The concerns about the 'justiciability' of public decisions and the 'consistency' of a duty of care with a body's statutory purposes have proven especially difficult to meet with bright-line rules.<sup>15</sup> In part, this is because the justiciability question itself has two, distinct aspects in judicial thinking that are easily conflated - one relating to courts' *constitutional* reluctance to second-guess public body decisions regarding distributive choices carrying the public mandate;<sup>16</sup> the other relating to their *practical incapacity* to determine what a public body should have done, given their own lack of experience and expertise in distributive or resourcing questions, the subjective and open-textured nature of some of the discretionary standards placed at issue, the informational constraints that attend the private law system,<sup>17</sup> and the polycentric nature of some of the decisions in question.<sup>18</sup> Similarly, the question whether a duty of care is 'compatible' with a body's statutory purposes inevitably requires the 'intention' of the relevant statute to be inferred, often from very general broad-brush descriptions of a body's public functions. This process of interpretation is notoriously slippery and often unpredictable.

<sup>12</sup> Or sometimes, their liberty – see, eg, *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, [2009] HCA 15 at 248, [87] where a duty on the part of the police to detain a person contemplating suicide was considered inconsistent with the latter's freedom of choice.

<sup>13</sup> *Amaca Pty Ltd v New South Wales* [2004] NSWCA 124 at [156] per Ipp JA.

<sup>14</sup> The concern about 'defensive practice' is one of the most persistently controversial, not least because it is based upon assumptions about behaviour that have not been empirically tested.

<sup>15</sup> For an excellent analysis, see Booth & Squires above n 10, Ch 2.

<sup>16</sup> *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 62, [170] per Gummow J ('imperilling legislative devolution'); *Graham Barclay Oysters Pty Ltd v Ryan & Ors* (2002) 211 CLR 540, [2002] HCA 54 at 553-4, [6], per Gleeson CJ.

<sup>17</sup> *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, at 1067, per Lord Diplock; *Crimmins* above n 16 at [5] per Gleeson CJ; *Brodie v Singleton Shire Council* (2001) 206 CLR 512, [2001] HCA 29 at 628-629, [310]-[312] per Hayne J. On the distinction between these two forms of argument see further Booth & Squires above n 10, 33-41; M Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review*, 44, 57.

<sup>18</sup> On which, see L Fuller, 'The Form and Limits of Adjudication' (1978) *Harvard Law Review* 353.

At the breach stage, courts run into similar difficulties in determining the proper standard of care to apply to public body decisions, especially where the decision involves the balancing of competing demands on scarce resources.<sup>19</sup> There is also a more fundamental, destabilising question - on which views can reasonably differ - as to whether public bodies should *in principle* be expected to take *less* care than a private individual, *more* care, or (the Diceyan view) be treated *in as nearly as possible the same way*. On the one hand, it is arguable that they should be held to lower standards, because they are tasked with undertaking actions that benefit society as a whole, not particular individuals.<sup>20</sup> Unlike most private actors, they also have little choice about whether or not to discharge their functions and so are unable to avoid the constraints of their own limited resources by abstaining from risk-bearing activity.<sup>21</sup> On the other hand, it is sometimes suggested that they should be held to a higher, altruistic standard since, unlike most private actors, they operate for the benefit of others without regard to self-interest.<sup>22</sup> On this view, public bodies are akin to trusted private fiduciaries, to whom stricter legal standards are applied in managing the affairs of others.

A third view is that, where discretionary decision-making about resources is involved, they should be treated in the same way as highly skilled or specialised private actors, such as doctors. After all, doctors too regularly face complex decisions about competing priorities and resource-distribution, and may similarly have no practical (or ethical?) choice other than to act in one way, or another. On this view, the ‘*Bolam*’ standard is the logical standard to apply to public body resourcing decisions at common law,<sup>23</sup> as a measure of practical deference to the special knowledge of experts, the difficulties of the field and the importance of not stifling innovation, with the consequence that such decisions should be adjudged reasonable provided they comply with ‘a responsible body’ of expert opinion held by equivalent public decision-makers, for which the court is satisfied there is a rational evidential basis.<sup>24</sup> This standard lies half-way between that applied to ‘non-expert’ tasks like driving a car, where the defendant must comply with the *predominant* approach of reasonable peers, and the more exacting standards required of fiduciaries, some of whose prudential management duties (such as the duty to avoid conflicts of interest) tend to be strict.

<sup>19</sup> See, eg, *Refrigerated Roadways* above n 5 at [274] *per* Campbell JA (McCull JA and Sackville AJA agreeing). Whether this difficulty goes to duty or to breach apparently depends on how generalised it is likely to be in respect of the sort of decision the authority is engaged in: see [283].

<sup>20</sup> K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts in Australia* (Oxford University Press, 5<sup>th</sup> ed, 2012) 584.

<sup>21</sup> *Brodie* above n 17 at 623, [295] *per* Hayne J.

<sup>22</sup> P Vines, ‘Straddling the Public/Private Divide: Tortious Liability of Public Authorities’ (2010) 9(4) *The Judicial Review* 445, 449.

<sup>23</sup> For vestiges of this approach in the context of a broader appeal to the standard norms of negligence law, see S Bailey and M Bowman, ‘The Policy/Operational Dichotomy – A Cuckoo in the Nest’ (1986) *CLJ* 430, 435-6. The test derives from McNair J’s judgment in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583, at 587: a practitioner is not negligent if acting ‘in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art’. *Bolam* was rejected in Australia in the context of a doctor’s informational duties in *Rogers v Whitaker* (1992) 175 CLR 479 and in respect of treatment and diagnosis decisions in *Naxakis v Western General Hospital* (1999) 197 CLR 269. It has also now been rejected in the UK in respect of a doctor’s informational duties in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at [85]-[88]. Note, however, that a standard analogous to *Bolam* now applies in relation to all professional duties (other than the duty to warn of the risk of harm) in civil liability legislation in most states: *Civil Liability Act 2003* (Qld) s 22; *Civil Liability Act 2002* (NSW) s 50; *Wrongs Act 1958* (Vic) s 59; *Civil Liability Act 2002* (Tas) s 22. Western Australia’s provision only applies to health practitioners: *Civil Liability Act 2002* (WA) s 5PB. The ACT has no provision.

<sup>24</sup> The qualification reserves the ultimate judgement to the court: *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL). This is also the design of the statutory provisions listed, *ibid*.

Historically, these complex concerns have resulted in limited liabilities for public bodies at common law, which makes it unlikely, we suggest in the next section, that further statutory intervention was ever actually necessary to curtail over-extensive liabilities in respect of discretionary decision-making. It is, however, true to say that the difficulties of the field have left courts struggling to articulate entirely predictable rules. In the UK, judges at one time sought to accommodate ‘justiciability’ concerns at a logically distinct, separate stage of negligence proceedings, prior even to considering whether or not any duty of care was owed by an authority on the facts. This they did by adverting to a distinction between ‘policy’ decisions (presumptively non-justiciable), on the one hand, and ‘operational’ failings (presumptively justiciable), on the other.<sup>25</sup> They also experimented with ruling out negligence liability entirely in respect of discretionary decisions unless there had been a clear violation of public law standards.<sup>26</sup> Both of these approaches have declined in popularity in recent years; the justiciability question is now generally viewed as simply one part of the duty of care inquiry conducted on individual sets of facts (not a prior ‘in/out’ question),<sup>27</sup> and the distinction between ‘policy’ and ‘operation’ has been recognised as being far from watertight, with the consequence that courts now tend to ask and answer the question of justiciability directly in its own terms, rather than by mediating it through any hard and fast policy/operation ‘rule’.<sup>28</sup> The use of public law criteria as a protective shield in negligence proceedings has also waned – a point that is significant precisely because the Ipp Review’s proposed ‘policy defence’ was, as we shall see, constructed around this type of approach.

The result of these developments in the UK is that, nowadays, only a ‘narrow bank of high-level decisions are considered out of bounds’ by English courts, with the vast majority of cases being considered through the lens of ordinary negligence principles.<sup>29</sup> To the extent that judges worry about negligence liabilities impinging unduly on discretionary ‘public’ decision-making, they prefer simply to check a duty of care’s consistency with the background ‘statutory framework’, and with apparent legislative ‘intentions’ regarding the availability of a private law cause of action.<sup>30</sup> This may have resulted in more cases going to trial and in more detailed judicial scrutiny of public body decisions, which is no doubt unattractive to public authorities, but also consistent, we would suggest, with the basic, Diceyan conception of the rule of law.

<sup>25</sup> *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 754 *per* Lord Wilberforce. See also (more cautiously) *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 737-738 *per* Lord Browne-Wilkinson.

<sup>26</sup> *Stovin v Wise* [1996] AC 923. There has since been a retreat from this approach: *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL) and *Phelps v Hillingdon London Borough Council* [2001] 2 AC (HL). See further Booth and Squires above n 10, 49-53, 54-58.

<sup>27</sup> Booth and Squires above n 10, 29 criticise any such change (justiciability should always be determined as a prior question).

<sup>28</sup> *Rowling v Takaro Properties Ltd* [1988] AC 473 (PC) at 501 *per* Lord Keith; *Stovin* above n 26 at 951-952 *per* Lord Hoffmann; 938-939 *per* Lord Nicholls; *Barrett* above n 26 at 571-572 *per* Lord Slynn; 583 *per* Lord Hutton; *Phelps* above n 26 at 658 *per* Lord Slynn; 665 *per* Lord Nicholls; 973-974 *per* Lord Clyde. For the various criticisms of the distinction and the reasons why UK courts have steered away from it in recent years under the influence of the European Court of Human Rights, see Cane above n 10, 213-218, 219-221.

<sup>29</sup> D Nolan, ‘Governmental Liability’, Ch 17 in K Oliphant (ed) *The Law of Tort* (Lexis Nexis Butterworths, 2007), 893.

<sup>30</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, [2004] UKHL 15 (HL). See also *Stovin* above n 26. To the extent that *Stovin* suggested that the existence of a common law cause of action depends on *positive* legislative intention to this effect, it is dubious. The modern approach in Australia is different (and, we suggest, correct), asking instead whether a cause of action is clearly intended to be *excluded* by the Act: see n 44 below.

In Australia, courts have also sometimes attempted to gauge the justiciability of public body decisions by reference to the policy/operation distinction,<sup>31</sup> but they now also regard the distinction as only being ‘of some use’.<sup>32</sup> By contrast, the bold use of public law criteria to restrict negligence actions never really took off, having been expressly disapproved by McHugh J in *Crimmins* as inapposite, given the very different rationales of public and private law actions.<sup>33</sup> The result is that, in the great majority of cases,<sup>34</sup> the various policy concerns we have mentioned above have been dealt with flexibly and sensitively at the duty and breach stages of the negligence inquiry, as they are in the UK.

As regards duty, Australian courts now approach novel cases in a granular, fact-specific way, having regard to a wide variety of salient ‘features’ or ‘factors’.<sup>35</sup> These include: (i) the foreseeability of harm to the plaintiff;<sup>36</sup> (ii) the extent of the authority’s power, or control over the risk<sup>37</sup>; (iii) the defendant’s knowledge (actual, or possibly constructive) of the risk;<sup>38</sup> (iv) whether the decision in question is one that is capable of being resolved judicially, in the sense that there is a ‘criterion by which a court can assess’<sup>39</sup> its propriety; (v) whether a duty would encroach upon the authority’s ‘core-

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<sup>31</sup> *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at 442 *per* Gibbs CJ; 500 *per* Deane J (it is generally the implied intention of the statute in question to preclude liability for policy decisions); 468-9 *per* Mason J (distinguishing between ‘decisions which involve or are dictated by financial, economic, social or political factors or constraints.... budgetary allocations and the constraints which they entail in terms of allocation of resources’ on the one hand and ‘action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness’ on the other. Cautious reference to the distinction is also made in the more recent cases: *Pyrenees Shire Council v Day* (1998) 192 CLR 330, [1988] HCA 3 at 358-9 [67]-[68] *per* Toohey J; 425-6 [253] *per* Kirby J (but note Gummow J’s rejection of the distinction as unhelpful at 393 [182]); *Crimmins* above n 16, at 50 [131] *per* McHugh J; at 101, [292] *per* Hayne J; *Barclay* above n 16 at 556 [12] *per* Gleeson CJ. By contrast with Mason J’s view in *Heyman*, Gummow J in *Pyrenees* at 394 [182]-183 preferred to isolate only ‘quasi-legislative’ decisions as non-justiciable, leaving budgetary and resource questions to be engaged at breach stage.

<sup>32</sup> *Refrigerated Roadways* above n 5 at [259] *per* Campbell JA.

<sup>33</sup> *Crimmins* above n 16, at [82]-[83].

<sup>34</sup> The exception may be where the concern about justiciability is clearly of the constitutional type, where it is still suggested that it may be appropriate for courts to consider it in its own terms before any debate about the existence of a duty of care arises: see *Electro Optic Systems Pty Ltd v State of New South Wales*; *West & Anor v State of New South Wales* [2014] ACTCA 45 at [210] *per* Jagot J. See also, perhaps, *Meshlawn P/L and Anor v State of Qld and Anor* [2010] QCA 181 at [70]-[72] *per* Chesterman J.

<sup>35</sup> *Crimmins* above n 16 at 39 [93] *per* McHugh J; *Barclay* above n 16 at 596-7 [146], [149] *per* Gummow and Hayne JJ; 577 [84] *per* McHugh J; *Stuart* above n 12 at 254 [113] *per* Gummow, Hayne and Heydon JJ. A popular iteration of the general approach, now often cited, is that of Allsop P in *Caltex Refineries(Qld) Pty Ltd v Stavara* (2009) 76 NSWLR 64, [2009] NSWCA 258.

<sup>36</sup> This requirement is trite law, but lies at the heart of *Sydney Water Corporation v Maria Turano and Another* (2009) 239 CLR 51, [2009] HCA 42.

<sup>37</sup> See, eg, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, at 550-552, 556-557; *Brodie* above n 17 at 559 [102], 574 [140] *per* Gaudron, McHugh and Gummow JJ; *Crimmins* above n 16 at 38-9 [91]-[93], 42 [104] *per* McHugh J; 61 [166] *per* Gummow J (dissenting); 98-100 [277]-[286] *per* Hayne J (dissenting); 116 [357] *per* Callinan J; *Barclay* above n 16 at 558 [20] *per* Gleeson J; 598 [150] *per* Gummow and Hayne JJ; *Stuart* above n 12 at 254 [114] *per* Gummow, Hayne and Heydon JJ; 261-262, 266 [137]-[138], [149] *per* Crennan and Kiefel JJ.

<sup>38</sup> *Pyrenees* above n 31 at 371 [108] *per* McHugh J; 389 [168] *per* Gummow J; 420 [246] *per* Kirby J; *Crimmins* above n 16 at 13 [3] *per* Gleeson CJ; 24-5 [43],[46] *per* Gaudron J; 39 [93], 41[101]-[102] *per* McHugh J (counselling against the use of constructive knowledge in this field); 85 [233] *per* Kirby J; *Armidale City Council v Alec Finlayson Pty Ltd* [1999] FCA 330 at [27] (actual knowledge); *Amaca* above n 13; *Port Stephens Shire Council v Booth and Ors* [2005] NSWCA 323 at [96] (actual knowledge).

<sup>39</sup> *Dorset Yacht* above n 17 at 1067 *per* Lord Diplock; *Brodie* above n 17 at 628-629 [310]-[311] *per* Hayne J; *Barclay* above n 16 at 554-5 [8], 557 [13] *per* Gleeson CJ; *Crimmins* above n 16 at 13 [5] *per* Gleeson CJ; *Newcastle City Council v Shortland Management Services* [2003] NSWCA 156 at [80]-[82] *per* Spigelman CJ (Mason P and Sheller JA agreeing); *Refrigerated Roadways*

policy-making’ or ‘(quasi-)legislative functions’;<sup>40</sup> (vi) whether a duty would be incompatible with the terms, purposes or scope of the statute (in particular, whether the statute intended to advance the interests of particular plaintiffs or identifiable groups, or those of society ‘as a whole’);<sup>41</sup> (vii) whether imposing a duty would be likely to distort the impartiality of a body’s decision-making by inducing defensive practices,<sup>42</sup> or would place decision-makers in a position in which their legal or ethical duties might conflict;<sup>43</sup> (viii) whether or not it would cohere with other areas of the law;<sup>44</sup> (ix) whether or not the authority ‘assumed responsibility’ to a particular individual who (specifically) relied upon it;<sup>45</sup> (x) whether or not a duty would posit a risk of an indeterminate<sup>46</sup> or logically uncontainable<sup>47</sup> liability; and (xi) whether or not the plaintiff was vulnerable in the sense of reasonably being able to protect himself or herself against the harm in question.<sup>48</sup>

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above n 5 at [267], [274], [281]-[283] *per* Campbell JA (McColl JA and Sackville AJA agreeing); *Electro Optic* above n 34 at [201] *per* Jagot J.

<sup>40</sup> The phrase is that of McHugh J in *Crimmins* above n 16 at 37 [87], 39 [93]. Other judges restricted their focus to ‘legislative’ or ‘quasi-legislative’ functions: Gaudron J at 21 [32]; Gummow J at 62 [170]; Kirby J at 100 [288]; Hayne J at 101 [291]-[292]. Contrast *Brodie* above n 17 at 560 [106] *per* Gaudron, McHugh and Gummow JJ (“it is no answer to a claim in tort against the Commonwealth that its wrongful acts or omissions were the product of a ‘policy decision’”). It is unclear to what extent there is a distinction between this criterion and the previous one.

<sup>41</sup> *Pyrenees* above n 31 at 347 [24-5] *per* Brennan CJ; 391 [175] *per* Gummow J; 421 [247] *per* Kirby J; *Crimmins* above n 16 at 39-41 [93]-[100] *per* McHugh J; 72 [203], 76-77 [213]-[215] *per* Kirby J; *Barclay* above n 16 at 596 [146] *per* Gummow and Hayne JJ; *Stuart* above n 12 at 239 [52] *per* French CJ; 250-251 [98], 254 [112] *per* Gummow, Hayne and Heydon JJ; 260 [131-2], 263 [141] *per* Crennan and Kiefel JJ; *Sutherland Shire Council v Becker* [2006] NSWCA 344 at [100]; *Meshlawn* above n 34 at [70] *per* Chesterman J; *MM Constructions (Aust) Ltd v Port Stephens Council* [2012] NSWCA 417 at [98]. Note that the relevance of the fact that a statute was intended to benefit the public, not individuals, was previously thought irrelevant to the negligence action by both Gibbs CJ (436) and Mason J (465) in *Heyman* above n 31. Note also that the way this question is now framed (is there anything in the statute to negate the existence of a duty?) is the reverse of the approach taken by Brennan J in *Heyman* (who saw the essential question, at 482-3, as being whether there is anything in the statute that might *positively imply* the duty). The former is the proper approach, since the incidence of common law negligence liabilities, in contrast to liabilities for breach of statutory duty, does not depend on the existence of any positive statutory intention.

<sup>42</sup> *Crimmins* above n 16 at 102-3 [296] *per* Hayne J (dissenting); *Amaca* above n 13 at [160] *per* Ipp JA. Not all judges accept this concern: see, eg, *McKenna v Hunter & New England Local Health District* [2013] NSWCA 476 at [105] (Macfarlan JA).

<sup>43</sup> *Sullivan v Moody* (2001) 207 CLR 562 at 582-3 [60]-[63]; *X v South Australia* [2005] SASC 150; *Precision Products (NSW) Ltd v Hawkesbury City Council* [2008] NSWCA 278 at [118]-[119] *per* Allsop P; *Dansar Pty Ltd v Byron Shire Council* [2014] NSWCA 364.

<sup>44</sup> *Sullivan* above n 43 at 581 [54]; *X v South Australia* (No 3) [2007] SASC 125 [196]; *Moorabool Shire Council v Taitapanui* (2006) 14 VR 55; *Precision Products* above n 43 at [116], [119].

<sup>45</sup> *NSW v Spearpoint* [2009] NSWCA 233. General reliance of the type contemplated by Mason J in *Heyman* above n 31 at 463-4 (‘dependence’) is no longer regarded as sufficient, so that some form of what Brennan J in *Heyman* (at 486) called ‘induced’ reliance is now key. See *Pyrenees* above n 31 at 344 *per* Brennan CJ; 387-8 *per* Gummow JJ; 411 *per* Kirby; *Brodie* above n 17 at 627 [307]-[308] *per* Hayne J; *Stuart* above n 12 at 260 [132] *per* Crennan and Kiefel JJ. This has strangely not prevented some judges continuing to refer to it as one possible factor: *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412 at [26] *per* Hodgson JA.

<sup>46</sup> *Makawe* above n 45 at [93] *per* Hodgson JA; *Electro-Optic* above n 34 at [353] *per* Jagot J; at [733] *per* Katzmann J. See also the references to the different concept of ‘massive’ liabilities in *Barclay* above n 16 at [324] *per* Callinan J; *Amaca* above n 13 at [157] *per* Ipp JA.

<sup>47</sup> *Stuart* above n 12 at 252-253 [107] *per* Gummow, Hayne and Heydon JJ (if the duty applied to exercise of powers under Mental Health legislation, it would logically have to apply to the exercise of any type of power).

<sup>48</sup> *Pyrenees* above n 31 at 370 [107] *per* McHugh J; 421 [247] *per* Kirby J; *Makawe* above n 45 at [21] *per* Hodgson JA; [63] *per* Campbell JA; [168]-[178] *per* Simpson J; *Amaca* above n 13 at [156] *per* Ipp JA.



None of these factors (save foreseeability, which is essential) is now thought to be absolutely necessary, or determinative,<sup>49</sup> although those relating to control, justiciability and the consistency of a duty with statutory purposes are regarded as especially important in cases in which it is alleged that an authority has been negligent in failing to exercise its statutory powers.<sup>50</sup> Some cases involving pure economic loss have also foundered on the basis that a plaintiff had a reasonable means of protecting itself against the economic risk in question,<sup>51</sup> which is consistent with the approach taken in respect of other, private defendants.

Beyond this, decisions regarding failings of a more ‘operational’ nature often turn on lower-level questions of breach, with significant leniency being accorded to authorities so as to take account of their varied responsibilities, the financial and other resources available to them<sup>52</sup> and their legitimate expectations that individuals will protect themselves against more ‘obvious’ forms of hazard, such as the dangers of diving into potentially shallow waters, or walking upon uneven ground.<sup>53</sup> The fact that courts are able to accommodate concerns about their capacity to judge public decisions by taking a more hands-off approach toward questions of breach was signalled many years ago in *Sutherland Shire Council v Heyman* itself, in which both Gibbs CJ and Wilson J opined that even if a duty were owed by the Council on the facts, it could not be shown to have been breached.<sup>54</sup> The same view has been taken in other cases in more recent years.<sup>55</sup>

The common law approach to public body negligence liability described above clearly has both positive and negative features. On the downside, there was (and still is) a degree of uncertainty in both UK and Australian law as to exactly when a discretionary public decision of the type forming the focus of the Ipp Report will be actionable. The trend has been away from hard and fast refusals to investigate such questions on constitutional grounds (save perhaps in the most exceptional and obvious cases) toward a more flexible approach based on practical judicial ‘capacities’ to address such issues and respect for express or implied Parliamentary ‘intentions’. The soft edges of the criteria deployed in these inquiries, when combined with the elasticity of the modern ‘multifactoral’ approach towards duty of care questions in Australia, create concern about the predictability of public bodies’ private law liabilities. Outside existing precedents, Australian courts’ approach toward duty questions now has the semblance of a structured discretion, rather than a set of hard-and-fast rules. The judicial tendency to consider more issues at the breach stage also means that more extensive, detailed evidence - sometimes of a sensitive, financial type - is likely to have to be presented by authorities at trial - a concern that governments voiced openly

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<sup>49</sup> *Makawe* above n 45 at [48] per Hodgson JA (consider the features’ ‘cumulative effect’); *Dansar* above n 43 at [109] per Meagher JA.

<sup>50</sup> Few claims in recent years have expressly been rejected on grounds of their constitutional (as opposed to practical) non-justiciability, but several have failed for lack of proof that an authority’s powers gave it sufficient control over the risk in question. See, eg, *Barclay* above n 16; *Stuart* above n 12; *X v South Australia, New South Wales v Godfrey* [2004] NSWCA113 and *Turano* above n 36 at [53].

<sup>51</sup> See, eg, *MM Constructions* above n 41.

<sup>52</sup> See eg *Refrigerated Roadways* above n 5.

<sup>53</sup> *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 455 [52] per Toohey and Gummow JJ; *Vairy v Wyong Shire Council* (2005) 223 CLR 422, [2005] HCA 62, at 481-483 [215]-[220] per Callinan and Heydon JJ; *Ghantous v Hawksbury City Council* (2001) 206 CLR 512, [2001] HCA 29; *Brodie* above n 17 at [163] per Gaudron, McHugh and Callinan JJ.

<sup>54</sup> *Heyman* above n 31 at 448-9 per Gibbs CJ; 471 per Wilson J. For the view that such discretion inevitably makes it harder to prove breach, see also *Brodie* above n 17 at 559-560, [104]-[105] per Gaudron, McHugh and Gummow JJ, citing the old authority of *Miller v McKeon* (1905) 3 CLR 50 at 60 per Griffith CJ; 601 [229] per Kirby J.

<sup>55</sup> See *Meshlawn* above n 34, where a discretionary decision about liquor licencing was adjudged perfectly reasonable, when a realistic view was taken of all the evidence.

in the wake of the High Court's decision in *Brodie*.<sup>56</sup> This could mean longer litigation, more detailed fact-finding and more reference by courts to 'expert' assessments of public decisions about sensitive, difficult questions.

On the other hand, it is quite clear that the common law system is alert to the various concerns about imposing negligence liability on a public body in respect of its unique statutory functions and has developed a pretty sophisticated set of tools for reaching nuanced decisions that reflect a balance of justice and policy considerations. The common law has also shown itself quite resolute in rejecting claims that question a public body's legislative<sup>57</sup> or quasi-legislative<sup>58</sup> decisions; and in recent years has robustly denied liability in a series of claims involving discretionary public decisions.<sup>59</sup> It is true that the *Presland*<sup>60</sup> case, to which we allude further below, created some controversy in Australia in the early part of the millennium and a sense that perhaps the law had gone too far, but, if that decision was ever wrong, the courts themselves were swift to deal with the error on appeal.<sup>61</sup>

A final benefit of the common law system – which is important (and not a little ironic) in light of the aspirations for consistency that underpinned the Ipp Review, is that it provides a unitary normative system: the law as stated by the High Court of Australia binds courts in all domestic jurisdictions. Although the system hence carries with it some frustrating unpredictabilities, it at least offers the possibility of forcing Australian law, however gradually, to a single, final, consensus position. This, we suggest, accords a respectful equality of legal treatment to citizens in respect of their basic private interests that is woefully lacking in the random pattern of current statutory arrangements.

### III. THE IPP REVIEW PROPOSAL

This is the background against which the Ipp Review Panel was asked to determine how public authority negligence liability should be treated in 2002. Despite the common law's various control devices, a number of local governments expressed genuine concern to the Panel about their potential liability, particularly for decisions affected by scarce resources, or embodying choices between competing activities or social priorities. They argued that this threat of liability was affecting their ability to perform their functions in the public interest.<sup>62</sup>

The Panel identified two potentially problematic types of case: those involving public decisions about the allocation of limited resources, and those involving decisions about matters of social policy. Its solution was to allow authorities to meet claims by pleading that any alleged negligence was the result of a conscious and considered decision, made in good faith, on the basis of financial, economic, political or social considerations'.<sup>63</sup> The resulting 'policy defence' was proposed in the following terms:

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<sup>56</sup> Above n 17.

<sup>57</sup> *Barclay*, above n 16 (no claim possible against the NSW Government for failure to legislate so as to more closely control the operations of the oyster industry).

<sup>58</sup> *Crimmins*, above n 16 (no claim possible in respect of the defendant's failure to make regulations to improve worker safety).

<sup>59</sup> See, eg, *X v Bedfordshire* above n 25; *Sullivan* above n 43; *Stuart* above n 12.

<sup>60</sup> *Presland v Hunter Area Health Service*, [2003] NSWSC 754. For the facts and decision, see Part IV(B)(3), below.

[2005] NSWCA 33.

<sup>61</sup> *Ipp Review* [10.3]. The paradigms for these examples were the cases of *Brodie* and *Dorset Yacht* above n 17, respectively. Note, however, the actual decision in the latter case did not turn on any attack on any policy decision of the Home Office to operate a system of low security prisons.

<sup>63</sup> *Ipp Review* [10.13].

In any claim for damages for personal injury or death arising out of negligent performance or non-performance of a public function, a policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position could have made it.<sup>64</sup>

In framing the defence in this way, the Panel's intention was not to make 'policy decisions' completely immune to tort liability ('non-justiciable', in the language of the common law), nor indeed to provide a true 'defence',<sup>65</sup> but instead to subject negligence liability in such cases to an additional precondition, by lowering the standard of care required and thereby raising the hurdle plaintiffs must overcome to establish liability.

One irony of this proposal is that, taken at face value, it endorsed a potentially *more extensive* approach to public body liability in respect of social policy and resource-allocation decisions than arguably existed at common law at the time. This is because, with the occasional exception,<sup>66</sup> it had not been suggested that decisions of the 'policy' type would either be justiciable by courts, or provably negligent on the normal common law standard in any event. Since the mandate of the Panel was to *cut back* on public authority liabilities, it must, we suppose, have assumed that liability for such decisions still remained a serious possibility at common law.<sup>67</sup> Perhaps the common law's approach was adjudged simply too unclear at the time for the contrary conclusion to be considered safe. In fact, however, we have been unable to find a single case, English or Australian, either prior or subsequent to the Ipp Review, in which a court has held the type of social policy or higher-level resourcing decision that was the focus of the panel's concerns to be both justiciable and to give rise to negligence liability. In our view, this seriously calls into question whether or not any additional protection for public authorities was really needed in the domain in which the Ipp Review sought to provide it. If this is so, then the Report was complicit in setting up a straw man and subsequent legislation has sought to solve a problem that never really existed.

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<sup>64</sup> Ibid Recommendation 39.

<sup>65</sup> The mere fact that the onus lies on a defendant to raise or plead a matter is probably insufficient to classify the matter as one of 'defence', although some authors do use the term in this way: see J Goudkamp, *Tort Law Defences* (Oxford, Hart Publishing, 2013), 6. It is also unclear which onus - evidential or legal - was intended to be cast onto D. For the view that the onus (legal or evidential unspecified) lies on D to establish that the relevant decision was based on the exercise of a special statutory power, but that the ultimate (legal?) onus of proving that a decision breached the lower standard of care still lies on P, see *Curtis v Harden Shire Council* [2014] NSWCA 314 at [244] *per* Basten JA; at [7] *per* Bathurst CJ. Cf. *Dansar* above n 43 at [93] *per* MacFarlan JA (dissenting).

<sup>66</sup> See, eg, *Dorset Yacht* above n 17 at 1068, *per* Lord Diplock; *Smith v Secretary of State for Health* (2002) 67 BMLR 34 at [95] *per* Morland J, both of which suggest, *obiter*, that an ultra vires policy decision might be justiciable. But subsequent cases have clarified that the fact that a decision is ultra vires does not necessarily make it justiciable: see especially, *Barrett and Phelps* above n 26. The recent emphasis on the fact that the 'policy/operation' distinction is only a guide to justiciability, not definitive, might also give rise to this impression that 'policy' decisions are justiciable (and see *Brodie* above n 17 at 560 [106] *per* Gaudron, McHugh and Gummow JJ), but the more credible interpretation of these statements is probably that the fact that some 'operation' is involved does not necessarily make a decision justiciable, because operation can itself depend on higher-level resourcing decisions. That does not necessarily make truly 'political' decisions justiciable, even if they are ultra vires. See further Booth & Squires, above n 10 at 54-58.

<sup>67</sup> A contrary thesis - that the Panel actually intended to extend liability - was mooted at one point by Vines, above n 22. However, this seems very hard to reconcile with the Panel's terms of reference.

The defence as formulated involved several elements; the performance of a public function, a policy decision, a claim ‘arising out of’ negligence, and a resulting personal injury, or death. These elements are worthy of further amplification because they assist in identifying the proposal’s purpose and intended scope, and in highlighting the extent to which the enacted provisions we examine in Part IV vary from the suggested design.

#### **A. ‘Public function’**

The defence was intended to protect only those actions or omissions of a public authority that involve the performance of a ‘public function’. Whilst this term went undefined and was left for future judicial interpretation,<sup>68</sup> the Panel did broadly characterise a public function as one that requires a defendant to ‘balance the interests of individuals against a wider public interest, or to take account of competing demands on its resources’.<sup>69</sup> Therefore, the defence was not intended to protect authorities in the performance of activities that might also be engaged in by private individuals or corporations. In this regard, it replicated the common law’s existing practice of providing no special protection for the ‘private’ activities of public bodies, such as owning or occupying property.<sup>70</sup>

#### **B. ‘Policy decision’**

The defence was clearly expressed to apply only to ‘policy’ decisions, defined as a ‘decision based substantially on financial, economic, political or social factors or constraints’.<sup>71</sup> This aligns with the common law view of the types of case in respect of which there is traditionally some constitutional justiciability problem, or some practical difficulty in determining the proper standard of care for a court to apply.

The term ‘policy decision’ itself has two sub-elements. First, there must be a ‘decision’, which is to say that the public authority must have actually *made* a conscious choice in respect of a matter, not simply failed to turn its mind to the question of whether or not to perform a public function.<sup>72</sup>

Second, the decision must be one of ‘policy’, as opposed to an operational one. This distinction, we saw in Part II, is now regarded as providing no more than a rough guide to justiciability at common law, but the Panel implicitly appears to have regarded it as serviceable, if properly explained. The Report gave an example of its application in a case involving road maintenance. If a car accident were caused by a pothole in a road and the authority led evidence that (a) it did not know about the hole, (b) that it inspected roads on a six-monthly cycle, (c) that the hole developed after the last inspection and (d) that it had formally resolved not to carry out inspections more frequently for budgetary reasons, this would most likely be a policy decision and the defence could be raised. However, if the defendant knew about the pothole, but then simply decided to do nothing, or inspected the hole and wrongly decided it was not dangerous, the decision would probably not be based on financial, economic, political or social factors, and the proposed defence would be inapplicable.<sup>73</sup>

#### **C. ‘Personal injury or death’**

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<sup>68</sup> Ipp Review [10.23]

<sup>69</sup> Ibid [10.22].

<sup>70</sup> The difficulty of defining public or private ‘actions’ and ‘functions’ is insightfully and fully discussed by Aronson, above n 17. It lies beyond the scope of the current piece.

<sup>71</sup> Ipp Review [10.22].

<sup>72</sup> Ibid [1.14].

<sup>73</sup> The Panel was only instructed to consider claims of this type: *ibid* [10.31]-[10.33]

The proposed defence was limited to cases involving personal injury and death and did not extend to cases of property damage or economic loss. This reflected the Panel's limited terms of reference.<sup>74</sup> The restriction is significant precisely because all jurisdictions that subsequently enacted a similar defence appear to have ignored it, as we see in Part IV.

#### **D. 'Negligent performance'**

The defence was expressly intended to apply to negligence claims, but the Panel also recommended its extension to claims for breach of statutory duty. Although the latter of these causes of action has been described as having 'almost no life in this country beyond its original context of workplace injuries',<sup>75</sup> the concern was evidently that plaintiffs might sidestep the proposed limitation on negligence liability by relying on breach of statutory duty instead,<sup>76</sup> thereby subverting the objectives of the reform. The logic of this part of the proposal also seems to have been lost on most jurisdictions implementing it, since in most of those jurisdictions, the relevant provisions probably apply *only* to claims based on breach of statutory duty, which is puzzling for reasons articulated further in Part IV.

#### **E. 'So unreasonable that no reasonable public functionary in the defendant's position could have made it'**

The substance of the proposal was for the application of a much-reduced standard of care to policy decisions, based on the 'Wednesbury unreasonableness' test that prevails in judicial review cases.<sup>77</sup> According to Lord Greene in the *Wednesbury* case itself,<sup>78</sup> it requires the relevant failure to be of a very high order of magnitude - 'something overwhelming'.

The *Wednesbury* standard is a public law standard, but had been set to work in the negligence context in the United Kingdom in *Stovin v Wise*,<sup>79</sup> where Lord Hoffmann determined (Lords Goff and Hoffmann agreeing) that a council could not be liable for carelessly failing to exercise its statutory powers to improve visibility at a road junction unless it had 'a duty in public law to undertake the work... [so that].. *'it would have been irrational not to exercise its discretion to do so'*.<sup>80</sup>

The proposed defence was expressly stated as implementing the *Stovin* approach in Australian law,<sup>81</sup> but the formulation has proven controversial for several reasons. First, Professor Aronson has astutely observed that it is wrong to regard the defence as a literal implementation of *Stovin*.<sup>82</sup> This is because *Stovin* made irrationality an absolute precondition of a public body's liability for omission to exercise a statutory power; it did not suggest it as appropriate test of whether or not the body has breached a duty proven to be owed. Second, as the previous section made clear, the House of Lords has since retreated from using the *Wednesbury* unreasonableness standard in tort law. Indeed, Lord Hoffman has himself indicated that any suggestion he may have made in *Stovin* that breaching the public law standard could found a private law right

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<sup>74</sup> Ibid [10.28]

<sup>75</sup> Aronson above n 17, 76.

<sup>76</sup> Ipp Review [10.44]

<sup>77</sup> Ibid [10.27]

<sup>78</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230.

<sup>79</sup> Ipp Review [10.26]. See also *X v Bedfordshire* above n 25 at 736-7 *per* Lord Browne-Wilkinson.

<sup>80</sup> *Stovin v Wise* above n 26 at 956. Our emphasis.

<sup>81</sup> Ipp Review [10.26]

<sup>82</sup> Aronson, above n 17, 48.

of action in tort, was ‘controversial’, and probably ‘ill-advised’.<sup>83</sup> The public law concept of ‘irrationality’ has also been vehemently criticised academically<sup>84</sup> and in recent Australian decisions interpreting statutory enactments of the policy defence, many of which point out the entirely distinct function that the concept plays in the review of public law decisions.<sup>85</sup>

Finally, the *Wednesbury* unreasonableness test is notoriously difficult to apply. Although its adoption was intended to signal a lower standard of care,<sup>86</sup> it is still difficult to articulate precisely what conduct it protects. The significant body of case law considering the test in its original, administrative law context has resulted in its description as tautologous, circular, and vague.<sup>87</sup> Some commentators have credibly ventured to suggest that this vagueness is in turn likely to soften any practical distinction between it and the usual approach to breach in negligence law.<sup>88</sup> To the extent that Australian jurisdictions have sought to interpret and implement the new standard in negligence cases, it has certainly proven problematic, as the next Part demonstrates. These difficulties are likely, we suggest, to undermine the idea that the reforms have brought any greater *certainty* about the extent of public body negligence liability, even if their effect has been to further limit it.

#### IV. THE STATUTORY REFORMS

Following the Ipp Review, all Australian jurisdictions, with the exceptions of South Australia and the Northern Territory, introduced or amended legislation with the stated intention of giving effect to its recommendations. The legislation is remarkable for its lack of consistency either cross-jurisdictionally, or with the design of the Panel’s original proposal. This deviation from the original approach would perhaps be less of a concern, if the majority of the provisions were not expressed to be based upon it.

##### A. *Three forms of provision, not one.*

The legislative amendments consisted, in the end, of three main<sup>89</sup> types of provision, not one. These took the form of:

1. A general principles provision;

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<sup>83</sup> *Gorringe* above n 30 at [26]. On the more general retreat, see Booth & Squires, above n 10, 49-58.  
<sup>84</sup> See, eg, J Convery, ‘Public or Private? Duty of Care in a Statutory Framework: *Stovin v Wise* in the House of Lords’ (1997) 60 *MLR* 559, 565-7; A Mason, ‘Negligence and the Liability of Public Authorities’ (1998) 2 *Edin L Rev* 3, 18; S Bailey and M Bowman, ‘Public Authority Negligence Revisited’ (2000) *CLJ* 85, esp 112-117; E Carroll, ‘*Wednesbury* and Reasonableness as a Limit on the Civil Liability of Public Authorities’ (2007) 15 *Tort Law Review* 77; G Watson, ‘Section 43A of the Civil Liability Act 2002 (NSW): Public Law Styled Immunity for the Negligence of Public and other Authorities?’ (2007) 15 *TLJ* 153; D Nolan, ‘Varying the Standard of Care in Negligence’ (2013) *Cambridge Law Journal* 651, 669.

<sup>85</sup> See, eg, *Allianz Australia Insurance Ltd v RTA of New South Wales* [2010] NSWCA 328 at [78]; *Precision Products* above n 43 at [177].

<sup>86</sup> Ipp Review [10.27].

<sup>87</sup> *Allianz* above n 85 at [79], citing *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Life-stock Corporation* [1990] FCA 139; Allars, *Introduction to Australian Administrative Law* (1990) [5.52]; Airo-Farulla, ‘Rationality and Judicial Review of Administrative Action’ (2000) 24 *Melbourne University Law Review* 543.

<sup>88</sup> Cane above n 10, 208; Bailey and Bowman above n 84, 114. For evidence of such confusion, see the dissenting judgment of Pullin JA in *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [No 2]* [2012] WASCA 79, discussed further below.

<sup>89</sup> For an overview of the full range, see Barker, Cane, Lunney & Trindade, above n 20 595-598. In NSW, there is hence one type of provision that precludes liability for failure to exercise a regulatory function unless a plaintiff could have forced the exercise of those functions in (public law) proceedings: *Civil Liability Act 2002* (NSW) s 44.

2. A version of the Ipp policy defence; and
3. A specific provision limiting the liability of road authorities.

Neither the first, nor the third of these was ever suggested by the Panel and we reference them here merely to contextualise the various ‘policy defences’ that came about. The aim of provisions of the third type was partially to restore the old (much-criticised) ‘non-feasance rule’ in respect of road authority liability for dangerous road defects, which runs directly contrary to the Panel’s view that the High Court’s decision in *Brodie* was sound in principle.<sup>90</sup> Their practical effect is to relieve road authorities of the burden of presenting evidence to defend allegations of breach in cases where it is alleged that they ought to have discovered a risk of which they were unaware. The provisions are not directly related to combatting any of the difficulties alluded to above regarding discretionary ‘policy’ decisions, being equally applicable to carelessness of an entirely ‘operational’ nature; and they obviously only apply to a very limited range of public authorities.

Provisions of the first, general, type appear in all post-Ipp legislative enactments, and apply to public authorities of all types. Except in Victoria, they provide that, in determining questions of either duty, or breach:

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising the functions;
- (b) the general allocation of financial or other resources by the authority is not open to challenge;
- (c) the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates);
- (d) the authority may rely on evidence of its compliance with its general procedures and any applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.<sup>91</sup>

The Victorian provision incorporates (a), (c) and (d), but omits (b).<sup>92</sup>

It is unclear whether any of these rules significantly extend the protection previously available to public authorities at common law, but it seems unlikely.<sup>93</sup> One key problem for current purposes, however, is how principle (b) interacts with the ‘policy defence’ provisions that we examine in the next section, since decisions about ‘general allocations of resources’ appear paradigmatic of the type of ‘policy’ decision which the Ipp Review’s ‘policy defence’ proposal was intended to protect. Where jurisdictions (such as New South Wales) have enacted provisions of both types, the legislation now

<sup>90</sup> Ipp Review [10.5]. Whilst recognising the concerns to which the decision gave rise, it suggested these could and should be met instead by the policy defence.

<sup>91</sup> *Civil Liability Act 2002* (Qld) s 35; *Civil Liability Act 2002* (Tas) s 38; *Civil Law (Wrongs) Act 2002* (ACT) s 110; *Civil Liability Act 2002 (NSW)* s 42; *Civil Liability Act 2002* (WA) s 5W.

<sup>92</sup> See *Wrongs Act 1958* (Vic) s 83.

<sup>93</sup> Proposition (a) may mark the most significant shift in extending the same economically subjectivised standard of care to public authorities generally as prevails at common law to landowners tackling natural hazards arising on their land (*Goldman v Hargrave* [1967] Ch 645 (PC)), but there is arguably already Australian authority for it at common law: *Cekan v Haines* (1990) 21 NSWLR 296 at 314 *per* Mahoney J; *Refrigerated Roadways* above n 5. See also *Crimmins* above n 16 at 21, [34] *per* Gaudron J. Proposition (d) is radical if it allows authorities to use their own negligent procedures to immunise themselves against liability, but it has been doubted whether the provision has this effect: *Transpacific Cleanaway Ltd v South East Water Limited* [2008] VCAT 1798 at [71] *per* Macnamara D.P.

appears to drive a wedge between certain types of policy decision that are completely immune to negligence liability ('general' resource allocations that are 'not open to challenge'), and other types of policy decision (decisions about more 'specific' resource allocation taken in the 'exercise of special statutory powers') which remain potentially actionable, provided they are so unreasonable that no reasonable authority could have made them. This is a puzzle. If the distinction is indeed intended and extant in the legislation, its rationale is unclear and its boundaries hard to delineate.<sup>94</sup> The only way of avoiding the conclusion that different legal approaches are intended in respect of different levels of 'policy' decision in the same legislation, would be to construe 'policy defence' provisions of the second type as, somewhat paradoxically, not aimed at policy resourcing decisions at all, but at failings of a purely 'operational' type. But, although there is clear evidence that these provisions do apply to operational failings, as we shall see, it is highly unlikely that they are confined to failings of that type. The result is an uncomfortable interpretive deadlock, the proper escape from which is yet to be determined.

### **B. The 'Policy defences'**

Almost all jurisdictions that implemented statutory reforms post-Ipp Review included some version of the policy defence proposed, but there are significant variations in the terminology used. This has resulted in inconsistencies across jurisdictions and significant departures from the core elements of the Review's recommendation. None of the legislative policy defences are confined to proceedings involving actions for personal injury or death;<sup>95</sup> some of them appear to have been interpreted as applying to failures in operation, as well as in matters of 'policy'; and several apply exclusively to actions for breach of statutory duty, leaving negligence liabilities either entirely untouched, or touched only by the other types of provision we have mentioned.

#### **1 Queensland, Tasmania and ACT**

The Queensland, Tasmanian and Australian Capital Territory ('ACT') provisions are broadly similar, and collectively represent the greatest departure from the Ipp recommendations. We consider them together.

Section 36 of Queensland's *Civil Liability Act 2003* is entitled 'proceedings against public or other authorities based on breach of statutory duty'. It provides:

- (1) This section applies to a proceeding that is based on an alleged wrongful exercise of or failure to exercise a function of a public or other authority.
- (2) For the purposes of the proceeding, an act or omission of the authority does not constitute a wrongful exercise or failure unless the act or omission was in the circumstances so unreasonable that no public or other authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

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<sup>94</sup> For examples of the struggle, see *New South Wales v Ball* [2007] NSWCA 71; *Refrigerated Roadways* above n 5 esp at [405].

<sup>95</sup> In QLD, the provisions apply to claims for personal injury, property damage and economic loss: *Civil Liability Act 2002* (Qld) sch 2; in TAS to claims for personal injury, death, or property damage: *Civil Liability Act 2002* (Tas); in the ACT and NSW, to civil liability in tort: *Civil Law (Wrongs) Act 2002* (ACT) s 108; *Civil Liability Act 2002 (NSW)* s 40; and in WA to personal injury, property damage or economic loss: *Civil Liability Act 2002* (WA) ss 5V, 3. VIC also defines harm to include property damage: *Wrongs Act 1958* (Vic) s 43.



The Tasmanian and ACT provisions are almost identical, although both also specifically refer to breach of statutory duty in the text of the provision itself.<sup>96</sup>

The specified standard of care ('so unreasonable...') mimics the Ipp recommendation, but there are few other similarities. Protection is not explicitly confined to an authority's performance of its *public* functions,<sup>97</sup> to 'policy' decisions, or to claims for personal injury or death. The generic reference to protection for the exercise of (any?) 'function' may therefore give the provisions a range of application which is far wider than that contemplated by the Ipp Review, and which is hard to justify on a Diceyan view. Where a public body acts in a private capacity (for example, drives a car, or builds a flight of stairs on its property) there seems little justification for treating it any differently in terms of the standard of care it is expected to observe.

On the other hand, the express reference in these provisions to 'breach of statutory duty'<sup>98</sup> clearly has the potential to curtail their scope considerably. Whilst the Ipp Panel intended the defence to apply to actions for breach of statutory duty *in addition* to actions in negligence, so as to prevent plaintiffs undercutting the aims of the reform, the provision, as drafted, seems to apply exclusively to the former.

This is a strange result. Aronson concludes that it is the effect of the legislation as enacted, but rightly notes the oddity of limiting a measure designed to significantly curb public authority liability to an action that has so little life outside the workplace injury context.<sup>99</sup> The application of a lower standard of care in actions for breach of statutory duty also seems out of kilter with the fundamentals of the action itself, which does not necessarily depend on proof of any lack of care.

Unfortunately, the extrinsic material surrounding the introduction of the legislation offers little by way of clarification. The explanatory notes and second reading speech to the Queensland Bill make no mention of the type of claims to which the provision will apply.<sup>100</sup> The notes accompanying the Tasmanian Bill and the subsequent second reading speech are more narrowly worded, referring to breach of statutory duty,<sup>101</sup> but do not expressly disclaim any application to negligence claims.

This confusion was recently addressed in *Hamcor Pty Ltd v Queensland*,<sup>102</sup> a case in which the Queensland Fire and Rescue Service (QFRS) unwisely applied water to a chemical fire at the plaintiff's premises, resulting in serious contamination of the plaintiff's land. QFRS raised the section 36 defence to the plaintiff's claim in

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<sup>96</sup> *Civil Liability Act 2002* (Tas) s 40(1) states that 'this section applies to proceedings in respect of a claim to which this Part applies that are based on an alleged breach of a statutory duty by a public or other authority...'. *Civil Law (Wrongs) Act 2002* (ACT) s 111 states that 'this section applies to a proceeding based on a claimed breach of a statutory duty by a public or other authority (the defendant authority) in relation to the exercise of, or a failure to exercise, a function of the defendant authority'.

<sup>97</sup> Meaning functions that derive exclusively from an authority's statutory powers, rather than from activities that private parties also perform: Ipp Review [10.22].

<sup>98</sup> In the title in QLD, and in the text of the provision in TAS and the ACT.

<sup>99</sup> Aronson, above n 17, 76.

<sup>100</sup> Explanatory Notes, Civil Liability Bill 2003 (Qld) 12; Tasmania, *Parliamentary Debates*, Legislative Assembly, 11 March 2003, 365-366 (Terry Mackenroth, Deputy Premier). The notes speak only to interpretation of the reasonableness standard, stating that 'clause 36 provides that the mere fact that a public or other authority undertakes a certain activity under a statutory power, or does not undertake a certain activity despite holding a statutory power to do so, of itself does not mean the authority must act in the same way in each circumstance. However, if the actions of the public authority are manifestly unreasonable in the circumstances, those actions may constitute a wrongful act or a failure to act. The standard by which the actions of the public authority are to be considered is that of a reasonable public authority'.

<sup>101</sup> Clause notes, Civil Liability Amendment Bill 2003 (Tas); Tasmania, *Parliamentary Debates*, House of Assembly, 24 June 2003, 82-97 (Judy Jackson).

<sup>102</sup> [2014] QSC 224.

negligence. At first instance, QFRS was found to have owed and breached a duty of care at common law,<sup>103</sup> but the claim was dismissed on the basis that it was entitled to benefit from an immunity particular to Fire Brigades.<sup>104</sup> Dalton J nonetheless expressed the *obiter* view that section 36 does not apply to negligence claims, reaching this conclusion by reading the section in the context of the Act as a whole, by applying the presumption that statutes do not derogate from private rights, and by noting the section's explicit (and, in her Honour's view, deliberate) reference to 'breach of statutory duty'.<sup>105</sup> On appeal, Dalton J's decision was upheld, but the Queensland Court of Appeal was not called upon to decide the section 36 point and declined the invitation to do so<sup>106</sup> which leaves us without any conclusive steer.

As regards section 36's substance and effect, Dalton J acknowledged that the provision 'drastically reduces the rights of persons to a remedy by very significantly lowering the standard of care owed by public or other authorities'<sup>107</sup> within the traditional (statutory) duty, breach, damage and causation framework.<sup>108</sup> She also suggested that, whilst the public law test of *Wednesbury* unreasonableness is out of place in civil proceedings and in this respect 'fraught with difficulty', the section nonetheless gives effect to it, requiring 'the kind of unreasonableness which invalidates, or makes improper, the act or omission as an exercise of statutory power'. This standard, she thought, 'goes beyond a *Bolam* standard'<sup>109</sup> and makes it 'extraordinarily difficult for a plaintiff to prove breach'.<sup>110</sup> Had the section applied, she would therefore have concluded that QFRS's actions were insufficient to violate it;<sup>111</sup> a conclusion that the Court of Appeal did choose to endorse.<sup>112</sup> Also implicit in Dalton's J's judgment is recognition of the fact that the provision potentially applies to claims for economic loss; and to purely operational decisions about how to set about extinguishing a fire, which is clearly not something that the Ipp Panel intended, or which any judge, law reform body, or member of the academy has, to our knowledge, ever recommended.

## 2 Victoria

The Victorian provision is similar, but is potentially narrower in scope in so far as it applies to acts or omissions 'relating to a function conferred on the public authority specifically in its capacity as a public authority'.<sup>113</sup> This captures the additional, 'public function' element of the Ipp defence that is arguably lacking from the text of the Queensland, ACT and Tasmanian provisions. The Victorian legislation also expressly excludes negligence claims from its reach<sup>114</sup> and contains a specific reference in the text of the provision itself to breach of statutory duty.<sup>115</sup> Unsurprisingly given this language, the Victorian Civil and Administrative Tribunal and the Victorian Supreme Court have confirmed its application to only claims of the latter type.<sup>116</sup> A further distinguishing feature of the provision is that it does not apply

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<sup>103</sup> Ibid at [174], [182].

<sup>104</sup> *Fire and Rescue Service Act 1990* (Qld) ('FRSA') s 129.

<sup>105</sup> [2014] QSC 224 at [195].

<sup>106</sup> [2015] QCA 183 at [64], [66], [67].

<sup>107</sup> [2014] QSC 224 at [196].

<sup>108</sup> Ibid at [201].

<sup>109</sup> Ibid at [204].

<sup>110</sup> Ibid at [210].

<sup>111</sup> Ibid at [211].

<sup>112</sup> [2015] QCA 183 at [61] (albeit for the purpose of deciding the proper application of s 129 of the FRSA).

<sup>113</sup> *Wrongs Act 1958* (Vic) s 84(2).

<sup>114</sup> Ibid s 80(1) states that 'this part (except section 84) applies to any claim for damages resulting from negligence', making it clear that s 84 does not apply to negligence claims.

<sup>115</sup> Ibid s 84(1).

<sup>116</sup> *Transpacific Cleanaway* above n 93 at [77]; *South East Water Ltd v Transpacific Cleanaway Pty Ltd* [2010] VSC 46 at [62]-[63]; *Quigley v Lower Murray Urban and Rural Water Corporation*

to the breach of ‘absolute’ statutory duties. This is superficially more logical than the QLD, ACT and TAS provisions, but likely to further limit its practical scope to a very narrow range of cases.<sup>117</sup>

The probable confinement of the ‘policy defence’ in Queensland, Tasmania, the ACT and Victoria to claims for breach of statutory duty has therefore rendered the provisions of little practical use to public authorities, given the rarity of such actions succeeding outside of the health and safety context. Given the serious repercussions that the provisions of the first three of these jurisdictions in particular could have on plaintiff rights in respect of even ‘operational’ failings in negligence law, we would not consider this confinement to be a matter of regret.

### 3 New South Wales

The New South Wales legislation contains two separate provisions applying the *Wednesbury* standard to public authorities. Section 43 of the *Civil Liability Act 2002* is drafted in almost identical terms to Tasmania’s provision, and applies solely to claims for breach of statutory duty.<sup>118</sup>

By contrast, section 43A offers a more wide-ranging defence in all proceedings ‘based on’ the ‘exercise of special statutory powers’. A special statutory power is defined as one conferred under statute, and of a kind that persons generally cannot exercise without specific statutory authority.<sup>119</sup> The exercise (or non-exercise) of such powers does not attract civil liability unless the act or omission in question was ‘so unreasonable that no authority having the special statutory power in question could properly consider... [it]... to be... reasonable’.<sup>120</sup> The provision clearly applies to negligence actions and lowers the standard of care to be applied in determining whether a public authority has breached its duty of care.<sup>121</sup>

Section 43A was a kneejerk legislative reaction to a very unusual negligence case, *Presland v Hunter Area Health Service and Anor.*<sup>122</sup> That case attracted controversy because it allowed a disturbed psychiatric patient who had been released from hospital to recover damages from the hospital for the fact and consequences of his imprisonment when he killed his brother’s fiancée on the day of his release. The decision was later reversed by the Court of Appeal without reference to s 43A,<sup>123</sup> but in the intervening period, the legislature saw fit to act.

Referring to *Presland*, the second reading speech described the rationale for introducing the provision in the following terms:

We are all aware of the extraordinary pressures doctors are facing at this time. The last thing we want the courts to be doing is adding to those pressures. In

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*trading as Lower Murray Water (Building and Property)* [2014] VCAT 1325 at [21]; *Sami v Roads Corporation* [2008] VSC 377 at [128].

<sup>117</sup> *Wrongs Act 1958* (Vic) s 84 (4). Requiring “reasonableness” in the *Wednesbury* sense sits more easily with duties of reasonable care than with duties that are normally strict, but, there again, the logic of confining the provision to statutory, as opposed to common law duties of care seems very questionable. In practice, ‘absolute’ statutory duties are fairly rare, so that the difference in scope between VIC and the other jurisdictions here mentioned may not be great in practice.

<sup>118</sup> *RTA of NSW v Rolfe* [2010] NSWSC 714 at [43]; *Patsalis v State of New South Wales* [2012] NSWCA 307 at [87]; *McKenna* above n 42 at [167].

<sup>119</sup> *Civil Liability Act 2002* (Qld) s 43A(2).

<sup>120</sup> *Ibid*, s 43A(3).

<sup>121</sup> *Refrigerated Roadways* above n 5 at [359]; *Curtis* above n 65 at [5], [277].

<sup>122</sup> [2003] NSWSC 754.

<sup>123</sup> *Hunter Area Health Service v Presland* [2005] NSWCA 33.

the mental health context, the *Presland* case has created the risk that doctors will behave too conservatively, detaining patients unnecessarily, out of fear that they can be sued by the patient for anything he or she does if not detained. Other decision-makers may be similarly constrained when trying to decide how to exercise their powers in the public interest. Therefore, the bill inserts a new section 43A that applies to the exercise of, or failure to exercise, a "special statutory power". This will apply to powers that persons generally could only exercise with specific statutory authority, such as the power of a medical officer to detain a person under the Mental Health Act.<sup>124</sup>

In a 2008 analysis, Professor Aronson has suggested that, given its background, the provision should be given a narrow interpretation, confining its application to defendants who, as in *Presland* itself, possess statutory authority to 'act in a way that changes, creates or alters people's legal status or rights or obligations without their consent'.<sup>125</sup>

However, both the second reading speech and the text of the provision itself refer to local government functions more generally, and it is the exercise of such, general functions that has in practice given rise to most of the litigation concerning s 43A. It was also clearly not the Ipp Panel's intention to confine the *Wednesbury* unreasonableness test to the exercise of powers of the type that were at issue in *Presland*.

The cases considering s 43A have addressed two issues that are key to determining the provisions' scope and operation: (i) the proper definition of a 'special statutory power' and (ii) the nature and strictness of the relevant standard of care. On both questions there remains a good deal of uncertainty. As regards the first, the High Court of Australia in *Sydney Water v Turano*,<sup>126</sup> did not consider s 43A in detail, merely noting the provision's 'uncertain' scope and referring to Aronson's interpretation of the term 'special statutory power' without necessarily endorsing its correctness.<sup>127</sup>

Early decisions of the New South Wales Court of Appeal were also not definitive, focusing not on what a 'special statutory power' was, but rather on what it was not. Powers to erect safety screens on a bridge to prevent objects from being thrown from it,<sup>128</sup> to install guideposts at the side of road,<sup>129</sup> or to place warning signs on the road's median strip<sup>130</sup> have all been held not to be 'special statutory powers', but simply the normal incidents of land ownership. In *Grant v Roads and Traffic Authority of NSW*,<sup>131</sup> Rothman J, adopting the reasoning of Campbell JA in the *Refrigerated Roadways* case, again considered the definitional question only negatively, saying that, unless the term 'special' is to be regarded as otiose, a 'special statutory power':

'...cannot be of a kind that, in circumstances not requiring statutory power, persons can exercise. ... [I]f the power is one that, in other circumstances, being in relation to private property or private conduct, would not require

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<sup>124</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 4 December 2003, 5835-5839 (John Della Bosca).

<sup>125</sup> Aronson, above n 17, 78-79.

<sup>126</sup> [2009] HCA 42.

<sup>127</sup> *Turano* above n 36 at [23]-[26].

<sup>128</sup> *Refrigerated Roadways Pty Ltd* above n 5 at [368]. Although private citizens lack the ability to erect screens, this is not because they lack a statutory power, but because they do not own the land, so that their acts would constitute a trespass: at [369].

<sup>129</sup> *Bellingen Shire Council v Colavon Pty Limited* [2012] NSWCA 34 at [38] per Beazley JA in obiter, as the appellant was not permitted to rely on the defence due to its late pleading: [50].

<sup>130</sup> *Grant v Roads and Traffic Authority of NSW* [2014] NSWSC 379 at [140]-[142].

<sup>131</sup> *Ibid* at [139].

statutory authority, the power, when granted to a statutory body (or private individual in relation to property or conduct of or on behalf of government) is not a special statutory power within s 43A(2) of the Act.<sup>132</sup>

None of these cases, it should be noted, expressly contradicts Aronson's narrow construction of the provision, but neither do they explicitly endorse it.

However, more recent decisions, such as *Lee v Carlton Crest Hotel (Sydney) Pty Ltd*<sup>133</sup> and *Curtis v Harden Shire Council*<sup>134</sup> support a broader interpretation. In *Lee*, s 43A was held to be applicable to a body's statutory power to inspect and certify structures,<sup>135</sup> and in *Curtis*, to a power to erect road signage warning drivers of the risk of loose gravel, or of the need to reduce their speed. Both powers were found to be 'special' on the basis that they existed only by virtue of the body's statutory authority. This is more expansive than Aronson's proposed definition, as the powers do not appear to have been to 'create or alter people's legal status or rights or obligations without their consent'.

The result is that courts appear to be applying s 43A well beyond the bounds of the type of case that initially provided the initiative for reform. Like Dalton J in *Hamcor*, they have also applied it to failings of a purely operational type, even when these are not themselves dictated by higher-level, background, policy decisions. In this detail, they again describe a realm of protection for public authorities that extends well beyond the Ipp Panel's original intent.

As regards the second question relating to the required standard of care under s43A, courts engage in a two-step analysis: once a breach of duty at common law is established, it must then be considered whether the additional test is satisfied.<sup>136</sup> The test is again derived from the administrative law concept of Wednesbury unreasonableness and its application in tort law has consequently proven difficult. One reason for this, Giles JA noted in *Allianz Insurance Ltd v RTA of New South Wales*,<sup>137</sup> is that the concept of reasonableness in negligence law focuses on the *substantive quality* of a decision made, not on its *validity* for the distinct purpose of determining whether a body should be obliged to take it again.

In *Precision Products (NSW) Pty Ltd v Hawkesbury City Council*, Allsop P (Beazley JA and McColl JA agreeing) indicated that it was clearly Parliament's intent to 'ameliorate the rigours of the law of negligence',<sup>138</sup> but considered it a matter for debate whether the provision introduces a substantive standard of 'gross negligence'.<sup>139</sup> In *Allianz*, the Court of Appeal considered, but rejected, any equation between the standard and the public law concept of 'irrationality', noting that the latter approach could lead to excessive emphasis on a decision-maker's state of mind.<sup>140</sup> The Court declined to endorse 'gross negligence' as the relevant standard, whilst

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<sup>132</sup>

Ibid.

<sup>133</sup> [2014] NSWSC 1280.

<sup>134</sup> [2014] NSWCA 314. Other cases endorsing a broader construction of the notion of 'special statutory power' include *Collins v Clarence Valley Council (No 3)* [2013] NSWSC 1682 (Beech-Jones J) and *Rickard & Others v Allianz Insurance Ltd & Others* [2009] NSWSC 1115 (Hoeben J).

<sup>135</sup> Above n 133 at [387].

<sup>136</sup> See, eg, *Collins* above n 134 at [200].

<sup>137</sup> Above n 85 at [78].

<sup>138</sup> *Precision Products* above n 43 at [177].

<sup>139</sup> A standard mooted by Aronson above n 17, 80 and Nolan, above n 84, 672-9, 685-687.

<sup>140</sup> Above n 85 at [89] *per* Giles JA, McColl JA and Sackville AJA agreeing. The determination is to be made from the point of view of the authority, but with an 'objective element' in respect of which questions of 'degree and judgement' arise: at [79], [87].

acknowledging that the provision requires unreasonableness at a 'high level'.<sup>141</sup> There again, in *Grant*, Rothman J also rejected public law interpretations of the provision. Recognising that it requires a higher degree of negligence than the ordinary standard, his Honour was uncertain whether 'gross negligence' is the right test.<sup>142</sup> He instead suggested (obiter) that the key question is:

Could an authority properly consider the act or omission a reasonable exercise of the power? The use of the word "could" does not here raise a mere possibility, but is intended to refer to capacity... if it is possible that an authority acting reasonably could perform the act, then liability is excluded.<sup>143</sup>

The focus of this analysis is not on determining what decision should have been taken by an authority, but on identifying a possible *range* of decisions that a reasonable authority could properly have taken. It is only if the authority's decision falls outside of that range that the relevant standard will have been breached.

The same sort of approach appealed recently to courts in *Lee*<sup>144</sup> and *Curtis*,<sup>145</sup> the Court of Appeal in the latter case intimating that the test 'envisages a range of opinions as to what might constitute a reasonable act or reasonable failure to act, but asks if no public authority properly considering the issue could place it within that range', viewing the matter not through the court's own eyes, but through those eyes of a responsible public authority.<sup>146</sup>

There consequently appears to be considerable awkwardness about the public law roots of the test in s 43A and a desire on the part of courts to sever it from them, so as to treat the provision as if it were *sui generis*. This awkwardness mirrors the decline in popularity of public law tests for negligence liability that we witnessed at common law and reflects, we suggest, the same underlying concerns about them. There are also some interesting parallels in recent cases between the way in which s 43A is being interpreted and the *Bolam* standard applied at common law to expert decision-making. It is true that in the Queensland case of *Hamcor*, Dalton J was very clear that the relevant statutory standard was lower than the *Bolam* standard. By contrast, in *Curtis*, Bathurst CJ mentions *Bolam* in parenthesis, alongside the s43A approach.<sup>147</sup> The language used in both *Grant* and *Curtis* suggests that courts consider the private law analogy to be the more appropriate one, but that the standard imposed under s 43A is still somewhat lower than under *Bolam* - compliance with the practice of *any* (one?) reasonable authority sufficing to make the public body safe, as opposed to compliance with a 'responsible *body*' of opinion.

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<sup>141</sup> Ibid at [87]. For rejection of the gross negligence standard, see also *Curtis* above n 65 at [278] per Basten JA (Beazley P and Bathurst CJ agreeing).

<sup>142</sup> *Grant*, above n 130 at [146].

<sup>143</sup> Ibid at [153].

<sup>144</sup> *Lee*, above n 133 at [386]. The standard was found to have been breached.

<sup>145</sup> *Curtis* above n 65 at [278] per Basten JA (Beazley P and Bathurst CJ agreeing).

<sup>146</sup> Ibid at [279]. Ultimately, the Court found that the failure of the Council to reduce the speed limit and erect a slippery road warning sign was so unreasonable that no reasonable public authority would have failed to take these steps. Amongst other factors, additional signage would not have been expensive, time-consuming or inconvenient to place: [302]-[311].

<sup>147</sup> *Curtis* above n 65 at [6]: '[t]he Court must look at the matter having regard to what the authority in question *could* properly consider a reasonable exercise of the power. If the authority could properly consider what was done was a reasonable exercise of the power then there will be no liability. This is so even if the Court considering the matter independently of the section would have concluded there was a failure to fulfil the duty. (Cf in an entirely different context *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582)'. Note that it is not entirely clear whether the comparison in this paragraph is aimed at assimilation, or contrast. The ambiguity stems from the disparate ways in which the abbreviation 'cf' is used in modern English.

If certainty of legal standards is to be a measure of the success of post-Ipp legislative reform, then this discussion of s 43A indicates that victory is still a long way off. One possible way of resolving matters and clarifying the law, which we canvas further in Part V, might lie in abandoning *Wednesbury* altogether and embracing instead the *Bolam* approach in relation to discretionary public body decisions. It is not clear on current authority whether that approach is sensibly achievable without doing damage to the language and intent of s 43A, which means that if this type of approach is desired, it may be best to start again from scratch.

#### 4 *Western Australia*

The Western Australian iteration of the policy defence most closely resembles the original Ipp Review recommendation. Section 5X of the *Civil Liability Act 2002* states that:

In a claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function, a policy decision cannot be used to support a finding that the defendant was at fault unless the decision was so unreasonable that no reasonable public body or officer in the defendant's position could have made it.

This mimics most of the key elements of the original proposal, including the focus on 'public' functions and 'policy' decisions, and the definition of the type of 'policy decision' protected is the same.<sup>148</sup> The provision does not provide a defence as such, but rather acts as a direction to courts that a policy decision cannot be used to support a finding of fault unless the conditions of the section are met.<sup>149</sup> It clearly applies to negligence proceedings and further extends, by virtue of s 5Y, to claims for breach of statutory duty in the way that the Ipp Review recommended.<sup>150</sup> It does, however, extend beyond the Ipp recommendation in so far as it captures not just claims for personal injury and death, but also for property damage and economic loss.<sup>151</sup>

The only judicial interpretation of s 5X to date is to be found in *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [No 2]*,<sup>152</sup> where the plaintiff vineyard owner failed in a negligence action for economic loss suffered when its grapes were tainted by smoke from a fire started by the defendant as part of a controlled burn operation that went awry. The primary basis on which the claim was rejected at both first instance and by the Court of Appeal was that any common law duty of care in respect of the relevant operations would be inconsistent with the defendant's statutory functions. At first instance, however, Murphy J had also indicated, *obiter*, that the action would have been precluded by s 5X, because the defendant's decision to undertake the burn was a 'policy' decision based on social and political factors,<sup>153</sup> and its conduct had not breached the relevant standard.<sup>154</sup> The Court of Appeal concurred in his Honour's conclusion that the decision was one of policy,<sup>155</sup> but split on the question whether the relevant standard would have been breached. McLure JA (Buss JA concurring) thought

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<sup>148</sup> *Civil Liability Act 2002* (WA) s 5U.

<sup>149</sup> *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [No 2]* [2012] WASCA 79 at [300] *per* Pullin JA.

<sup>150</sup> *Civil Liability Act 2002* (WA) s 5Y.

<sup>151</sup> *Civil Liability Act 2002* (WA) s 3.

<sup>152</sup> [2010] WASC 45; [2012] WASCA 79.

<sup>153</sup> [2010] WASC 45 at [510].

<sup>154</sup> *Ibid* at [510]-[511].

<sup>155</sup> [2012] WASCA 79 at [114] *per* McLure P, Buss JA concurring, [301] *per* Pullin JA.

that it would not have been,<sup>156</sup> whilst Pullin JA (dissenting) concluded that it had been and that a negligence action should lie.<sup>157</sup>

Even here, where the form of legislation most closely replicates the recommendations of the Ipp Review, there are clearly problems in interpreting how to implement the relevant statutory standard. The majority took the view that s5X ‘operates so as to significantly alter the otherwise applicable standard of care at common law’,<sup>158</sup> advertent directly to the *Wednesbury* public law standard. On this view, it was ‘clearly wrong to equate that standard with the general law standard of care in negligence’.<sup>159</sup> By contrast, Pullin JA (dissenting) appears to have suggested that the process of deciding whether a decision breaches s 5X is similar to that involved in weighing the various considerations under s 5B(2) of the *Civil Liability Act 2002* (WA). Section 5B(2) is a version of the general provision introduced into most civil liability legislation across Australia, that requires courts, in assessing breach in any case, to consider the probability and likely seriousness of harm, as well as the burden of taking precautions and the social utility of the defendant’s activity. Applying these factors, Pullin JA found the relevant standard to have been breached.

Pullin J’s interpretation of s 5X diverges dramatically from the approach of most<sup>160</sup> New South Wales courts and comes close to equating the approach under the Western Australian provision with the standard approach to breach questions existing at common law. As a dissenting opinion in the sole case to date on this issue, it seems doubtful that his approach will be followed, but the very fact of his divergence from the majority approach validates the predictions of commentators that the *Wednesbury* approach can all too easily shade back into the more standard private law requirement of fault.<sup>161</sup> The irony of the case, from our own critical point of view, is that the answer to the question whether the relevant standard under s5X had been breached seems to have been no easier to predict than the question whether the defendant owed a duty of care at common law. Section 5X was not needed on the facts to provide the protection required; and closer hypothetical inquiry into its potential application on the facts required very detailed examination of the evidence and was evidently capable of yielding radical disagreement even amongst the most intelligent of minds.

## V. BACK TO THE DRAWING-BOARD

Two criticisms of the common law underpinned the recent drive for the reform of public authority negligence liability in Australia - the idea that liabilities in respect of policy and resourcing decisions were excessive and adversely affecting authorities’ discharge of their functions; and the distinct, but associated concern that they were complex and unpredictable. Our analysis of the common law position in Part II of this article raises a serious question mark against the first of these assumptions.<sup>162</sup> There is more substance in the second, owing to the multiplicity and complexity of considerations that have tended to enter court judgments on duty questions at common law, the flexibility of the modern multifactorial approach in Australia, and the fact-intensivity of inquiries regarding breach. The ironic truth, however, is that the

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<sup>156</sup> [2012] WASCA 79 at [114].

<sup>157</sup> Ibid at [303]-[304].

<sup>158</sup> Ibid at [114] *per* McLure P.

<sup>159</sup> Ibid at [114] *per* McLure P, Buss JA concurring.

<sup>160</sup> Carroll astutely observes a potentially similar approach in *T&H Fatouros Pty Ltd v Randwick City Council* [2006] NSWSC: above n 84, 90.

<sup>161</sup> Above n 88.

<sup>162</sup> There are also serious doubts as to whether the causes of the ‘insurance crisis’ ever lay in levels of negligence litigation: see above n 2. Insurance markets have also since stabilised.



complexities and inconsistencies of public authority liability have dramatically increased, not decreased, in the wake of the Ipp Review.

Whilst the Review's recommendations were expressly intended to promote consistency in the law across Australia,<sup>163</sup> we now have at least five different approaches to liability in play across the country. This outcome was regarded as undesirable even by governments that commissioned the Review and in our view it remains morally objectionable for reasons earlier canvassed.<sup>164</sup> It is one thing to suggest that local taxation rates may justifiably differ across the country, quite another to suggest that the right to sue for harm caused by government to basic private interests should do so. Whatever the uncertainties of the common law, these were at least the uncertainties of a *single system* of thinking about private law rights. That system is now overlaid in the majority of jurisdictions with a further set of statutory rules, the substance of which varies from place to place. The law is a ragged patchwork, sewn by a dozen different hands.

There is also little evidence that the introduction of lower, more protective standards for public body decisions is likely to yield any greater *certainty* in terms of 'bright line' standards than already existed at common law, even if it serves to further reduce liability in some cases. Authorities may perhaps be assured that claims are now even more likely to fail than they were prior to the reforms, but are they really in a better position to predict *when* this will be? The current confusion attending both the provisions' scope and the precise operation and meaning of the various statutory standards has not created any bright lines. The confusion stems in part from trying to model private law liability rules by reference to public law concepts originally designed for quite different purposes, but it is also a consequence of poor drafting, the malleability of the concepts themselves and the fact that they operate at lower levels of inquiry regarding breach of duty. Indeed, if absolute certainties are the key priority (which we doubt), then the best solution would be to rule out primary liabilities for public authorities altogether in respect of particular fields of activity through a scheme of immunity. This is the only sure-fire way of ensuring that detailed and difficult inquiries about the 'reasonableness' or otherwise of decisions are not entered into, but it would fly directly in the face of the progressive abolition of government immunities in tort and the respectable Diceyan tradition upon which that movement has historically been based.<sup>165</sup>

There are also good reasons to question the rationality of many of the individual 'policy defence' reforms in their own right, even if one were to tolerate their inconsistencies. In Queensland, Tasmania, Victoria and the ACT, the defence is bizarrely restricted to claims for breach of statutory duty, providing protection so narrow that it is of little practical use to authorities in any event. At the same time, amending the legislation in these jurisdictions to incorporate negligence claims, as originally intended, would paradoxically give public bodies much wider protection than the Ipp Panel ever considered appropriate because, if Dalton J in *Hamcor* is correct, these defences apply to 'policy' decisions and 'operational' failings alike. This either misconstrues, or purposely ignores, the parameters of the Review's recommendations and steps far beyond the bounds of protection provided at common law. The controversy of this step, to which we allude further below, cautions against it in the absence of clear empirical evidence of some pressing social need for it to be taken.

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<sup>163</sup> Ipp Review, [1.9]-[1.13].

<sup>164</sup> See also B McDonald, 'The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence' (2006) 14 *Torts Law Journal* 268, 268.

<sup>165</sup> Above, n 9.

In New South Wales, where the defence clearly does apply to negligence actions, there is also evidence that protection controversially applies to failings of a purely operational type; and there is much confusion about the standard of care that the defence imposes. Judges generally take the view that it is inappropriate to apply a public law ‘*Wednesbury* unreasonableness’ standard to private law actions, whilst recognising that this was the Ipp Panel’s intention and that the language of the legislation comes close to replicating it. The response of Courts in cases such as *Grant*, *Curtis* and *Lee* seems to have been to interpret the legislation in a ‘private law’ way that imposes a standard analogous to the *Bolam* test applicable at common law to expert, professional decisions. In Western Australia, the interpretive fate of the test remains unclear. The one decided authority juxtaposes two very different styles of approach - the application of a public law *Wednesbury* standard without gloss, on the one hand, and a much more generous approach analogous to the normal negligence standard, on the other.

These inconsistencies, confusions and difficulties suggest to us that the negligence liability of public authorities in Australia needs to be urgently revisited and that its current ailments sadly cannot be fully cured simply through more creative approaches to statutory interpretation, as Professor Vines has hopefully suggested.<sup>166</sup> In the remaining space, we cannot hope to set out a full proposal for reform, but canvas two main options that are now worthy of more detailed consideration.

#### **A. Option 1- Revert to the Common Law**

The first is to repeal all versions of the policy defence<sup>167</sup> and return liability questions entirely to the common law. Although this might appear a backward step, a singular approach would still undoubtedly be simpler and would have clear benefits over the current statutory patchwork in terms of consistency and equality of treatment for victims. Our analysis in Part II of this article revealed that the common law already has robust protections in place for decisions of a legislative, quasi-legislative or ‘policy’ type, and that it has a sophisticated set of tools available to it which balance plaintiff interests against countervailing policy concerns. These have resulted in courts respectfully avoiding the second-guessing of decisions they feel incapable of judging, and being sensitive to the resourcing constraints that public authorities often face. No doubt improvements to some of these rules could be made to organise them better and harden up their edges – the current form of discretionary balancing exercise that sometimes goes on in novel cases regarding the duty of care question seems almost intolerable. Greater assurance regarding which ‘factors’ are *necessary* (rather than simply relevant) to the existence of a duty of care in respect of the exercise of statutory functions would also greatly assist. In any event, however, the common law is alert to the concerns that governments have historically voiced. Coupled with doubt as to the genuine necessity for legislative reform in the first place and the more recent recovery of liability insurance markets, this could provide a sound rationale for legislative repeal.

#### **B. Option 2-Uniform Legislation and the Bolam Standard**

If the common law is thought too slow, unresponsive, undemocratic, or necessarily too uncertain to develop a clear and stable position on this controversial question, an alternative would be to enact Uniform legislation in all jurisdictions. There is precedent for this approach in the Uniform Defamation Acts that have sprung up

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<sup>166</sup> Vines above n 22.

<sup>167</sup> Carroll, above n 84, 92.

across Australia since 2006,<sup>168</sup> although that legislation has itself been criticised as having been drafted too hastily and with inadequate reflection.<sup>169</sup> This experience, and the anomalies we have identified amongst the post-Ipp reforms, indicate that any process toward a uniform statutory norm needs to be very carefully considered, involve clear drafting and take full account of the protections and principles that already exist for public bodies at common law. There is no sense in simply replicating under statute a regime of protection already extant at common law. Nor is it helpful, in our view, to introduce a regime that is different to the common law in respects so marginal as to be practically insignificant. That merely increases complexity without improving utility.

The chances of persuading governments to revisit the topic of public liability so soon seems remote in the current political and economic climate, but if the Uniform Legislation route is chosen, there is then a more fundamental question that will need to be answered: what form should legislative protection for public authorities take? One possibility is to bring all jurisdictions into line with Western Australia, whose provisions most closely reflect the recommendation of the Ipp Review. The central problem with this provision, so far as we can see, is its persistent fidelity to the ‘*Wednesbury* unreasonableness’ test, which has been vehemently criticised and proven hard to apply.<sup>170</sup> Demonstrating that decisions lie outside of a body’s power, or discretion (which is the purpose and effect of determination of *Wednesbury* unreasonableness) does not logically bear on whether or not it was negligent; and if the concern about imposing duties of care on decisions made within discretion is that to do so would undermine an immunity or privilege that was intended by Parliament, then it is already the position at common law that duties of care will not be permitted to contradict statutory intentions.

An alternative approach, requiring abandonment of the troublesome public law concept, would be to endorse the *Bolam* test that applies in respect of complex clinical decisions at common law. This test is now approximated<sup>171</sup> throughout Australia in civil liability legislation dealing with professional standards more generally and has also been applied in the UK to *public* decisions of an expert nature, such as those relating to the provision of educational<sup>172</sup> and emergency services.<sup>173</sup> The test could viably be extended to discretionary public decisions more generally. Indeed, there are some clear analogies between decisions of the professional and public type: both involve the exercise of discretions in respect of limited resources, and both may be difficult for judges to appraise owing to their lack of expertise regarding the subject matter and the subjectivity of some of the criteria involved. In both cases a more deferential approach may legitimately serve to protect the development of innovative public service practices that may have longer-term public benefits.

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<sup>168</sup> *Defamation Act 2005* (Qld); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Vic); *Defamation Act 2005* (Tas); *Defamation Act 2005* (WA); *Defamation Act 2005* (SA); *Defamation Act 2006* (NT); and amendments to the *Civil Law (Wrongs) Act 2002* (ACT).

<sup>169</sup> D Rolph, ‘A Critique of the National, Uniform Defamation Laws’ (2008) 16(3) *Torts Law Journal* 207, 245. See also A Kenyon, ‘Six Years of Australian Uniform Defamation Law: Damages, Opinion and Defence Meanings’ (2012) 35(1) *UNSW Law Journal* 31.

<sup>170</sup> Above nn 87, 88.

<sup>171</sup> McNair’s original formulation at n 23 guaranteed safety where D complies with ‘a responsible body’ of expert opinion, whereas the legislation refers to practice ‘widely accepted’ by a ‘significant number’ of respected practitioners.

<sup>172</sup> *Phelps*, above n 26 at 655 *per* Lord Slynn, 672 *per* Lord Clarke.

<sup>173</sup> *Capital & Counties Plc v Hampshire County Council* [1997] QB 1004, at 1043-1044.

Booth and Squires above n 10 at 236-7 suggest that the standard can only apply to *professional* judgments, but there is sufficient malleability in this concept in our view to justify the inclusion of ‘expert’ public decisions.

If this route were to be taken, one option would be to confine the use of the *Bolam* standard to decisions of a ‘policy’ type, as originally defined by the Ipp committee – that is, to discretionary decisions taken in the exercise of public functions that involve the allocation of scarce resources, or the making of decisions that involve balancing private and public interests. This would then effectively implement the current Western Australian approach country-wide, but would ground it in a private law standard, rather than a public law one. It would provide a more deferential approach to decisions about whether to allocate funds to health care rather than road safety, but would normally result in the ordinary negligence standard being applied to a decision about where to locate a warning sign on the side of a road, or the carelessness of a prison warder in leaving a cell door open, thereby allowing a prisoner to escape.

Another possibility would be to extend the *Bolam* approach to any exercise, or failure to exercise, a discretionary ‘public’ function. This would accord additional deference to discretionary public body decisions of both a policy and operational type, wherever the body in question is acting solely in their statutory capacity, as opposed to exercising powers or capacities that are shared by private individuals or corporations. It would hence apply to protect prison guards acting in restraint of prisoners, or police-officers firing a gun at an armed assailant,<sup>174</sup> but not to council employees driving a motor-vehicle, or servicing the motor vehicle-fleet.

Either of these models is a viable possibility, although our preliminary view is that the former provides the wiser starting point since it is narrower and derogates less significantly from private rights; it addresses the area about which governments themselves originally expressed most concern; and the liability insurance ‘crisis’ now appears to have passed.<sup>175</sup> On either approach, a public body would not breach any duty of care owed if it acted in a way that (at the time the decision was taken) was ‘widely accepted’ by ‘a significant number of respected [public bodies] in the field as competent ... practice,’<sup>176</sup> unless that body of supporting opinion lacked a rational evidential basis, or was contrary to written law.<sup>177</sup>

Taking a *Bolam* approach to public body decision-making is arguably consistent, we have suggested, with the way in which New South Wales Court of Appeal is currently interpreting the standard under s 43A, although that conclusion must be expressed with some caution, and the *Bolam* standard may be slightly more generous to plaintiffs.<sup>178</sup> Endorsing it would be methodologically distinct from imposing a substantive standard of ‘gross negligence’<sup>179</sup> (‘faute lourde’ in French law) but is probably unlikely to yield significantly different results in practice. It would also still require reference to detailed evidence and a fact-intensive inquiry, and the law would still have some soft edges, since, as we know all too well from the common law, defining a ‘policy decision’ (on the first model) or a ‘public’ function<sup>180</sup> (under both models) is difficult.

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<sup>174</sup> We are grateful to one of the anonymous referee for these examples.

<sup>175</sup> See n 2 above.

<sup>176</sup> See, eg, *Civil Liability Act 2003* (Qld) s 22(1).

<sup>177</sup> *Civil Liability Act 2003* (Qld) s 22(2)-(5).

<sup>178</sup> See the discussion of *Curtis* and *Lee* above.

<sup>179</sup> This approach is favoured by Nolan and Aronson - see n 139 above and is akin to the ‘serious fault’ standard proposed by the Law Commission of England and Wales as appropriate to cases involving a public body’s truly ‘public’ functions: Law Commission Consultation Paper No 187, *Administrative Redress: Public Bodies and the Citizen* (the [proposal was never implemented for reasons explained in Law Commission Report No 322]). There are clearly traces of the language in the case law, but NSW courts have not clearly affirmed it and some have rejected it. Full consideration of its merits lie beyond the scope of the current piece, but it is unlikely, we suggest, to yield significantly different results to the one we here propose, requiring as it does a ‘very clear departure from ordinary standards of care and skill’: *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23 at [49] *per* Lord Bingham.

<sup>180</sup> For discussion of some of the intractable difficulties in cleanly separating ‘public’ and

It would also still be impossible to know for *sure* in advance whether a public body was safe from liability in its practices, although we suggest that the *Bolam* standard would provide actors a reasonable degree of assurance. If accompanied by existing provisions which subjectivise<sup>181</sup> the standard of care so as to take into account available public revenues, it would afford a significant basis for public authority confidence.

One question that will remain if the *Bolam* approach is pursued is whether a still more protective approach, akin to an absolute immunity, is warranted in respect of certain types of ‘policy’ decision on grounds of their constitutional non-justiciability. That immunity, it seems to us, already exists in respect of some decisions at common law (for example, in respect of decisions of a local government about whether or not to legislate) and no further statutory tinkering is therefore likely to be needed, if it is still considered desirable. We tend to the view that some such additional immunities are probably warranted, but that the range of decisions protected in this way against judicial scrutiny ought to be relatively narrow, as it now is at common law in both the United Kingdom and Australia. This view is premised on the ideal that only the most central governmental functions should be immune to judicial scrutiny on a constitutional basis in the modern age. The final result would then be a narrow band of constitutionally non-justiciable decisions, a broader band of discretionary public decisions subjected to the *Bolam* standard under one of the two models suggested above, and (at the lowest level) a set of decisions judged by reference to the normal negligence standard. Selection between the two different models of *Bolam* protection identified will produce protection of radically different scope. As we have intimated above, our preference for caution and against derogating from private law rights leads us to suggest that the narrower model ought to be adopted in the first instance in the absence of clear empirical evidence that anything more radical is needed. This would leave the normal negligence standard applying not just to decisions made by a public body when acting in a private capacity (eg in driving or servicing a car), but also to ‘operational’ aspects of the exercise of its uniquely public functions.

## VI. CONCLUSION

Sometimes the only realistic line of advance lies in retracing one’s steps. Whilst the principles that attach to public body liability for negligence are complex and difficult, the legislative responses to the Ipp Review’s recommendations are, we have argued, unacceptable in their current form, serving only to increase inconsistency, to deny equality of treatment to tort victims and to introduce new irrationalities and uncertainties into the law. Recent experiences of the legislation in action demonstrate that it is time to start again, *tabula rasa*. If any special, statutory standard of care is to be applied to ‘policy’ decisions in Australian negligence actions, it is not, we have suggested, the *Wednesbury*, public law standard, but, rather a standard akin to that which already applies to analogous, expert, discretionary decision-makers in the private law. Alternatively, the time may have come to abandon hope of uniform legislative solutions, to simply undo what has been done, and to once more trust our courts to do a rather better job.

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‘private’ domains, see eg W Lucy and A Williams, ‘Public and Private; neither deep nor meaningful?’ ch 2 in K. Barker, D Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge, CUP, 2013) 45.

<sup>181</sup> It is possible that this subjectivised standard should apply only to cases of pure omission, as has tended to be the case at common law: see above n 93 and Nolan, above n 84, 670-2.