

# PUBLIC AUTHORITY LIABILITY FOR NEGLIGENCE IN THE POST-*Ipp* ERA: SCEPTICAL REFLECTIONS ON THE ‘POLICY DEFENCE’

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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 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 canvasses 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.*

## CONTENTS

I	Introduction.....	2
II	Public Authority Negligence: The Common Law Background.....	5
III	The <i>Ipp Review</i> Proposal.....	16
	A ‘Public Function’.....	18
	B ‘Policy Decision’.....	18
	C ‘Personal Injury or Death’.....	19
	D ‘Negligent Performance’.....	19
	E ‘So Unreasonable that No Reasonable Public Functionary in the Defendant’s Position Could Have Made It’.....	20

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IV	The Statutory Reforms.....	22
	A Three Forms of Provision, Not One.....	22
	B The ‘Policy Defences’ .....	24
	1 Queensland, Tasmania and the Australian Capital Territory.....	25
	2 Victoria .....	28
	3 New South Wales.....	29
	4 Western Australia .....	35
V	Back to the Drawing Board .....	37
	A Option 1: Revert to the Common Law.....	40
	B Option 2: Uniform Legislation and the <i>Bolam</i> Standard.....	41
VI	Conclusion .....	45

## 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 2002 *Review of the Law of Negligence: Final Report* (*Ipp Review*).<sup>1</sup> The *Ipp Review* itself was commissioned by Commonwealth, state and territory governments as a reaction to the spiralling cost of liability insurance — a phenomenon that was itself (not uncontroversially)<sup>2</sup> attributed to the unpredictability of negligence law. The *Ipp 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 negligence to limit the liability of public authorities’.<sup>4</sup>

<sup>1</sup> Panel of Eminent Persons, *Review of the Law of Negligence: Final Report* (2002).

<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, Kylie Burns, ‘Distorting the Law: Politics, Media and the Litigation Crisis — An Australian Perspective’ (2007) 15 *Torts Law Journal* 195; Rob Davis, ‘The Tort Reform Crisis’ (2002) 25 *University of New South Wales Law Journal* 865; Harold Luntz, ‘Reform of the Law of Negligence: Wrong Questions — Wrong Answers’ (2002) 25 *University of New South Wales Law Journal* 836. Since the implementation of the reforms, public liability insurance premium rates have certainly dropped: see 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, ‘Ministerial Meeting on Public Liability’ (Joint Communique, 30 May 2002).

<sup>4</sup> *Ipp Review*, above n 1, ix.

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.<sup>6</sup> The standard proposed borrowed its terminology from the public law concept of reasonableness stipulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* ('*Wednesbury*'),<sup>7</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>8</sup>

This recommendation proved to be the catalyst for a subsequent wave of uncoordinated and inconsistent law reform across Australia, much of which has shown 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 by common law principles.<sup>9</sup> 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

<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, *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360, 434 [360] (Campbell JA) ('*Refrigerated Roadways*').

<sup>6</sup> See *Ipp Review*, above n 1, 153–4 [10.12].

<sup>7</sup> [1948] 1 KB 223; *Ipp Review*, above n 1, 157–8 [10.27].

<sup>8</sup> *Ipp Review*, above n 1, 157–8 [10.26] (recommendation 39).

<sup>9</sup> In South Australia, 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. The Northern Territory government's response to the *Ipp Review* recommendations is found in the *Personal Injuries (Civil Claims) Act 2003* (NT) and the *Personal Injuries (Liabilities and Damages) Act 2003* (NT). Neither of these statutes address public authority liability.

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 extent, indeed, that we should now seriously consider either discarding them entirely; or reengaging 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 Review* 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 *Ipp Review* in light of their recent judicial interpretation. It details the extent of the legislation's inconsistencies, interpretive difficulties and infidelities to the *Ipp Review* 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>10</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 in Australia was regulated almost entirely by the common law.<sup>11</sup> This remains the case in South Australia and the Northern Territory.<sup>12</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 *Ipp Review* is that public authority liability for negligence has always 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

<sup>10</sup> The basic vision appears in A V Dicey, *The Law of the Constitution* (Macmillan, 7<sup>th</sup> ed, 1908); see especially at 189–91, 198–9. For reference to some of the necessary exceptions that finesse the base principle of equality, see Peter W Hogg and Patrick J Monahan, *Liability of the Crown* (Carswell, 3<sup>rd</sup> ed, 2000) 1–4 [1.2]. The Diceyan view strongly underpins the form of most statutes abolishing Crown immunities in Australia. For the history, see Paul Finn, ‘Claims against the Government Legislation’ in P D Finn (ed), *Essays on Law and Government* (Law Book Co, 1996) vol 2, 25.

<sup>11</sup> See generally Cherie Booth and Dan Squires, *The Negligence Liability of Public Authorities* (Oxford University Press, 1<sup>st</sup> ed, 2006); William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 10<sup>th</sup> ed, 2009) 648–62; Peter Cane, *Administrative Law* (Oxford University Press, 5<sup>th</sup> ed, 2011) 201–10.

<sup>12</sup> See above n 9.

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;<sup>13</sup> (ii) the fact that a body's failure may consist of a 'pure omission' to prevent harm more immediately caused by a third party or natural hazard;<sup>14</sup> (iii) the potential incompatibility of any duty of care with the intentions and purposes of a statute under which the public body acts;<sup>15</sup> (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;<sup>16</sup> (v) worries that 'indeterminate' or 'massive' liabilities might result from a single, wrong decision;<sup>17</sup> (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);<sup>18</sup> and (vii) a concern — voiced in increasingly strong terms by the High Court of Australia in recent years — that an appropriate balance is struck between the responsibility of public agencies to protect individuals and the latter's duty<sup>19</sup> to look out for themselves.<sup>20</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 these has been questioned<sup>21</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'

<sup>13</sup> See, eg, Booth and Squires, above n 11, 29–31.

<sup>14</sup> Ibid 14–15.

<sup>15</sup> See, eg, *Sullivan v Moody* (2001) 207 CLR 562, 581 [55], 585 [62] ('Sullivan').

<sup>16</sup> See, eg, ibid 582 [60].

<sup>17</sup> See, eg, ibid 582–3 [60]–[63].

<sup>18</sup> See, eg, ibid 581 [54]; *X v South Australia [No 3]* [2007] SASC 125 (5 April 2007) [196] (Debelle J).

<sup>19</sup> Or sometimes, their liberty. See, eg, *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 248 [87] (Gummow, Hayne and Heydon JJ) ('*Stuart*') 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>20</sup> *Amaca Pty Ltd v New South Wales* (2004) 132 LGERA 309, 339 [156] (Ipp JA) ('*Amaca*').

<sup>21</sup> See, eg, *Swinney v Chief Constable of Northumbria Police Force* [1996] 3 WLR 968, 984–5 (Hirst LJ); *Van Colle v CC Hertfordshire* [2008] UKHL 50 [49] (Lord Bingham). 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. For an alternative construction, see Hanna Wilberg, 'Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims' (2010) 126 *Law Quarterly Review* 420.

of a duty of care with a body's statutory purposes have proven especially difficult to meet with bright line rules.<sup>22</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>23</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>24</sup> and the polycentric nature of some of the decisions in question.<sup>25</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 slippery and often unpredictable.

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>26</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, as opposed to particular individuals.<sup>27</sup> Unlike most private actors, they also have little choice

<sup>22</sup> For an excellent analysis see Booth and Squires, above n 11, ch 2.

<sup>23</sup> That which would 'imperil the devolution of responsibility from the legislature': *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 62 [170] (Gummow J) ('*Crimmins*'); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553–4 [6] (Gleeson CJ) ('*Graham Barclay Oysters*').

<sup>24</sup> *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1067 (Lord Diplock) ('*Dorset Yacht*'); *Crimmins* (1999) 200 CLR 1, 13 [5] (Gleeson CJ); *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 628–9 [310]–[312] (Hayne J) ('*Brodie*'). On the distinction between these two forms of argument, see Booth and Squires, above n 11, 33–41; Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44, 56–8.

<sup>25</sup> See Lon L Fuller and Kenneth I Winston, 'The Form and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 393–404.

<sup>26</sup> See, eg, *Refrigerated Roadways* (2009) 77 NSWLR 360, 433 (Campbell JA). 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: at 418–19 [283].

<sup>27</sup> Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5<sup>th</sup> ed, 2012) 584–5.

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>28</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>29</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 sometimes have no practical choice other than to act in one way or another. On this view, the rule in *Bolam v Friern Hospital Management Committee* ('*Bolam*') is the logical standard to apply to public body resourcing decisions at common law,<sup>30</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, in respect of which the court is satisfied there is a rational evidential basis.<sup>31</sup> This standard lies

<sup>28</sup> *Brodie* (2001) 206 CLR 512, 623 [295] (Hayne J).

<sup>29</sup> P Vines, 'Straddling the Public/Private Divide: Tortious Liability of Public Authorities' (2010) 9 *Judicial Review* 445, 449.

<sup>30</sup> For vestiges of this approach in the context of a broader appeal to the standard norms of negligence law see S H Bailey and M J Bowman, 'The Policy/Operational Dichotomy — A Cuckoo in the Nest' (1986) 45 *Cambridge Law Journal* 430, 435–6. The test derives from McNair J's judgment in *Bolam* [1957] 1 WLR 582, 587, which held that 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 United Kingdom in respect of a doctor's informational duties in *Montgomery v Lanarkshire Health Board* [2015] AC 1430, 1462–3 [85]–[88] (Lords Kerr and Reed JJSC). 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 5O; *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 Australian Capital Territory has no provision.

<sup>31</sup> The qualification reserves the ultimate judgement to the court: *Bolitho v City and Hackney Health Authority* [1998] AC 232. This is also the design of the statutory provisions listed: see *Civil Liability Act 2003* (Qld) s 22; *Civil Liability Act 2002* (NSW) s 5O; *Wrongs Act 1958* (Vic) s 59; *Civil Liability Act 2002* (Tas) s 22.



halfway 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.

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 overly 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 United Kingdom (‘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 advertent to a distinction between ‘policy’ decisions (presumptively non-justiciable) on the one hand, and ‘operational’ failings (presumptively justiciable) on the other.<sup>32</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>33</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>34</sup> and the distinction between ‘policy’ and ‘operation’ has been recognised as being far from watertight.<sup>35</sup> Consequently, 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>36</sup> The use of public law

<sup>32</sup> *Anns v Merton London Borough Council* [1978] AC 728, 754 (Lord Wilberforce) (‘*Anns*’). See also *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 737–8 (Lord Browne-Wilkinson) (‘*X v Bedfordshire*’).

<sup>33</sup> *Stovin v Wise* [1996] AC 923 (‘*Stovin*’). There has since been a retreat from this approach: *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (‘*Barrett*’); *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 (‘*Phelps*’). See also Booth and Squires, above n 11, 49–58.

<sup>34</sup> Booth and Squires, above n 11, 29, criticise any such change, contending that justiciability should always be determined as a prior question.

<sup>35</sup> This was recognised even by Lord Wilberforce, who is credited with introducing the distinction into English law: see *Anns* [1978] AC 728, 755. See also below n 36.

<sup>36</sup> *Rowling v Takaro Properties Ltd* [1988] 1 AC 473, 501 (Lord Keith); *Stovin* [1996] AC 923, 951–2 (Lord Hoffmann), 938–9 (Lord Nicholls); *Barrett* [2001] 2 AC 550, 571–2 (Lord Slynn), 583 (Lord Hutton); *Phelps* [2001] 2 AC 619, 658 (Lord Slynn), 665 (Lord Nicholls), 673–4 (Lord Clyde). For the various criticisms of the distinction and the reasons why UK

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 band of high-level decisions are considered ... to be completely out of bounds' by English courts, with the vast majority of cases being considered through the lens of 'ordinary negligence principles'.<sup>37</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>38</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.

In Australia, courts have also sometimes attempted to gauge the justiciability of public body decisions by reference to the policy/operation distinction,<sup>39</sup>

courts have steered away from it in recent years under the influence of the European Court of Human Rights: see Cane, above n 11, 213–21.

<sup>37</sup> Donal Nolan, 'Governmental Liability' in Ken Oliphant (ed), *The Law of Tort* (Lexis Nexis Butterworths, 2007) 893.

<sup>38</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, 1077–8 [71] (Lord Scott) ('*Gorringe*'). See also *Stovin* [1996] AC 923, 935–6 (Lord Nicholls). 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 below n 52.

<sup>39</sup> *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 442 (Gibbs CJ) ('*Heyman*'). It is generally the implied intention of the statute in question to preclude liability for policy decisions: at 500 (Deane J). In doing so, the statute distinguishes 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: at 468–9 (Mason J). Cautious reference to the distinction is also made in more recent cases: *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 358–9 [67]–[68] (Toohey J), 425–6 [253] (Kirby J) ('*Pyrenees*'). But see Gummow J's rejection of the distinction as unhelpful: at 393 [182]. See also *Crimmins* (1999) 200 CLR 1, 50 [131] (McHugh J), 101 [292] (Hayne J); *Graham Barclay Oysters* (2002) 211 CLR 540, 556–7 [12] (Gleeson CJ). By contrast with Mason J's view in *Heyman*, Gummow J in *Pyrenees* preferred to isolate only 'quasi-legislative' decisions as non-justiciable, leaving budgetary and resource questions to be engaged at the breach stage: at 393–4 [182]–[183].

but they now also regard the distinction as only being ‘of some use’.<sup>40</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 v Stevedoring Industry Finance Committee* (‘*Crimmins*’) as inapposite, given the very different rationales of public and private law actions.<sup>41</sup> The result is that, in the great majority of cases, 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.<sup>42</sup>

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>43</sup> These include: (i) the foreseeability of harm to the plaintiff;<sup>44</sup> (ii) the extent of the authority’s power, or control over the risk;<sup>45</sup> (iii) the defendant’s knowledge (actual, or possibly constructive) of the risk;<sup>46</sup> (iv) whether the decision in question is one that is capable of being resolved judicially, in the

<sup>40</sup> *Refrigerated Roadways* (2009) 77 NSWLR 360, 413 [259] (Campbell JA).

<sup>41</sup> (1999) 200 CLR 1, 35–6 [82]–[83].

<sup>42</sup> The exception may be where the concern about justiciability is clearly of the 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 New South Wales* (2014) 10 ACTLR 1, 48 [210] (Jagot J) (‘*Electro Optic Systems*’). See also *Meshlawn Pty Ltd v Queensland* [2010] QCA 181 (20 July 2010) [70]–[72] (Chesterman JA) (‘*Meshlawn*’).

<sup>43</sup> A popular iteration of the general approach, now often cited, is that of Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavara* (2009) 75 NSWLR 649, 676 [102]. See also *Crimmins* (1999) 200 CLR 1, 39 [93] (McHugh J); *Graham Barclay Oysters* (2002) 211 CLR 540, 596–7 [146], [149] (Gummow and Hayne JJ), 577–8 [84] (McHugh J); *Stuart* (2009) 237 CLR 215, 254 [114] (Gummow, Hayne and Heydon JJ), 261–2 [137]–[138], 266 [149] (Crennan and Kiefel JJ).

<sup>44</sup> This requirement is trite law, but lies at the heart of *Sydney Water Corporation v Turano* (2009) 239 CLR 51, 70 [45] (‘*Turano*’).

<sup>45</sup> See, eg, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 550–2, 556–7 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Brodie* (2001) 206 CLR 512, 558–9 [102]–[103], 573–4 [140] (Gaudron, McHugh and Gummow JJ); *Crimmins* (1999) 200 CLR 1, 38–9 [91]–[93], 42 [104] (McHugh J), 61 [166] (Gummow J), 98–100 [277]–[286] (Hayne J), 116 [357] (Callinan J); *Graham Barclay Oysters* (2002) 211 CLR 540, 558–9 [20] (Gleeson CJ), 598 [150] (Gummow and Hayne JJ); *Stuart* (2009) 237 CLR 215, 254 [114] (Gummow, Hayne and Heydon JJ), 261–2 [137]–[138], 266 [149] (Crennan and Kiefel JJ).

<sup>46</sup> *Pyrenees* (1998) 192 CLR 330, 371 [108] (McHugh J), 389 [168] (Gummow J), 420 [246] (Kirby J); *Crimmins* (1999) 200 CLR 1, 13 [3] (Gleeson CJ), 24–5 [43], [46] (Gaudron J), 39 [93], 41–2 [101]–[102] (McHugh J) (counselling against the use of constructive knowledge in this field), 85 [233] (Kirby J); *Armidale City Council v Alec Finlayson Pty Ltd* (1999) 104 LGERA 9, 20–1 [27] (actual knowledge); *Amaca* (2004) 132 LGERA 309, 339 [157]; *Port Stephens Shire Council v Booth* (2005) 148 LGERA 351, 373 [96] (actual knowledge).

sense that there is a ‘criterion by which a court can assess’ its propriety;<sup>47</sup> (v) whether a duty would encroach upon the authority’s ‘core policy-making’ or ‘(quasi-) legislative functions’;<sup>48</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>49</sup> (vii) whether imposing a duty would be likely to distort the impartiality of a body’s decision-making by inducing defensive practices,<sup>50</sup> or would place decision-makers in a position in which their legal or ethical duties might conflict;<sup>51</sup> (viii) whether or not it

<sup>47</sup> *Dorset Yacht* [1970] AC 1004, 1067 (Lord Diplock); *Brodie* (2001) 206 CLR 512, 628–9 [310]–[311] (Hayne J); *Graham Barclay Oysters* (2002) 211 CLR 540, 554–5 [8], 557 [13] (Gleeson CJ); *Crimmins* (1999) 200 CLR 1, 13 [5] (Gleeson CJ); *Newcastle City Council v Shortland Management Services* (2003) 57 NSWLR 173, 189 [80]–[82] (Spigelman CJ); *Refrigerated Roadways* (2009) 77 NSWLR 360, 415 [267], 416 [274], 418–19 [281]–[283] (Campbell JA); *Electro Optic Systems* (2014) 10 ACTLR 1, 47 [201] (Jagot J).

<sup>48</sup> The ‘core policy-making’ phrase is that of McHugh J in *Crimmins* (1999) 200 CLR 1, 37 [87], 39 [93]. Other judges restricted their focus to ‘legislative’ or ‘quasi-legislative’ functions: at 20–1 [32] (Gaudron J) (‘legislative’), 62 [170] (Gummow J) (‘quasi-legislative’), 100 [288] (Kirby J) (‘quasi-legislative’), 101 [291]–[292] (Hayne J) (‘quasi-legislative’). Cf *Brodie* (2001) 206 CLR 512, 560 [106] (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>49</sup> *Pyrenees* (1998) 192 CLR 330, 347 [24]–[25] (Brennan CJ), 391 [175] (Gummow J), 421 [247] (Kirby J); *Crimmins* (1999) 200 CLR 1 39–41 [93]–[100] (McHugh J), 72 [203], 76–7 [213]–[215] (Kirby J); *Graham Barclay Oysters* (2002) 211 CLR 540, 596–7 [146] (Gummow and Hayne JJ); *Stuart* (2009) 237 CLR 215, 239 [52] (French CJ), 250–1 [98], 254 [112] (Gummow, Hayne and Heydon JJ), 260 [131]–[132], 263 [141] (Crennan and Kiefel JJ); *Sutherland Shire Council v Becker* [2006] NSWCA 344 (12 December 2006) [100] (Bryson JA); *Meshlawn* [2010] QCA 181 (20 July 2010) [70] (Chesterman J); *MM Constructions (Aust) Ltd v Port Stephens Council* [2012] NSWCA 417 (19 December 2012) [98] (Allsop P) (‘*MM Constructions*’). Note that the relevance of the fact that a statute was intended to benefit the public (and not individuals) was previously thought irrelevant to the negligence action by both Gibbs CJ and Mason J in *Heyman* (1985) 157 CLR 424, 436 (Gibbs CJ), 465 (Mason J). 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 as being whether there is anything in the statute that might *positively imply* the duty: at 482–3. 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>50</sup> *Crimmins* (1999) 200 CLR 1, 102–3 [296] (Hayne J); *Amaca* (2004) 132 LGERA 309, 340 [160] (Ipp JA). Not all judges accept this concern: *McKenna v Hunter and New England Local Health District* [2013] NSWCA 476 (23 December 2013) [105] (Macfarlan JA) (‘*McKenna*’).

<sup>51</sup> *Sullivan* (2001) 207 CLR 562, 582–3 [60]–[63]; *X v South Australia [No 2]* (2005) 91 SASR 258, 282 [117] (Anderson J); *Precision Products (NSW) Ltd v Hawkesbury City Council* (2008)

would cohere with other areas of the law;<sup>52</sup> (ix) whether or not the authority ‘assumed responsibility’ to a particular individual who (specifically) relied upon it;<sup>53</sup> (x) whether or not a duty would posit a risk of an indeterminate<sup>54</sup> or logically uncontainable<sup>55</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>56</sup>

None of these factors (save foreseeability, which is essential) is now thought to be absolutely necessary, or determinative,<sup>57</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>58</sup> Some

74 NSWLR 102, 128 [118]–[119] (Allsop P) (*Precision Products*’); *Dansar Pty Ltd v Byron Shire Council* (2014) 89 NSWLR 1, 35 [159] (Meagher JA) (*‘Dansar’*).

<sup>52</sup> *Sullivan* (2001) 207 CLR 562, 581 [54]; *X v South Australia [No 3]* (2007) 97 SASR 180, 234–5 [196] (DeBelle J); *Moorabool Shire Council v Taitapanui* (2006) 14 VR 55, 73 [72] (Ormiston and Ashley JJA); *Precision Products* (2008) 74 NSWLR 102, 128 [119] (Allsop P).

<sup>53</sup> *New South Wales v Spearpoint* [2009] NSWCA 233 (30 July 2009) [13]–[14] (Ipp JA). General reliance of the type contemplated by Mason J (‘dependence’) in *Heyman* (1985) 157 CLR 424, 463–4 is no longer regarded as sufficient: see *Pyrenees* (1998) 192 CLR 330, 344–5 [20] (Brennan CJ), 387–8 [163] (Gummow J), [230]–[231] 411 (Kirby J); *Brodie* (2001) 206 CLR 512, 627 [307]–[308] (Hayne J); *Stuart* (2009) 237 CLR 215, 260 [132] (Crennan and Kiefel JJ). It now appears that some form of what Brennan J in *Heyman* called ‘induced’ reliance is required: at 486. This has strangely not prevented some judges continuing to refer to it as one possible factor: see, eg, *Makawe Pty Ltd v Randwick City Council* (2009) 171 LGERA 165, 175 [26] (Hodgson JA) (*‘Makawe’*).

<sup>54</sup> *Makawe* (2009) 171 LGERA 165, 186 [93] (Hodgson JA); *Electro Optic Systems* (2014) 10 ACTLR 1, 84 [353] (Jagot J), 195 [733] (Katzmann J). See also the references to the different concept of ‘massive’ liabilities in *Graham Barclay Oysters* (2002) 211 CLR 540, 665 [324] (Callinan J); *Amaca* (2004) 132 LGERA 309, 339 [157] (Ipp JA).

<sup>55</sup> See especially *Stuart*, where Gummow, Hayne and Heydon JJ held that if a duty applied to exercise of powers under mental health legislation, it would logically have to apply to the exercise of any type of power: (2009) 237 CLR 215, 252–3 [107].

<sup>56</sup> *Pyrenees* (1998) 192 CLR 30, 370 [107] (McHugh J), 421 [247] (Kirby J); *Makawe* (2009) 171 LGERA 165, 173 [21] (Hodgson JA), 181 [63] (Campbell JA), 196–8 [168]–[178] (Simpson J); *Amaca* (2004) 132 LGERA 309, 339 [156] (Ipp JA).

<sup>57</sup> *Makawe* (2009) 171 LGERA 165, 179–80 [48] (Hodgson JA) (considering the features’ ‘cumulative effect’); *Dansar* (2014) 89 NSWLR 1, 24 [109] (Meagher JA).

<sup>58</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, *Graham Barclay Oysters* (2002) 211 CLR 540, 589 [122] (Gummow and Hayne JJ), 630 [248] (Kirby J); *Stuart* (2009) 237 CLR 215, 254 [114] (Gummow, Hayne and Heydon JJ); *X v South Australia [No 2]* (2005) 91 SASR 258, 282; *New South Wales v Godfrey* (2004) Aust Torts Reports ¶81–741; *Turano* (2009) 239 CLR 51, 73 [53].

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>59</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>60</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>61</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>62</sup> The same view has been taken in other cases in more recent years.<sup>63</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 Review* 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 multifactorial approach toward duty of care questions in Australia, create

<sup>59</sup> See, eg, *MM Constructions* (2012) 191 LGERA 292.

<sup>60</sup> See, eg, *Refrigerated Roadways* (2009) 77 NSWLR 360.

<sup>61</sup> *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431, 454–5 [52] (Toohey and Gummow JJ); *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 481–3 [215]–[220] (Callinan and Heydon JJ); *Brodie* (2001) 206 CLR 512, 581 [163] (Gaudron, McHugh and Gummow JJ).

<sup>62</sup> (1985) 157 CLR 424, 448–9 (Gibbs CJ), 471 (Wilson J). For the view that such discretion inevitably makes it harder to prove breach see also *Brodie* (2001) 206 CLR 12, 601 [229] (Kirby J), 559–60 [104]–[105] (Gaudron, McHugh and Gummow JJ), citing *Miller v McKeon* (1905) 3 CLR 50, 60 (Griffith CJ).

<sup>63</sup> See, eg, *Meshlawn* [2010] QCA 181 (20 July 2010), where a discretionary decision about liquor licencing was adjudged perfectly reasonable, when a realistic view was taken of all the evidence.

concern about the predictability of public bodies' private law liabilities. Outside existing precedents, the approach of Australian courts 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 in the wake of the High Court of Australia's decision in *Brodie v Singleton Shire Council* ('*Brodie*').<sup>64</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. It has developed a sophisticated set of tools for reaching nuanced decisions that reflect a balance of justice and policy considerations. The common law has also shown itself to be quite resolute in rejecting claims that question a public body's legislative<sup>65</sup> or quasi-legislative<sup>66</sup> decisions, and in recent years has robustly denied liability in a series of claims involving discretionary public decisions.<sup>67</sup> It is true that the *Presland v Hunter Area Health Service* ('*Presland*')<sup>68</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>69</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 frustratingly unpredictable

<sup>64</sup> (2001) 206 CLR 512.

<sup>65</sup> See, eg, *Graham Barclay Oysters* (2012) 211 CLR 540, where no claim was held possible against the New South Wales Government for failure to legislate, so as to more closely control the operations of the oyster industry.

<sup>66</sup> See, eg, *Crimmins* (1999) 200 CLR 1, where no claim was held possible in respect of the defendant's failure to make regulations to improve worker safety.

<sup>67</sup> See, eg, *X v Bedfordshire* [1995] 2 AC 633; *Sullivan* (2001) 207 CLR 562; *Stuart* (2009) 327 CLR 215.

<sup>68</sup> [2003] NSWSC 754 (19 August 2003). For the facts and decision, see below Part IV(B)(3).

<sup>69</sup> *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22.

features, 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>70</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>71</sup> The resulting 'policy defence' was proposed in the following terms:

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>72</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

<sup>70</sup> *Ipp Review*, above n 1, 151 [10.3]. The paradigms for these examples were the cases of *Brodie* (2001) 206 CLR 512 and *Dorset Yacht* [1970] AC 1004 respectively. Note, however, the actual decision in the latter case did not turn on an attack on any policy decision of the Home Office to operate a system of low security prisons.

<sup>71</sup> *Ipp Review*, above n 1, 154 [10.13].

<sup>72</sup> *Ibid* 158 [10.27] (recommendation 39).



language of the common law), nor indeed to provide a true ‘defence’,<sup>73</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>74</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>75</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

<sup>73</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 James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 6. It is also unclear which onus — evidential or legal — was intended to be cast onto the defendant. For the view that the onus (legal or evidential unspecified) lies on the defendant to establish that the relevant decision was based on the exercise of a special statutory power, but that the ultimate onus of proving that a decision breached the lower standard of care still lies on the plaintiff: see *Curtis v Harden Shire Council* (2014) 88 NSWLR 10, 14 [7] (Bathurst CJ), 64 [244] (Basten JA) (‘*Curtis*’). Cf *Dansar* (2014) 89 NSWLR 1, 21 [93] (Macfarlan JA).

<sup>74</sup> See, eg, *Dorset Yacht* [1970] AC 1004, 1068 (Lord Diplock); *Smith v Secretary of State for Health* (2002) 67 BMLR 34 [95] (Morland J), both of which suggest in 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* [2001] 2 AC 550; *Phelps* [2001] 2 AC 619. The recent emphasis on the fact that the ‘policy/operation’ distinction is only a guide to justiciability, and not definitive, might also give rise to this impression that policy decisions are justiciable: see *Brodie* (2001) 206 CLR 512, 560 [106] (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 Booth and Squires, above n 11, 54–8.

<sup>75</sup> A contrary thesis — that the Panel actually intended to extend liability — was mooted at one point by Vines, above n 29, 463. However, this seems very hard to reconcile with the Panel’s terms of reference.

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 *Ipp Review* was complicit in setting up a straw man, and subsequent legislation has sought to solve a problem that never really existed.

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.<sup>76</sup> 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>77</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>78</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>79</sup>

#### B 'Policy Decision'

The defence was clearly expressed to apply only to 'policy decision[s]', defined as a 'decision based substantially on financial, economic, political or social factors or constraints'.<sup>80</sup> This aligns with the common law view of the types of case in respect of which there is traditionally some constitutional justiciability

<sup>76</sup> *Ipp Review*, above n 1, 158 [10.27] (recommendation 39).

<sup>77</sup> *Ibid* 156 [10.23].

<sup>78</sup> *Ibid* 156 [10.22].

<sup>79</sup> The difficulty of defining public or private 'actions' and 'functions' is insightfully and fully discussed by Aronson, above n 24, 76–7. It lies beyond the scope of the current piece.

<sup>80</sup> *Ipp Review*, above n 1, 158 [10.27] (recommendation 39).

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>81</sup>

Second, the decision must be one of ‘policy’, as opposed to an operational one. This distinction, as discussed 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 *Ipp Review* 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: (i) it did not know about the hole; (ii) it inspected roads on a six-monthly cycle; (iii) the hole developed after the last inspection; and (iv) 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>82</sup>

### C ‘Personal Injury or Death’

The proposed defence was limited to cases involving ‘personal injury or death’, and did not extend to cases of property damage or economic loss. This reflected the Panel’s limited terms of reference.<sup>83</sup> The restriction is significant precisely because all jurisdictions that subsequently enacted a similar defence appear to have ignored it, as will be discussed 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

<sup>81</sup> Ibid 158 [10.28].

<sup>82</sup> Ibid 158–9 [10.31]–[10.33]. The Panel was only instructed to consider claims of this type.

<sup>83</sup> Ibid 158 [10.28].

duty.<sup>84</sup> 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>85</sup> the concern was evidently that plaintiffs might sidestep the proposed limitation on negligence liability by relying on breach of statutory duty instead,<sup>86</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 these 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>87</sup> According to Lord Greene in the *Wednesbury* case itself, it requires the relevant failure to be of a very high order of magnitude — ‘something overwhelming’.<sup>88</sup>

The *Wednesbury* standard is a public law standard, but had been set to work in the negligence context in the UK in *Stovin v Wise* (*‘Stovin’*), where Lord Hoffmann determined 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>89</sup>

The proposed defence was expressly stated as implementing the approach taken in *Stovin* in Australian law,<sup>90</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>91</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 an

<sup>84</sup> Ibid 162 [10.45].

<sup>85</sup> Aronson, above n 24, 76.

<sup>86</sup> *Ipp Review*, above n 1, 162 [10.44].

<sup>87</sup> Ibid 157 [10.27].

<sup>88</sup> [1948] 1 KB 223, 230.

<sup>89</sup> [1996] AC 923, 956 (emphasis added), cited in *Ipp Review*, above n 1, 157 [10.26]. See also *X v Bedfordshire* [1995] 2 AC 633, 736–7 (Lord Browne-Wilkinson).

<sup>90</sup> *Ipp Review*, above n 1, 157 [10.26].

<sup>91</sup> Aronson, above n 24, 47–8.

appropriate test of whether or not the body has breached a duty proven to be owed. Secondly, 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 of action in tort, was ‘controversial’, and probably ‘ill-advised’.<sup>92</sup> The public law concept of ‘irrationality’ has also been vehemently criticised academically<sup>93</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>94</sup>

Finally, the *Wednesbury* unreasonableness test is notoriously difficult to apply. Although its adoption was intended to signal a lower standard of care,<sup>95</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>96</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>97</sup> To the extent that Australian jurisdic-

<sup>92</sup> *Gorringe* [2004] 1 WLR 1057, 1065–6 [26]. On the more general retreat see Booth and Squires, above n 11, 49–58.

<sup>93</sup> See, eg, Jane Convery, ‘Public or Private? Duty of Care in a Statutory Framework: *Stovin v Wise* in the House of Lords’ (1997) 60 *Modern Law Review* 559, 565–7; Anthony Mason, ‘Negligence and the Liability of Public Authorities’ (1998) 2(1) *Edinburgh Law Review* 3, 18; S H Bailey and M J Bowman, ‘Public Authority Negligence Revisited’ (2000) 59 *Cambridge Law Journal* 85, 112–17; Elizabeth Carroll, ‘*Wednesbury* Unreasonableness as a Limit on the Civil Liability of Public Authorities’ (2007) 15 *Tort Law Review* 77; Grant Scott Watson, ‘Section 43A of the *Civil Liability Act 2002* (NSW): Public Law Styled Immunity for the Negligence of Public and other Authorities?’ (2007) 15 *Torts Law Journal* 153, 177; Donal Nolan, ‘Varying the Standard of Care in Negligence’ (2013) 72 *Cambridge Law Journal* 651, 669.

<sup>94</sup> See, eg, *Allianz Australia Insurance Ltd v Road Traffic Authority (NSW)* (2010) 57 MVR 80, 97 [78] (*‘Allianz’*).

<sup>95</sup> *Ipp Review*, above n 1, 157 [10.27].

<sup>96</sup> *Allianz* (2010) 57 MVR 80, 97–8 [79], citing *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat & Life-Stock Corporation* (1990) 96 ALR 153; Margaret Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) 187 [5.52]; Geoff Airo-Farulla, ‘Rationality and Judicial Review of Administrative Action’ (2000) 24 *Melbourne University Law Review* 543.

<sup>97</sup> Cane, above n 11, 208; Bailey and Bowman, above n 93, 114. For evidence of such confusion, see below Part IV(B)(4) for the dissenting judgment of Pullin JA in *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287 (*‘Southern Properties Appeal’*).

tions 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 types of provision, not one.<sup>98</sup> These took the form of:

- 1 a general principles provision;
- 2 a version of the *Ipp Review* 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, heavily criticised 'non-feasance rule' in respect of road authority liability for dangerous road defects,<sup>99</sup> which runs directly contrary to the Panel's view that the High Court of Australia's decision in *Brodie* was sound in principle.<sup>100</sup> Their practical effect is to relieve road authorities of the burden of presenting

<sup>98</sup> For an overview of the full range, see Barker et al, above n 27, 595–8. In New South Wales, 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.

<sup>99</sup> See Gleeson CJ's commentary in *Brodie* (2001) 206 CLR 512, 527–9 [14]–[18].

<sup>100</sup> *Ipp Review*, above n 1, 152 [10.5]. Whilst recognising the concerns to which the decision gave rise, the Panel suggested these could and should be met instead by the policy defence.

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 Review* legislative enactments, and apply to all kinds of public authorities. Except in Victoria, these provisions stipulate 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); and
- (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>101</sup>

The Victorian provision incorporates (a), (c) and (d), but omits (b).<sup>102</sup>

It is unclear whether any of these rules significantly extends the protection previously available to public authorities at common law, but it seems unlikely.<sup>103</sup> One key problem for current purposes, however, is how principle (b) interacts with the policy defence provisions that we examine in the next

<sup>101</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>102</sup> *Wrongs Act 1958* (Vic) s 83.

<sup>103</sup> Proposition (a) may mark the most significant shift in extending the same economically subjective standard of care to public authorities generally as prevails at common law to landowners tackling natural hazards arising on their land: see *Goldman v Hargrave* [1967] AC 645. But there is arguably already Australian authority for it at common law: *Cekan v Haines* (1990) 21 NSWLR 296, 314 (Mahoney J); *Refrigerated Roadways* (2009) 77 NSWLR 360. See also *Crimmins* (1999) 200 CLR 1, 21 [34] (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 Ltd* [2008] VCAT 1798 (29 August 2008) [71] (Macnamara DP) (*‘Transpacific Cleanaway’*).

section, since decisions about general allocations of resources appear paradigmatic of the type of ‘policy decision’ that the *Ipp Review’s* ‘policy defence’ proposal was intended to protect. Where jurisdictions (such as New South Wales) have enacted both principle (b) (that the general allocation of financial ... resources is not open to challenge) and a ‘policy defence’ of the type examined in the next Part, the legislation now 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’),<sup>104</sup> 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.<sup>105</sup> 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>106</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. 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 *Ipp Review’s* recommendation. None of the legislative policy defences are confined to proceedings involving actions for personal injury or death;<sup>107</sup>

<sup>104</sup> *Civil Liability Act 2002* (NSW) s 42.

<sup>105</sup> *Ibid* s 43A.

<sup>106</sup> For examples of the struggle, see especially *Refrigerated Roadways* (2009) 77 NSWLR 360, 440–1 [405]. See also *New South Wales v Ball* (2007) 69 NSWLR 463.

<sup>107</sup> In Queensland, the provisions apply to claims for personal injury, property damage and economic loss: *Civil Liability Act 2002* (Qld) sch 2. In Tasmania, they apply to claims for personal injury, death, or property damage: *Civil Liability Act 2002* (Tas). In the Australian Capital Territory and New South Wales, they apply to civil liability in tort: *Civil Law (Wrongs)*



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 the Australian Capital Territory*

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

Section 36 of Queensland’s *Civil Liability Act 2003* (Qld) 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.

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>108</sup>

The specified standard of care (‘so unreasonable’) mimics the *Ipp Review* recommendation, but there are few other similarities. Protection is not explicitly confined to an authority’s performance of its *public* functions,<sup>109</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

*Act 2002* (ACT) s 108; *Civil Liability Act 2002* (NSW) s 40. In Western Australia, they apply to personal injury, property damage or economic loss: *Civil Liability Act 2002* (WA) ss 5V, 3. Victoria also defines harm to include property damage: *Wrongs Act 1958* (Vic) s 43.

<sup>108</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(1) 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>109</sup> Meaning functions that derive exclusively from an authority’s statutory powers, rather than from activities that private parties also perform: *Ipp Review*, above n 1, 156 [10.22].

provisions a range of applications, which is far wider than that contemplated by the *Ipp Review*, and which is hard to justify on a Diceyan view.<sup>110</sup> 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>111</sup> clearly has the potential to curtail their scope considerably. Whilst the *Ipp Review* 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. Professor 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>112</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>113</sup> The Notes accompanying the Tasmanian Bill and the subsequent second reading speech are more narrowly

<sup>110</sup> See above n 10.

<sup>111</sup> As evident in the title of s 36 of the *Civil Liability Act 2003* (Qld), and in the text of the provisions in Tasmania and the ACT: *Civil Liability Act 2002* (Tas) s 40(1); *Civil Law (Wrongs) Act 2002* (ACT) s 111(1).

<sup>112</sup> Aronson, above n 24, 76.

<sup>113</sup> Explanatory Notes, Civil Liability Bill 2003 (Qld) 12; Queensland, *Parliamentary Debates*, Legislative Assembly, 11 March 2003, 366–9 (Rod Welford, Attorney-General and Minister for Justice). The Explanatory 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.

worded, referring to breach of statutory duty,<sup>114</sup> but do not expressly disclaim any application to negligence claims.

This confusion was recently addressed in *Hamcor Pty Ltd v Queensland* ('*Hamcor*'),<sup>115</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 *Civil Liability Act 2003* (Qld) s 36 defence to the plaintiff's claim in negligence. At first instance, QFRS was found to have owed and breached a duty of care at common law,<sup>116</sup> but the claim was dismissed on the basis that it was entitled to benefit from an immunity particular to fire brigades.<sup>117</sup> Dalton J nonetheless expressed the obiter view that s 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>118</sup> On appeal, Dalton J's decision was upheld, but the Queensland Court of Appeal was not called upon to decide the s 36 point and declined the invitation to do so,<sup>119</sup> which leaves us without any conclusive steer.

As regards the substance and effect of s 36, 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>120</sup> within the traditional statutory duty, breach, damage and causation framework.<sup>121</sup> Her Honour 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',<sup>122</sup> 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'.<sup>123</sup> This standard, her

<sup>114</sup> Explanatory Notes, Civil Liability Amendment Bill 2003 (Tas); Tasmania, *Parliamentary Debates*, House of Assembly, 24 June 2003, 82–97 (Judy Jackson).

<sup>115</sup> [2014] QSC 224 (1 October 2014).

<sup>116</sup> *Ibid* [174], [182] (Dalton J).

<sup>117</sup> *Fire and Rescue Service Act 1990* (Qld) s 129.

<sup>118</sup> *Hamcor* [2014] QSC 224 (1 October 2014) [195].

<sup>119</sup> *Hamcor Pty Ltd v Queensland* [2015] QCA 183 (2 October 2015) [64]–[67].

<sup>120</sup> *Hamcor* [2014] QSC 224 (1 October 2014) [196].

<sup>121</sup> *Ibid* [201].

<sup>122</sup> *Ibid* [205].

<sup>123</sup> *Ibid* [210].

Honour thought, ‘goes beyond a *Bolam* standard’<sup>124</sup> and makes it ‘extraordinarily difficult for a plaintiff to prove breach’.<sup>125</sup> Had the section applied, her Honour would therefore have concluded that QFRS’s actions were insufficient to violate it;<sup>126</sup> a conclusion that the Court of Appeal did choose to endorse.<sup>127</sup> Also implicit in Dalton 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 Review* 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 insofar 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>128</sup> This captures the additional, ‘public function’ element of the *Ipp Review*’s 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>129</sup> and contains a specific reference in the text of the provision itself to breach of statutory duty.<sup>130</sup> Unsurprisingly, given this language, the Victorian Civil and Administrative Tribunal and the Supreme Court of Victoria have confirmed its application to only claims of the latter type.<sup>131</sup> A further distinguishing feature of the provision is that it does not apply to the breach of ‘absolute’ statutory duties. This is superficially more logical than the

<sup>124</sup> Ibid [204].

<sup>125</sup> Ibid [210].

<sup>126</sup> Ibid [211].

<sup>127</sup> *Hamcor Pty Ltd v Queensland* [2015] QCA 183 (2 October 2015) [61] (albeit for the purpose of deciding the proper application of the *Fire and Rescue Service Act 1990* (Qld) s 129).

<sup>128</sup> *Wrongs Act 1958* (Vic) s 84(2).

<sup>129</sup> The Act makes it clear that s 84 does not apply to negligence claims, stating ‘this part (except section 84) applies to any claim for damages resulting from negligence’: *ibid* s 80(1).

<sup>130</sup> *Ibid* s 84(1).

<sup>131</sup> *Transpacific Cleanaway* [2008] VCAT 1798 (29 August 2008) [77] (Macnamara DP); *South East Water Ltd v Transpacific Cleanaway Pty Ltd* (2010) 177 LGERA 1, 34 [62]–[63] (Cavanough J); *Quigley v Lower Murray Urban and Rural Water Corporation* [2014] VCAT 1325 (21 October 2014) [21] (Macnamara VP); *Sami v Roads Corporation* (2008) 51 MVR 118, 150 [128] (Vickery J).

Queensland, ACT and Tasmanian provisions, but likely to further limit its practical scope to a very narrow range of cases.<sup>132</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* (NSW) is drafted in almost identical terms to Tasmania's provision, and applies solely to claims for breach of statutory duty.<sup>133</sup>

By contrast, s 43A offers a more wide-ranging defence in all proceedings 'based on' the 'exercise of special statutory powers'.<sup>134</sup> 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>135</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>136</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>137</sup>

<sup>132</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, then 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 Victoria and the other jurisdictions here mentioned may not be great.

<sup>133</sup> *Roads and Traffic Authority (NSW) v Rolfe* [2010] NSWSC 714 (2 July 2010) [43] (Harrison AsJ); *Patsalis v New South Wales* (2012) 266 FLR 207, 228 (Basten JA); *McKenna* [2013] NSWCA 476 (23 December 2013) [167] (Macfarlan JA).

<sup>134</sup> *Civil Liability Act 2002* (NSW) s 43A(1).

<sup>135</sup> *Ibid* s 43A(2).

<sup>136</sup> *Ibid* s 43A(3).

<sup>137</sup> *Refrigerated Roadways* (2009) 77 NSWLR 360, 434 [359] (Campbell JA); *Curtis* (2014) 88 NSWLR 10, 14 [5], 72 [277].

Section 43A was a kneejerk legislative reaction to a very unusual negligence case, *Presland v Hunter Area Health Service* ('*Presland*').<sup>138</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>139</sup> but in the intervening period, the legislature saw fit to act.

Referring to *Presland*,<sup>140</sup> 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 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>141</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>142</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 Review* Panel's intention to confine the *Wednesbury* unreasonableness test to the exercise of powers of the type that were at issue in *Presland*.

<sup>138</sup> [2003] NSWSC 754 (19 August 2003).

<sup>139</sup> *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22.

<sup>140</sup> [2003] NSWSC 754 (19 August 2003).

<sup>141</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 4 December 2003, 583–6 (John Della Bosca).

<sup>142</sup> Aronson, above n 24, 78–9.

The cases considering s 43A have addressed two issues that are key to determining the provision's 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>143</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>144</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>145</sup> to install guideposts at the side of road,<sup>146</sup> or to place warning signs on the road's median strip<sup>147</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 (NSW)* ('*Grant*'),<sup>148</sup> Rothman J, adopting the reasoning of Campbell JA in *Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd*, 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 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>149</sup>

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

<sup>143</sup> (2009) 239 CLR 51.

<sup>144</sup> *Ibid* 64–5 [23]–[26].

<sup>145</sup> *Refrigerated Roadways* (2009) 77 NSWLR 360, 435 [368] (Campbell JA). 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 435 [369].

<sup>146</sup> *Bellingen Shire Council v Colavon Pty Ltd* (2012) 188 LGERA 169, 177 [38] (Beazley JA). The appellant was not permitted to rely on the s 43A defence due to its late pleading: at 179 [50].

<sup>147</sup> *Grant v Roads and Traffic Authority (NSW)* (2014) 66 MVR 318, 345–6 [140]–[142] (Rothman J).

<sup>148</sup> *Ibid* 345 [139].

<sup>149</sup> *Ibid*.

However, more recent decisions such as *Lee v Carlton Crest Hotel (Sydney) Pty Ltd* ('Lee')<sup>150</sup> and *Curtis v Harden Shire Council* ('Curtis')<sup>151</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>152</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.<sup>153</sup> Both powers were found to be 'special' on the basis that they existed only by virtue of the body's statutory authority.<sup>154</sup> 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'.<sup>155</sup>

The result is that courts appear to be applying s 43A well beyond the bounds of the type of case that provided the initiative for reform. Like Dalton J in *Hamcor*,<sup>156</sup> 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 Review* Panel's original intent.

As regards the second question relating to the required standard of care under s 43A, 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>157</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 Roads and Traffic Authority (NSW)* ('Allianz'), is that the concept of reasonableness in negligence law focuses on the *substantive quality*

<sup>150</sup> [2014] NSWSC 1280 (19 September 2014).

<sup>151</sup> (2014) 88 NSWLR 10. Other cases endorsing a broader construction of the notion of 'special statutory power' include *Collins v Clarence Valley Council* [No 3] [2013] NSWSC 1682 (15 November 2013) ('Collins') and *Rickard v Allianz Insurance Ltd* (2009) 54 MVR 214.

<sup>152</sup> [2014] NSWSC 1280 [387] (Beech-Jones J).

<sup>153</sup> (2014) 88 NSWLR 10, 59 [211], 60 [216] (Beazley P).

<sup>154</sup> *Lee v Carlton Crest Hotel (Sydney) Pty Ltd* [2014] NSWSC 1280 (19 September 2014) [385]–[386] (Beech-Jones J) ('Lee'); *Curtis v Harden Shire Council* (2014) 88 NSWLR 10, 65 [248] (Basten JA) ('Curtis').

<sup>155</sup> Aronson, above n 24, 78–9.

<sup>156</sup> [2014] QSC 224 (1 October 2014).

<sup>157</sup> See, eg, *Collins* [2013] NSWSC 1682 (15 November 2013) [200] (Beech-Jones J).



of a decision made, not on its validity for the distinct purpose of determining whether a body should be obliged to take it again.<sup>158</sup>

In *Precision Products (NSW) Pty Ltd v Hawkesbury City Council*, Allsop P indicated that it was clearly Parliament's intent to 'ameliorate the rigours of the law of negligence',<sup>159</sup> but considered it a matter for debate whether the provision introduces a substantive standard of 'gross negligence'.<sup>160</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>161</sup> The Court declined to endorse 'gross negligence' as the relevant standard, whilst acknowledging that the provision requires unreasonableness at a 'high level'.<sup>162</sup> There again, in *Grant*, Rothman J also rejected public law interpretations of the provision that would equate it with criminal negligence or administrative law irrationality. 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>163</sup> His Honour instead suggested in 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>164</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.

<sup>158</sup> (2010) 57 MVR 80, 97 [78].

<sup>159</sup> (2008) 74 NSWLR 102, 141 [177].

<sup>160</sup> *Ibid.* This is a standard mooted by Aronson, above n 24, 80 and Nolan, 'Varying the Standard of Care in Negligence', above n 93, 672–9, 685–7.

<sup>161</sup> (2010) 57 MVR 80, 100 [89]. 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 97–8 [79], 100 [87].

<sup>162</sup> *Ibid.* 100 [87]. For rejection of the gross negligence standard see also *Curtis* (2014) 88 NSWLR 10, 72 [278] (Basten JA).

<sup>163</sup> For the above features of Rothman's J's approach, see (2014) 66 MVR 318, 346 [146]–[147], [149].

<sup>164</sup> *Ibid.* 348 [153].

The same sort of approach appealed recently to courts in *Lee*<sup>165</sup> and *Curtis*.<sup>166</sup> The Court of Appeal in the latter case intimated 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>167</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.<sup>168</sup> By contrast, in *Curtis*, Bathurst CJ mentions *Bolam* in parenthesis, alongside the s 43A approach.<sup>169</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* — that is, compliance with the practice of *any* reasonable authority sufficing to

<sup>165</sup> [2014] NSWSC 1280 (19 September 2014) [386] (Beech-Jones J). The standard was found to have been breached.

<sup>166</sup> (2014) 88 NSWLR 10, 72 [278] (Basten JA).

<sup>167</sup> *Ibid* 72 [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: at 78–80 [302]–[311].

<sup>168</sup> [2014] QSC 224 (1 October 2014) [204].

<sup>169</sup> (2014) 88 NSWLR 10, 357 [6] (citations omitted):

The 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*).

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.

make the public body safe, as opposed to compliance with a ‘responsible *body*’ of opinion.

If certainty of legal standards is to be a measure of the success of post-*Ipp Review* 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. This 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* (WA) 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>170</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>171</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. It does, however, extend beyond the *Ipp Review* recommendations insofar as it captures not just claims for personal injury and death, but also for property damage and economic loss.<sup>172</sup>

The only judicial interpretation of s 5X to date is to be found in *Southern Properties (WA) Pty Ltd v Executive Director, Department of Conservation and*

<sup>170</sup> *Civil Liability Act 2002* (WA) s 5U.

<sup>171</sup> *Southern Properties Appeal* (2012) 42 WAR 287, 343–4 [300] (Pullin JA).

<sup>172</sup> *Civil Liability Act 2002* (WA) s 3.

*Land Management [No 2]*,<sup>173</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.<sup>174</sup> At first instance, however, Murphy J had also indicated in 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>175</sup> and its conduct had not breached the relevant standard.<sup>176</sup> The Court of Appeal concurred that the decision was one of policy,<sup>177</sup> but split on the question whether the relevant standard would have been breached. McLure JA thought that it would not have been,<sup>178</sup> whilst Pullin JA concluded that it had been and that a negligence action should lie.<sup>179</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 s 5X 'operates so as to significantly alter the otherwise applicable standard of care at common law',<sup>180</sup> advertent directly to the *Wednesbury* public law standard. On this view, it was 'wrong to equate that standard with the general law standard of care in negligence.'<sup>181</sup> By contrast, Pullin JA 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).<sup>182</sup> 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

<sup>173</sup> [2010] WASC 45 (12 March 2010) ('*Southern Properties Trial*'); *Southern Properties Appeal* (2012) 42 WAR 287.

<sup>174</sup> *Southern Properties Trial* [2010] WASC 45 (12 March 2010) [481] (Murphy J); *Southern Properties Appeal* (2012) 42 WAR 287, 308 [105] (McLure P).

<sup>175</sup> *Southern Properties Trial* [2010] WASC 45 (12 March 2010) [510].

<sup>176</sup> *Ibid* [510]-[511].

<sup>177</sup> *Southern Properties Appeal* (2012) 42 WAR 287, 310 [114] (McLure P), 344 [301] (Pullin JA).

<sup>178</sup> *Ibid* 310 [114].

<sup>179</sup> *Ibid* 344-5 [303]-[304].

<sup>180</sup> See *ibid* 310 [114] (McLure P).

<sup>181</sup> *Ibid*.

<sup>182</sup> See *ibid* 333 [236], 335 [250], 337 [264]-[265].

precautions and the social utility of the defendant's activity.<sup>183</sup> Applying these factors, Pullin JA found the relevant standard to have been breached.<sup>184</sup>

Pullin JA's interpretation of s 5X diverges dramatically from the approach of most New South Wales courts<sup>185</sup> and comes close to equipping 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 Pullin JA's approach will be followed, but the very fact of his Honour's 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. The irony of the case, from our own critical point of view, is that the answer to the question of whether the relevant standard under s 5X had been breached seems to have been no easier to predict than the question of 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>186</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-intensive nature of inquiries regarding breach. The ironic truth, however,

<sup>183</sup> Ibid 328–9 [214], 333 [236]–[237].

<sup>184</sup> Ibid 342 [291].

<sup>185</sup> See, eg, Carroll above n 93, 90. Carroll astutely observes a potentially similar approach in *T & H Fatouros Pty Ltd v Randwick City Council* (2006) 147 LGERA 319.

<sup>186</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.

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

Whilst the *Ipp Review's* recommendations were expressly intended to promote consistency in the law across Australia,<sup>187</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 *Ipp Review*, and in our view, it remains morally objectionable for reasons earlier canvassed.<sup>188</sup> It is one thing to suggest that local taxation rates may justifiably differ across the country, yet 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

<sup>187</sup> *Ipp Review*, above n 1, 26–7 [1.9]–[1.13].

<sup>188</sup> See also Barbara 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.

tort and the respectable Diceyan tradition upon which that movement has historically been based.<sup>189</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 Review* Panel ever considered appropriate because, if Dalton J in *Hamcor* is correct,<sup>190</sup> these defences apply to ‘policy’ decisions and ‘operational’ failings alike. This either misconstrues, or purposely ignores, the parameters of the *Ipp 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.

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 Review* Panel’s intention and that the language of the legislation comes close to replicating it. The response of courts in cases such as *Grant*,<sup>191</sup> *Curtis*<sup>192</sup> and *Lee*<sup>193</sup> 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.

<sup>189</sup> See above n 10.

<sup>190</sup> [2014] QSC 224 (1 October 2014).

<sup>191</sup> (2014) 66 MVR 318.

<sup>192</sup> (2014) 88 NSWLR 10.

<sup>193</sup> [2014] NSWSC 1280 (19 September 2014).

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>194</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>195</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 balances 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.

<sup>194</sup> Vines, above n 29.

<sup>195</sup> Carroll, above n 93, 92.



### 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 statutes that have sprung up across Australia since 2006,<sup>196</sup> although that body of legislation has itself been criticised as having been drafted too hastily and with inadequate reflection.<sup>197</sup> These experiences, and the anomalies we have identified amongst the post-*Ipp Review* 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>198</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

<sup>196</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); *Civil Law (Wrongs) Act 2002* (ACT), as amended by *Civil Law (Wrongs) Amendment Act 2006* (ACT).

<sup>197</sup> David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16 *Torts Law Journal* 207, 245. See also Andrew T Kenyon, 'Six Years of Australian Uniform Defamation Law: Damages, Opinion and Defence Meanings' (2012) 35 *University of New South Wales Law Journal* 31.

<sup>198</sup> See above nn 97–8.

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 throughout Australia in civil liability legislation dealing with professional standards more generally,<sup>199</sup> 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>200</sup> and emergency services.<sup>201</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.

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 Review* Panel — 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.<sup>202</sup> This would then effectively implement the current Western Australian approach countrywide, 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 healthcare 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 warden in leaving a cell door open, thereby allowing a prisoner to escape.

<sup>199</sup> McNair J's original formulation guaranteed safety where the defendant complies with 'a responsible body' of expert opinion, whereas the legislation refers to practice 'widely accepted' by a 'significant number' of respected practitioners: *Bolam* [1957] 1 WLR 582, 587.

<sup>200</sup> *Phelps* [2001] 2 AC 619, 655 (Lord Slynn), 672 (Lord Clarke).

<sup>201</sup> *Capital & Counties Plc v Hampshire County Council* [1997] QB 1004, 1043–4 (Stuart-Smith LJ). Booth and Squires, above n 11, 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.

<sup>202</sup> *Ipp Review*, above n 1, 151 [10.3].

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>203</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>204</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>205</sup> unless that body of supporting opinion lacked a rational evidential basis, or was contrary to written law.<sup>206</sup>

Taking a *Bolam* approach to public body decision-making is arguably consistent, we have suggested, with the way in which the New South Wales Court of Appeal is currently interpreting the standard under s 43A of the *Civil Liability Act 2002* (NSW), although that conclusion must be expressed with some caution, and the *Bolam* standard may be slightly more generous to plaintiffs.<sup>207</sup> Endorsing it would be methodologically distinct from imposing a substantive standard of ‘gross negligence’<sup>208</sup> (‘faute lourde’ in French law) but

<sup>203</sup> We are grateful to one of the anonymous referees for these examples.

<sup>204</sup> See above n 2.

<sup>205</sup> *Civil Liability Act 2003* (Qld) s 22(1).

<sup>206</sup> *Ibid* ss 22(2)–(5).

<sup>207</sup> See above Part IV(B)(3) for discussion of *Curtis* (2014) 88 NSWLR 10 and *Lee* [2014] NSWSC 1280 (19 September 2014).

<sup>208</sup> This approach is favoured by Nolan and Aronson: see Nolan, ‘Varying the Standard of Care in Negligence’, above n 93 and accompanying text; Aronson, above n 24 and accompanying text. It 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 of England and Wales, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187 (2008) 4 [2.9]. The proposal was never implemented for reasons explained in Law Commission of England and Wales, *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010). There are clearly traces of the language in the case 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 (under both models) is difficult.<sup>209</sup> 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 with a reasonable degree of assurance. If accompanied by existing provisions which subjectivise<sup>210</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 UK 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

New South Wales 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': *D v East Berkshire Community Health NHS Trust* [2005] 2 WLR 993, 1015 [49] (Lord Bingham).

<sup>209</sup> For discussion of some of the intractable difficulties in cleanly separating 'public' and 'private' domains see, eg, William Lucy and Alexander Williams, 'Public and Private: Neither Deep nor Meaningful?' in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 45.

<sup>210</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 103; Nolan, 'Varying the Standard of Care in Negligence', above n 93, 670–2.

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 (for example, 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, deny equality of treatment to tort victims and 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.