

A critical evaluation of the Professional Practice Defence in the Civil Liability Acts

CATHERINE MAH*

The Civil Liability Acts of all Australian States ('State CLAs')¹ provide a defence in certain circumstances where a defendant has acted in a manner that was widely accepted by peer professional opinion as competent professional practice ('Professional Practice Defence').² This article critically examines the current State formulations of the Professional Practice Defence to highlight a range of problems associated both with the class of persons who can access the defence and the circumstances in which it can apply. These problems can unreasonably and undesirably restrict or expand the operation of the defence due to their inconsistent expression between States, their uncertain interpretation and the unprincipled nature of specific elements among State formulations. In light of these incongruities in professional liability law, this article makes recommendations to guide the process of statutory reform towards the adoption of a nationally consistent, clearly defined and principles-based Professional Practice Defence.

INTRODUCTION

The Professional Practice Defence has been operational in all States since 2004. Yet it is still not clear exactly how that defence operates, since there have been very few decided cases considering this.³ As a result, many of the problems with

* BCom, LLB (Hons) (UWA). Business Analyst, Port Jackson Partners. The author gratefully acknowledges the assistance of Associate Professor Peter Sinden and Jimmy Tran for valuable comments on earlier drafts. For more information, contact mah@pjpl.com.au. All remaining errors are the author's own.

1 *Civil Liability Act 2002* (NSW) ('CLA (NSW)'); *Civil Liability Act 2002* (Tas) ('CLA (Tas)'); *Civil Liability Act 1936* (SA) ('CLA (SA)'); *Civil Liability Act 2003* (Qld) ('CLA (Qld)'); *Wrongs Act 1958* (Vic) ('Wrongs Act (Vic)'); *Civil Liability Act 2002* (WA) ('CLA (WA)').

2 CLA (NSW) s 5P; CLA (Tas) s 22; CLA (SA) s 41; CLA (Qld) s 22; *Wrongs Act* (Vic) s 60; CLA (WA) s 5PB. CLA (WA) was the last of the State CLAs to be enacted, which commenced operation on 9 November 2004: CLA (WA) s 2(1).

3 As at 1 September 2012, the defence has been raised in 31 cases: *Simon; McKenna v Hunter & New England Local Health District* [2012] NSWDC 19; *Coote v Kelly* [2012] NSWSC 219; *Gillett v Robinson* [2011] NSWSC 1143; *King v Western Sydney Local Health Network* [2011] NSWSC 1025; *Hirst v Sydney South West Area Health Service* [2011] NSWSC 664; *Doherty v New South Wales* [2010] NSWSC 450; *Hollier v Sutcliffe* [2010] NSWSC 279; *Peterson v South Eastern Sydney Illawarra Area Health Service* [2010] NSWDC 114; *Thompson v Haasbroek* [2010] NSWSC 111; *Hope v Hunter and New England Area Health Service* [2009] NSWDC 307; *Kocev v Toh* [2009] NSWDC 169; *Galloway v Hasn* [2009] NSWDC 349; *Brown v Simpson* [2008] NSWDC 57; *Melchior v Sydney Adventist*

the defence are not well appreciated. This article aims to expose these issues thereby highlighting the need for reform.

Part I provides an overview of the intended purpose and actual value of the Professional Practice Defence. It explores why the defence was originally enacted, sets out the common formulation of that defence and demonstrates how it can effectively lower the standard of care required of those persons who are lawfully entitled to avail themselves of it.

However, because the State-based enactments of the defence are not consistent, the availability of this valuable protection varies from State-to-State. Part II explores these fractures between these formulations of the Professional Practice Defence, highlighting the key differences concerning who is entitled to access the defence and in what circumstances it can apply.

Part III then considers the various problems that the inconsistencies, uncertainties and unprincipled elements of the State formulations raise, which can foster unwarranted outcomes in relation to the accessibility and application of the defence. This Part finds that the present state of the law of professional liability created by these fractured State formulations is highly unsatisfactory and stands in urgent need of reform.

In Part IV, this article concludes with an outline of how such reform might be approached. A number of recommendations are made that would, if implemented, produce a nationally consistent, clearly defined and principled formulation of the statutory Professional Practice Defence.

AN OVERVIEW OF THE DEFENCE

Why was the defence enacted?

On 30 May 2002, the Commonwealth, State and Territory Governments announced a panel chaired by Ipp J ('Ipp Panel')⁴ to review the standard of care in

Hospital Ltd [2008] NSWSC 1282; *O'Gorman v Sydney South West Area Health Service* [2008] NSWSC 1127; *Hawes v Holley* [2008] NSWDC 147; *Walker v Sydney West Area Health Service* [2007] NSWSC 526; *Halverson v Dobler* [2006] NSWSC 1307 affirmed in *Dobler v Halverson* [2007] NSWCA 335; *Weller v Phipps* [2010] NSWCA 323; *Djz Constructions Pty Ltd v Paul Pritchard* [2010] NSWSC 1024; *Permanent Custodians Ltd v King* [2009] NSWSC 600; *Sutton v Firth (No 2)* [2009] NSWDC 53; *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505; *Indigo Mist Pty Ltd v Palmer* [2012] NSWCA 239; *Perpetual Trustees Victoria Ltd v Belcastro* [2011] NSWSC 1418; *Engineered Fire Safety Solutions Pty Ltd v the Owners Strata Plan 45205* [2009] NSWDC 309; *Leheste v The Minister for Health* [2012] WADC 92; *Mazza v Webb* [2011] QSC 163; *Goddard Elliott v Fritsch* [2012] VSC 87; *Landmark Operations Ltd v Tiver Nominees Pty Ltd* [2008] SASC 322.

⁴ The members of the Ipp Panel were Justice David Ipp, Peter Cane (Law Professor), Don Sheldon (Chairman of the Council of Procedural Specialists) and Ian Macintosh (Mayor).

professional negligence matters.⁵ Their goal was to assist governments to develop ‘consistent national approaches’⁶ to address the perceived crisis in liability insurance,⁷ in particular medical indemnity insurance.⁸ Although the terms of reference were broadly framed, the impetus for reform was almost solely driven by concerns arising from the medical profession.

The crisis revolved around the fear that the rising cost of medical indemnity insurance was pricing medical practitioners out of practice,⁹ driven by increases in medical negligence litigation¹⁰ and the apparent ease of establishing liability under the prevailing standard of care.¹¹ Many medical practitioners were frustrated that the standard did not provide clear guidance as to how they should act in order to avoid liability, given that they could still be held negligent if they complied with the competent practices within their profession.¹² This led to a broader concern that public access to health care would ultimately be reduced.¹³

5 Commonwealth of Australia Treasury, *Review of the Law of Negligence Final Report* (2002) (‘Ipp Report’) x.

6 Ibid 26 [1.8] citing the Commonwealth of Australia Treasury, *Joint Communiqué Ministerial Meeting on Public Liability* (30 May 2002).

7 Ibid ix, 25 [1.2]–[1.3]. The Ipp Panel also stated that ‘[a]lthough the Ministerial communiqué asserts that there is a relationship between the current law and recent rises in insurance premiums, the Panel has not investigated, and has formed no view about that relationship or the likely impact of our recommendations on the insurance market’: 27 [1.16].

8 See generally Loane Skene and Harold Luntz, ‘Effects of Tort Law Reform on Medical Liability’ (2005) 79 *Australian Law Journal* 345, 346.

9 See Ipp Report, above n 5, 42 [3.21]; Harold Luntz, ‘Medical Indemnity and Tort Law Reform’ (2003) 10 *Journal of Law and Medicine* 385, 392; Australian Medical Association, *AMA welcomes Federal Government intervention to ease medical indemnity crisis* (28 March 2002) <<http://ama.com.au/node/916>>; Australian Medical Association, *AMA calls on government to ensure security of medical indemnity industry* (20 March 2002) <<http://ama.com.au/node/913>>.

10 See Australian Doctors’ Fund, Submission No 001 to the Commonwealth of Australia Treasury, *Review of the Law of Negligence*, 10 July 2002, 11 citing that Gillian Harrex, Karen Johnston and Estelle Pearson, ‘Medical indemnity in Australia’ (Paper presented at The Institute of Actuaries of Australia XIII General Insurance Seminar, 25–28 November 2001) reported a ‘rapid escalation of claims costs for medical negligence’. See also United Medical Protection, Submission No 011 to the Commonwealth of Australia Treasury, *Review of the Law of Negligence*, 1 July 2004, 2.

11 See generally Ipp Report, above n 5, 25 [1.4]. See also Julian Morris, ‘Insuring Against Negligence: Medical Indemnity in Australia’ (2002) 18(3) *Policy* 10; Helen Coonan, ‘Insurance Premiums and Law Reform - Affordable Cover and the Role of Government’ (2002) 25(3) *University of New South Wales Law Journal* 821, 832.

12 See United Medical Protection, above n 10, 3; Australian Medical Association, Submission No 055 to the Commonwealth of Australia Treasury, *Review of the Law of Negligence*, 12 August 2002, 7. See generally Loane Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (Butterworths, 1998) 1; Morris, above n 11, 12; Olya Melnitchouk, ‘Extending liability for medical negligence’ (1996) 4 *Torts Law Journal* 259, 260.

13 See generally Ipp Report, above n 5, 42 [3.21].

In the absence of empirical evidence supporting these concerns,¹⁴ the Ipp Panel sought to strike a balance between the interests of medical practitioners, their patients and the wider community in making their recommendations.¹⁵ Relevantly, the Ipp Panel recommended the introduction of a Professional Practice Defence¹⁶ for medical practitioners¹⁷ to be adopted uniformly across all Australian jurisdictions.¹⁸ However the panel also suggested the possibility that the defence could extend to classes such as ‘health-care professionals’, ‘all professionals’ or ‘all professions and trades’.¹⁹

From 2002 to 2004, all States gradually introduced the Professional Practice Defence.²⁰ However, the terms of each defence varies significantly between States, with no State adopting the Ipp Panel’s recommended formulation. But more significantly, the Territories have not introduced this defence.

What is the defence?

This Section describes the common formulation of the State-based variants, which provides a broad overview of the Professional Practice Defence in its most general terms according to its dominant elements. Whilst there are few shared elements of the defence across all States, the elements that have been adopted by the majority of States are also included in this common formulation.²¹ The precise differences between the State formulations of the defence will be explored in Part II.

The Professional Practice Defence in each State provides in varying terms that professionals in ‘the provision of a professional service’,²² or ‘health professionals’²³ in Western Australia (‘WA’), will not be liable for negligence²⁴ against any civil claim for damages for harm²⁵ if it is established that the professional acted in a

14 This absence of empirical evidence was noted in the Ipp Report, *ibid* 32 [1.38]–[1.39]; Justice David Ipp, ‘Negligence – Where lies the future?’ (2003) 23 *Australian Bar Review* 158, 160.

15 Ipp Report, above n 5, 32 [1.40], 42 [3.21].

16 *Ibid*, 1, 41–2 (Recommendation 3).

17 *Ibid* 43 [3.30].

18 *Ibid* 1, 35 (Recommendation 1), [2.1]–[2.2].

19 *Ibid* 43 [3.27]–[3.29].

20 See above n 1.

21 These elements are depicted in Figure 1 in Part II.D which provides a summary of the key similarities and differences between the State formulations of the Professional Practice Defence.

22 CLA (NSW) s 50(1); CLA Tas s 22(1); CLA (Qld) s 22(1); Wrongs Act (Vic) s 59(1). Cf CLA (SA) s 41 which applies to ‘person[s] who provide[] a professional service’ (emphasis added); CLA (SA) s 41(1). See further Part II.B.(a)–II.B.(b)

23 CLA (WA) s 5PB(1). The term ‘health professional’ is defined in CLA (WA) s 5PA. See further Part II.B.(c).

24 CLA (NSW) s 5P; CLA (SA) s 41(5); Wrongs Act (Vic) s 60; CLA (WA) s 5PB(2). Cf CLA (Tas) s 22(5); CLA (Qld) s 22(5) which have a broader application. See further Part II.C.(b).

25 CLA (NSW) s 5A (‘resulting from negligence’); CLA (Tas) s 10 (‘resulting from a breach

manner that (at the time the service was provided) was widely accepted by peer professional opinion²⁶ as competent professional practice.²⁷ All State CLAs further provide that peer professional opinion does not have to be universally accepted to be considered widely accepted,²⁸ and that a conflict of widely accepted peer professional opinions does not prevent any of those opinions being relied on.²⁹ However, the Professional Practice Defence does not apply if the court considers that the opinion is sufficiently objectionable because it exceeds a specific Exception Threshold.³⁰ For example, in the majority of States, the defence will be excluded where the ‘court considers that the opinion is irrational.’³¹ Further, the defence does not apply to liability arising in connection with informing or failing to inform of a risk (‘Informing Exception’).³²

Can the defence effectively lower the standard of care?

Having considered the purpose and content of the defence, it is necessary to turn to consider how the defence actually operates in order to provide defendants with protection against liability. Given the primary beneficiaries of the Professional Practice Defence were intended to be medical practitioners, this Section will consider how the practical operation of the defence can effectively lower the standard of care in medical negligence cases.

-
- of duty’); CLA (Qld) s 4; Wrongs Act (Vic) s 44 (‘resulting from negligence’); CLA (WA) s 5A (‘caused by the fault of a person’). However, note CLA (SA) is not limited to civil claims for damages for harm: CLA (SA) s 4. See further Part II.C.(a).
- 26 CLA (SA) s 41(1) replaces ‘peer professional opinion’ with ‘members of the same profession’.
- 27 CLA (NSW) s 5O(1); CLA (Tas) s 22(1); CLA (SA) s 41(1); CLA (Qld) s 22(1); Wrongs Act (Vic) s 59(1); CLA (WA) s 5PB(1). Further, all States except for Queensland and WA require that the practice must be widely accepted ‘in Australia’. Additionally, Queensland and Victoria require that the practice must be accepted by a ‘significant number of respected practitioners in the field’: CLA (Qld) s 22(1); Wrongs Act (Vic) s 59(1). See further Part II.C.(c)–II.C.(d).
- 28 CLA (NSW) s 5O(4); CLA (Tas) s 22(4); CLA (SA) s 41(4); CLA (Qld) s 22(4); Wrongs Act (Vic) s 59(4); CLA (WA) s 5PB(5).
- 29 The CLAs in all States except WA provide that ‘[t]he fact that there are differing peer professional opinions widely accepted ... does not prevent any one or more (or all) of those opinions being relied on...’: CLA (NSW) s 5O(3); CLA (Tas) s 22(3); CLA (SA) s 41(3); CLA (Qld) s 22(3); Wrongs Act (Vic) s 59(3). CLA (WA) s 5PB(3) provides that the defence applies ‘even if another practice that is widely accepted by the health’s professional’s peers as competent professional practice differs from or conflicts with the practice in accordance with the health professional acted or omitted to do something’.
- 30 CLA (NSW) s 5O(2); CLA (Tas) s 22(2); CLA (SA) s 41(2); CLA (Qld) s 22(2); Wrongs Act (Vic) s 59(2); CLA (WA) s 5PB(4). See further Part II.C.(e) for a detailed exposition of the different Exception Thresholds between States.
- 31 CLA (NSW) s 5O(2); CLA (Tas) s 22(2); CLA (SA) s 41(2); CLA (Qld) s 22(2).
- 32 CLA (NSW) s 5P; CLA (Tas) s 22(5); CLA (SA) s 41(5); CLA (Qld) s 22(5); Wrongs Act (Vic) s 60; CLA (WA) s 5PB(2). See further Part II.C.(f) for a discussion of the different Informing Exceptions between States. For the purposes of this article, all references to the ‘negligence standard’ or the ‘standard of care’ of the medical profession refer to the standard that applies to medical practitioners in treatment cases, which includes diagnosis, the prescribing of medications and the carrying out of procedures; and not those that are excluded by the Informing Exception unless otherwise indicated.

1. *Position prior to the enactment of the defence*

Before the Professional Practice Defence came into operation, the negligence standard of medical practitioners across all Australian jurisdictions was determined solely by common law. In order for a medical practitioner to discharge their duty to a patient³³ they had to satisfy the *Rogers* Test,³⁴ which is also known as the professional negligence standard. The *Rogers* Test provides that ‘[t]he standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill.’³⁵ In determining whether a medical practitioner had exercised reasonable care, the court took into account whether a reasonable person would have taken precautions against the risk of harm according to common law negligence principles.³⁶

Under the *Rogers* Test, courts adjudicated on what was the appropriate standard of care,³⁷ however evidence of acceptable medical practice was a ‘useful guide for the courts’ and had an ‘influential, often decisive, role to play’ in determining whether a medical practitioner had breached their duty.³⁸ In *Rosenberg v Percival*,³⁹ Gleeson J stated that, ‘In many cases, professional practice and opinion will be the primary, and in some cases it may be the only, basis upon which a court may reasonably act.’⁴⁰ The court was entitled to accept a responsible body of expert opinion, unless there was a strong reason to reject it.⁴¹

2. *Position subsequent to the enactment of the defence*

The negligence standard itself has not changed across any of the Australian jurisdictions, however the operation of the Professional Practice Defence can effectively reduce the standard of care in the States that have adopted it, by allowing a defendant to avoid liability if they can establish the defence.

Medical negligence cases arising after the commencement of the State CLAs suggest that the *Rogers* Test still applies in all Australian jurisdictions.⁴² South

33 This duty is imposed by tort law: *Rogers v Whitaker* (1992) 175 CLR 479, 483 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) and the terms of a contract between a medical practitioner and their patient.

34 Named after *Rogers v Whitaker* (1992) 175 CLR 479.

35 Ibid 483 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) citing *Cook v Cook* (1986) 162 CLR 376, 383–4 (Mason, Wilson, Deane and Dawson JJ). See also *Naxakis v Western General Hospital* (1999) 197 CLR 269; *Rosenberg v Percival* (2001) 205 CLR 434.

36 These principles are derived from *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 (Mason J).

37 *Rogers v Whitaker* (1992) 175 CLR 479, 487 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

38 Ibid 489 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ). This approach was confirmed in *Naxakis v Western General Hospital* (1999) 197 CLR 269 [18]–[20] (Gaudron J), [47] (McHugh J), [81] (Kirby J).

39 (2001) 205 CLR 434.

40 Ibid [7] (Gleeson J).

41 Ipp Report, above n 5, 38 [3.6].

42 In the NSW jurisdiction *Halverson v Dobler* [2007] NSWSC 1307 [180] (McClellan CJ),

Australia ('SA') and Victoria have even codified this test.⁴³

Further, along with enacting the Professional Practice Defence, the State CLAs, as well as the *Civil Law (Wrongs) Act 2002* (ACT)⁴⁴ have also essentially codified the common law negligence principles for determining whether a person has breached their standard of care.⁴⁵ However, unlike the Professional Practice Defence, a uniform formulation of this standard was adopted. All these Acts provide that a person is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable and not insignificant, and in the circumstances, a reasonable person in the persons' position would have taken those precautions.⁴⁶ In determining whether a person would have taken precautions, the court must consider the probability and likely seriousness of the harm, the burden of taking precautions and the social utility of the activity that creates that risk.⁴⁷ The intention is such that liability will only attach to a failure to take precautions against a risk of harm if the risk was foreseeable and 'not insignificant', which is a marginally higher threshold than the common law requirement that the risk had to be foreseeable and 'not far-fetched or fanciful'.⁴⁸

Where it has been established that a medical practitioner has breached their duty of care, they can now raise the Professional Practice Defence⁴⁹ to avoid negligence

affirmed on appeal in *Dobler v Halverson* [2007] NSWCA 335 (Giles, Ipp and Basten JJA), confirms this. Further support for this proposition is provided by *Walker v Sydney West Area Health Service* [2007] NSWSC 526 [167] (Simpson J); *O'Gorman v Sydney South West Area Health Service* [2008] NSWSC 1127 [120] (Hoeben J); *Sydney South West Area Health Service v MD* (2009) 260 ALR 702 [21] (Hodgson JA with Allsop P and Sackville AJA concurring).

43 CLA (SA) s 40 and Wrongs Act (Vic) s 58. These codifications follow Recommendation 4 of the Ipp Report, above n 5, 2, 44–5.

44 Note that in the Australian Capital Territory, the *Civil Law (Wrongs) Act 2002* (ACT) ('CLA (ACT)') s 43 also codified the same common law negligence principles although it did not enact a Professional Practice Defence.

45 CLA (NSW) s 5B; CLA (Tas) s 11; CLA (SA) s 32; CLA (Qld) s 11; Wrongs Act (Vic) s 48; CLA (WA) s 5B. Cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 44, 47–8 (Mason J). Note that in *Indigo Mist Pty Ltd v Palmer* [2012] NSWCA 239 [124], Beazley, McFarlan and Hoeben JJA stated that '[w]hile s 5B is not particularly useful in cases involving professional negligence, it still has a part to play.'

46 CLA (NSW) s 5B(1); CLA (Tas) s 11(1); CLA (SA) s 32(1); CLA (Qld) s 11(1); Wrongs Act (Vic) s 48(1); CLA (WA) s 5B(1); CLA (ACT) s 43(1).

47 CLA (NSW) s 5B(2); CLA (Tas) s 11(2); CLA (SA) s 32(2); CLA (Qld) s 11(2); Wrongs Act (Vic) s 48(2); CLA (WA) s 5B(2); CLA (ACT) s 43(2). Cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8, where Mason J stated that the relevant considerations are 'the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.'

48 See *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8 (Mason J). See Ipp Report, above n 5, 104–5 [7.12]–[7.15]. However, in *Drinkwater v Howarth* [2006] NSWCA 222 [16], Basten JA (with Hodgson and Tobias JJA agreed) stated that the result under the statute may not differ materially from the common law.

49 All of these sections are likely to be construed as defences, since CLA (NSW) s 5O: *Halverson v Dobler* [2007] NSWSC 1307 [182]–[183] (McClellan CJ) affirmed in *Dobler v Halverson* [2007] NSWCA 335 [59]–[61] (Giles JA with Ipp and Basten JJA agreed);

liability.

3. *The defence in action*

The Professional Practice Defence has never formally been successful since there are no cases where a medical practitioner has been held negligent and has subsequently avoided liability by relying on the defence.⁵⁰ However recent case law, primarily from New South Wales ('NSW'),⁵¹ illustrates that this defence can effectively lower the standard of care for medical practitioners.

It is incorrect to conclude that the Professional Practice Defence offers no practical protection to medical practitioners since courts have tended to conflate the substantive content of the defence into the breach inquiry.⁵² Conflation occurs because expert evidence of professional practice is considered at both stages, where applicable. In *Dobler v Halverson*,⁵³ the NSW Court of Appeal stated that although the Professional Practice Defence provides a 'defence',⁵⁴ it 'may end up operating so as to determine the standard of care'.⁵⁵ This is because the standard will be that determined by the court with guidance from evidence of acceptable professional practice, unless the defendant establishes the defence.⁵⁶ If the defendant's conduct accorded with professional practice widely accepted by rational peer professional opinion, then that practice 'sets the standard of care'.⁵⁷ Courts have considered whether the defendant acted in accordance with competent professional practice that was widely accepted by peer professional opinion to determine whether they met their *standard of care*.⁵⁸ In all cases where the court

Sydney South West Area Health Service v MD (2009) 260 ALR 702 [21] (Hodgson JA with Allsop P and Sackville AJA concurring); *Port Stephens Council v Theodorakakis* [2006] NSWCA 70; and Wrongs Act (Vic) s 59: *Brakoulias v Karunaharan* [2012] VSC 272 (Macaulay J) have recently been held to operate as defences.

50 See also Janine McIlwraith and Bill Madden, *Health Care and the Law* (Thomson Reuters, 5th ed, 2010) 203, where the authors make this observation.

51 27 of the 31 cases where the defence has been raised are from NSW. See above n 3. 20 of the 22 cases where the defence has been raised by medical practitioners are from NSW.

52 In all 9 of the 22 cases concerning medical practitioners where the content of the defence has been relied upon, it has been conflated with the breach inquiry: see *Gillett v Robinson* [2011] NSWSC 1143 [8], [53], [54] (Harrison J); *Hollier v Sutcliffe* [2010] NSWSC 279 [92]–[94], [150]– [154] (R A Hulme J); *Peterson v South Eastern Sydney Illawarra Area Health Service* [2010] NSWDC 114 [403]–[452] (Levy J); *Kocev v Toh* [2009] NSWDC 169 [80] (Hungerford ADCJ); *Galloway v Hasn* [2009] NSWDC 349 [7]–[30] (Sidis DCJ); *Melchior v Sydney Adventist Hospital Ltd* [2008] NSWSC 1282 (Hoeben J); *Hawes v Holley* [2008] NSWDC 147 [37], [100]–[101] (Hungerford ADCJ); *Walker v Sydney West Area Health Service* [2007] NSWSC 526 [90], [167] (Simpson J); *Lehste v The Minister for Health* [2012] WADC 92 [320] (Commissioner Gething). See also McIlwraith and Madden, above n 50, 203, where the authors state that '[t]hese steps are often dealt with concurrently'.

53 [2007] NSWCA 335.

54 *Dobler v Halverson* [2007] NSWCA 335 [59]–[61] (Giles JA with Ipp and Basten JJA agreed).

55 *Ibid* [61] (Giles JA with Ipp and Basten JJA agreed).

56 *Ibid*.

57 *Ibid* [59] (Giles JA with Ipp and Basten JJA agreed).

58 Courts have conflated the breach inquiry with the content of the defence and have relied

has both conflated these issues and has held that medical practitioners have not breached their duty, the court has held either implicitly or explicitly that the defence has also been ‘successful’.⁵⁹

In cases where it is established that the defendant met their standard of care, it is likely that the Professional Practice Defence would also have been available,⁶⁰ thus the same outcome may be reached irrespective of whether the defence is raised.⁶¹ Accordingly, it is unclear whether and in which cases the Professional Practice Defence has allowed medical practitioners to avoid liability on the basis that they breached their standard of care, yet successfully raised the defence.

Regardless, the courts’ treatment of the defence has effectively given more weight to peer professional opinion than previously, albeit at the breach inquiry.⁶² Its use has resulted in favourable outcomes for defendants, as courts have often found that defendants have not breached their duty *on the basis* that they acted in accordance with a practice supported by widely accepted peer professional opinion.⁶³

There have been cases where the Professional Practice Defence would have been successful but was not necessary because the plaintiff was not able to establish the necessary elements of the negligence action.⁶⁴ A good example is the case of *Melchior v Sydney Adventist Hospital Ltd*⁶⁵ where the court found that although the defendant owed a duty of care to the plaintiff, the scope of their duty did not cover the impugned conduct.⁶⁶ Hoeben J stated that even if the conduct fell within that duty and negligence was proved, the plaintiff’s claim still would have failed because the Professional Practice Defence was established.⁶⁷

either wholly or in part on the content of the defence to support the finding that the defendant did not breach their duty of care in the cases cited above n 52.

59

Ibid.

60

Kocev v Toh [2009] NSWDC 169 [80]; *Melchior v Sydney Adventist Hospital Ltd* [2008] NSWSC 1282 [142]–[144]. See also Carolyn Sappideen, ‘*Bolam* in Australia – More bark than bite’ (2010) 33(2) *University of New South Wales Law Journal* 386, 400 n 80 citing *Melchior v Sydney Adventist Hospital Ltd* [2008] NSWSC 1282 [96]; *Hawes v Holley* [2008] NSWDC 147 [100]; *Sydney South West Area Health Service v MD* (2009) 260 ALR 702; *Hope v Hunter and New England Area Health Service* [2009] NSWDC 307.

61

See above n 58. See also Sappideen, above n 60, 400.

62

Pursuant to the *Rogers* Test, ‘a finding of medical negligence may be made even though the conduct of the defendant was in accord with a practice accepted at the time as proper by a responsible body of medical opinion’: *Naxakis v Western General Hospital* (1999) 197 CLR 269 [47] (McHugh J).

63

See above n 58. See generally Patrick D Mahar and Justin A Burke, ‘What is the value of professional opinion? The current medicolegal application of the “peer professional practice” in Australia’ (2011) 194(5) *Medical Journal of Australia* 253, 253–4.

64

See Jennifer Yule, ‘Defences in medical negligence: to what extent has tort law reform in Australia limited the liability of health professionals?’ (2011) 4(1) *Journal of Australasian Law Teachers Association* 53, 58.

65

[2008] NSWSC 1282.

66

Ibid [116]–[120] (Hoeben J).

67

Ibid [144]–[145] (Hoeben J).

In *Freidin v St Laurent*,⁶⁸ Callaway JA also noted the potential practical value of the defence. He suggested that if the facts of that case had occurred after the commencement of the *Wrongs Act 1958* (Vic), the Professional Practice Defence could have applied which might have changed the outcome of the case.⁶⁹ Therefore, it can assist defendants to avoid liability where they have acted in accordance with a widely accepted competent professional practice despite breaching their duty of care.

Moreover, courts have taken an expansive approach to interpreting the Professional Practice Defence. Where there are two different practices supported by widely accepted peer professional opinion that seem equally viable, a court is likely to accept the defendant's conduct.⁷⁰ Further, it seems that a minority section of the profession can still form a 'widely accepted professional practice'.⁷¹

Therefore, whilst courts have yet to formally apply the Professional Practice Defence in a case where they have not conflated it with the breach inquiry, there is a strong indication from the language of judges that their reasons for not imposing liability are that the Professional Practice Defence effectively applied in substance.

It also seems that it is only in very rare cases that the Exception Threshold to the Professional Practice Defence will restrict the defence's application.⁷² No court has rejected the application of the Professional Practice Defence on the basis that it exceeded the Exception Threshold.

It follows that medical practitioners are subject to an effectively lower standard of care than would otherwise have been imposed under the general law of tort. However, because the State-based formulations of the Professional Practice Defence are not consistent, its availability will depend on the terms of each enactment. These differences are explored in Part II.

68 (2007) 17 VR 439.

69 Ibid [6] (Callaway JA). In this case, a patient alleged that her obstetrician should have performed an episiotomy, following which she suffered a large vulval haematoma. Four 'highly qualified expert[s]' gave evidence, two arguing that an episiotomy should have been performed, which would have decreased the risk of haematoma, and two arguing that an episiotomy was unnecessary, being unable to see how it could prevent a haematoma.

70 See Timothy Bowen and Andrew Saxton, 'Medical negligence dilemmas – When will the peer acceptance defence work?' (2009) *Australian Health Law Bulletin* 13, 17. See also *Hawes v Holley* [2008] NSWDC 147 [100]; *Halverson v Dobler* [2007] NSWSC 1307 [187] (McClellan CJ); *Dobler v Halverson* [2007] NSWCA 335 [60] (Giles JA with Ipp and Basten JJA agreed).

71 See Peter King, 'Faint heart wins fair battle: Court of Appeal upholds trial decision in *Halverson v Dobler*' (2008) 16(4) *Australian Health Law Bulletin* 50, 54 citing the CA transcript of *Dobler v Halverson* [2007] NSWCA 335 (Ipp JA) at T32: 39-44.

72 See *King v Western Sydney Local Health Network* [2011] NSWSC 1025 [114] (Garling J). See further Ipp Report, above n 5, 41 [3.19], where the Ipp Panel cited *Hucks v Cole* [1993] 4 Med LR 393 as an example of such a rare instance.

FRACTURES BETWEEN STATE FORMULATIONS

How were these differences created?

Although well intentioned, the Commonwealth, State and Territory Governments rushed the reform process with the eminently predicable result that they failed to implement a nationally consistent Professional Practice Defence.

The Ipp Panel were given less than two months to make their recommendation on whether a Professional Practice Defence should be introduced,⁷³ with the Governments meeting soon after⁷⁴ agreeing to implement the defence.⁷⁵ Whilst expressing a desire to achieve national consistency, the States and Territories agreed to enact legislation individually.⁷⁶ This signalled an outright rejection of the Ipp Report's paramount recommendation for a national response to be enacted in a single statute.⁷⁷

But even before this meeting, NSW had already begun debating a Bill⁷⁸ seeking to enact the Ipp Panel's recommendations. Only two months shy of the Ipp Panel's final report being released, the Bill had received assent⁷⁹ after just two days of debates.⁸⁰

The remaining States enacted varying formulations of the defence on an *ad hoc* basis over the next two years. The enactments reflected their differences of opinion on a number of issues.⁸¹ Indeed, the opinions held between jurisdictions were so diverse that the Territories did not even enact this defence.

The rush to receive the Ipp Panel's recommendations, combined with the

73 The Terms of Reference for the review was announced by the Commonwealth Government on 2 July 2002 and the Ipp Panel was required to report on terms regarding *inter alia* the standard of care in professional negligence matters by 30 August 2002, and all remaining terms by 30 September 2002: Ipp Report, above n 5, xi, 25 [1.1], 33 [1.44].

74 On 15 November 2002: Commonwealth of Australia Treasury, *Joint Communiqué Ministerial Meeting On Public Liability Insurance* (15 November 2002) ('*Joint Communiqué* (15 November 2002)').

75 Along with a range of other key recommendations of the Ipp Report.

76 *Joint Communiqué* (15 November 2002), above n 74. See also Mark Doepel and Chad Downie, *A Comprehensive Guide to Tort Law Reform throughout Australia* (Kennedys, November 2006) 2; Mark Doepel, *Tort law reform throughout Australia Special Report* (Minter Ellison, 6th ed, December 2005) 1.

77 Ipp Report, above n 5, 1 (Recommendation 1); 35 [2.1].

78 The Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) was introduced into the Legislative Assembly on 23 October 2002 and was debated on 30 October 2002.

79 The Ipp Panel presented the Ipp Report on 30 September 2002. The Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) received assent on 28 November 2002.

80 The Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) was exclusively debated in the Legislative Assembly on 30 October 2002 and in the Legislative Council on 19 November 2002.

81 See Doepel and Downie, above n 76, 2; Doepel, above n 76, 1.

individualised approaches taken by Governments to give effect to them, have led to the implementation of the Professional Practice Defence in varying terms. These variances limit or expand the class of defendants who are entitled to access the defence and the circumstances in which it can apply.

Who can access the defence?

Among the States, there are three different classes of defendants that may gain access to the defence: professionals, persons providing a professional service and health professionals.

1. Professionals

In NSW, Tasmania, Queensland and Victoria, the Professional Practice Defence applies to all professionals in the provision of a professional service,⁸² where a ‘professional’ means an individual or person ‘practising a profession’.⁸³ Notably, this circular use of terminology is absent of any defining criteria.

2. Persons providing a professional service

The SA defence seems to apply more broadly to a ‘person’ who provides a professional service,⁸⁴ regardless of whether that person practices any profession. Although many commentators have not recognised the existence of this variation between this class of ‘persons’ and ‘professionals’,⁸⁵ it seems that the SA defence would extend beyond ‘professionals’ to any non-professional persons who hold themselves out as having professional skills. This is because the *Rogers* Test applies to persons that ‘exercis[e] and profess[] to have [a] special skill’ irrespective of whether they actually have attained professional status or professional skills.⁸⁶ Further, the SA and Victorian codifications of the *Rogers* Test expressly provide that ‘a person who *holds himself or herself out* as possessing a particular skill [is subject to the standard] determined by reference to ... what could reasonably be expected of a person possessing that skill...’⁸⁷

Thus, persons who hold themselves out as possessing professional skills in the provision of a professional service may gain access to the defence only in SA.

82 CLA (NSW) s 50(1); CLA (Tas) s 22(1); CLA (Qld) s 22(1); Wrongs Act (Vic) s 59(1); CLA (SA) s 41(1).

83 CLA (NSW) s 50(1); CLA (Tas) s 22(1); CLA (Qld) s 20; Wrongs Act (Vic) s 57.

84 CLA (SA) s 41(1).

85 Many academics have stated that CLA (SA) s 41 applies to professionals. See, eg, McIlwraith and Madden, above n 50, 201 [6.95]; Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 2006) 310–1.

86 *Rogers v Whitaker* (1992) 175 CLR 479, 483 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) citing *Cook v Cook* (1986) 162 CLR 376, 383–4 (Mason, Wilson, Deane and Dawson JJ). See also *Naxakis v Western General Hospital* (1999) 197 CLR 269; *Rosenberg v Percival* (2001) 205 CLR 434.

87 CLA (SA) s 40(1)(a) (emphasis added); Wrongs Act (Vic) s 58(1)(a) (emphasis added).

3. Health professionals

On the other hand, the Professional Practice Defence in Western Australia ('WA') is restricted to 'health professionals'⁸⁸ which are defined as 'person[s] registered under the *Health Practitioner Regulation National Law (Western Australia)*' in [specific] health professions ... or 'any other person[s] who practise[] a discipline or profession in the health area that involves the application of a body of learning.'⁸⁹

What are the circumstances in which the defence can apply?

Although any persons within the prescribed class of defendants⁹⁰ in the relevant State may gain access to the defence, that defence will not apply unless its elements are established. There are six key differences concerning the application of the defence between the States.

What claims can the defence be raised against?

All State CLAs apart from SA only apply where a civil claim for damages for harm is made.⁹¹ The application of the SA defence is not so limited.⁹²

1. Only civil claims for damages for harm

The State CLAs (excluding SA) further provide that harm means harm of any kind, including the following: 'personal injury'; 'damage to property'; and 'economic loss.'⁹³ The CLAs in NSW, Tasmania and Victoria additionally provide that harm means death.⁹⁴ However, only Tasmania additionally provides that harm means 'pure economic loss.'⁹⁵ Although it is likely that all State CLAs apply to claims for pure economic loss, the difference in terminology may suggest that in all States other than Tasmania, 'economic loss' refers only to consequential economic loss.

88 CLA (WA) s 5PB(1).

89 These health professions include: Aboriginal and Torres Strait Islander health practice; Chinese medicine; chiropractic; dental; medical; medical radiation practice; nursing and midwifery; occupational therapy; optometry; osteopathy; pharmacy; physiotherapy; podiatry, psychology, or any other person who practises a discipline or profession in the health area that involves the application of a body of learning': CLA (WA) s 5PA.

90 Described above at Part II.A.

91 See also CLA (NSW) s 5A; CLA (Tas) s 10; CLA (Qld) s 4; Wrongs Act (Vic) s 44; CLA (WA) s 5A.

92 CLA (SA) s 4 provides that:

- (1) This Act is intended to apply to the exclusion of inconsistent laws of any other place to the determination of liability and the assessment of damages for harm arising from an accident occurring in this State.
- (2) Subsection (1) is intended to extend, and not to limit in any way, the application of this Act in accordance with its terms.
- (4) This Act does not affect a right to compensation under the *Workers Rehabilitation and Compensation Act 1986*.

93 CLA (NSW) s 5, CLA (Qld) Schedule 2 Dictionary; CLA (Tas) s 9; CLA (WA) s 3, Wrongs Act (Vic) s 43.

94 CLA (NSW) s 5(a), CLA (Tas) s 9(a); Wrongs Act (Vic) s 43(a).

95 CLA (Tas) s 9(c).

Thus, if this interpretation is accepted, it is only in Tasmania that a defendant that causes pure economic loss can rely on the Professional Practice Defence against claims for damages for harm.

All State CLAs apart from SA also list certain claims for damages that are excluded, including claims for specific classes of damages,⁹⁶ claims made under certain State Acts⁹⁷ and claims of a class excluded by the regulations.⁹⁸ These exclusions differ between States.

1. *Claims generally*

The SA Professional Practice Defence is not limited to civil claims for damages for harm.⁹⁹

What liability can be avoided?

In some States, persons can only avoid negligence liability if they successfully raise the relevant Professional Practice Defence. However in other States, the defence – if successfully raised – can allow such persons to avoid liability for any breach of duty.

1. *Negligence liability*

In NSW, Victoria, SA and WA, defendants can only enliven the defence against claims brought against them involving negligence, since if successfully raised they will not be liable in negligence.¹⁰⁰ The defence applies regardless of whether the claim is brought in tort, contract, under statute or otherwise.¹⁰¹

2. *Breach of duty*

The Professional Practice Defence in Queensland and Tasmania has a potentially

-
- 96 CLA (WA) s 3A(1) Item 1(a),(b), Item 4, Item 6; CLA (Tas) s 3B(1); CLA (NSW) ss 3B(1) (a),(c); CLA (Qld) ss 5(1)(c),(d).
- 97 Wrongs Act (Vic) ss 45(1),(2); CLA (WA) ss 3A(1), Item 3, Item 5; CLA (Tas) ss 3B(2),(3),(4); CLA (NSW) ss 3B(1)(b),(d),(e),(f),(g); CLA (Qld) ss 5(1)(a),(b).
- 98 Wrongs Act (Vic) s 45(3); CLA (WA) s 3A(2); CLA (Tas) ss 3B(5),(6); CLA (NSW) s 3B(3).
- 99 CLA (SA) s 4.
- 100 CLA (SA) s 41(1) ('incurs no liability in negligence'); CLA (NSW) s 50(1) ('does not incur a liability in negligence'); Wrongs Act (Vic) s 59(1) ('is not negligent'); CLA (WA) s 5PB(1) ('an act or omission ... is not a negligent act or omission').
- 101 CLA (NSW) s 5A(1) ('[t]his Part applies ... regardless of whether the claim is brought in tort, contract, under statute or otherwise'); Wrongs Act (Vic) s 44 ('[t]his Part applies ... regardless of whether the claim is brought in tort, contract, under statute or otherwise'); CLA (WA) s 5A(2) ('[t]his extends to a claim for damages for harm caused by the fault of a person even if the damages are sought to be recovered in an action for breach of contract or *other action*.' (emphasis added)). See further Explanatory Memorandum, Wrongs and Other Acts (Law of Negligence) Bill 2003 (Vic) 8.

wider application because they simply provide that if a person successfully raises this defence they do ‘not breach a duty’.¹⁰² This arguably extends the defence in these States to duties outside of negligence, such as statutory duties or other duties existing at common law and equity, including fiduciary duties.¹⁰³

What are the geographical limits on the opinions that can be relied upon?

All State formulations of the Professional Practice Defence apart from the Queensland and WA formulations require that the professional practice that the defendant seeks to rely upon must be widely accepted ‘in Australia’ as opposed to just ‘widely accepted’.¹⁰⁴ Thus far, no cases have considered the difference between these terms.

Widely accepted in Australia

Only two cases concerning the NSW defence, which employs ‘widely accepted in Australia’, distinguish practices that are widely accepted in Australia from international practices.¹⁰⁵ In *Hope v Hunter and New England Area Health Service*,¹⁰⁶ Levy DCJ held that the defendant could not avail the Professional Practice Defence because *inter alia* the expert evidence adduced supported practices in Scotland and the United States, which was not necessarily indicative of professional practice in Australia.¹⁰⁷ It was ‘telling on the issue but not necessarily determinative’¹⁰⁸ that no evidence was called to establish that the practice was widely accepted in Australia.¹⁰⁹

102 CLA (Qld) s 22(1) (‘A professional does not breach a duty arising from the provision of a professional service if...’); CLA (Tas) s 22(1) (‘A professional does not breach a duty arising from the provision of a professional service if...’). See also CLA (Qld) s 4 (‘this Act applies to any civil claim for damages for harm’); CLA (Tas) s 10 (‘This Part applies to civil liability of any kind for damages for harm resulting from a breach of duty’).

103 For example, if company directors have access to the defence as professionals or persons providing a professional service, they may be able to raise the defence against all of their directors’ duties including the following general law duties: duty of care, skill and diligence; duty to act in good faith in the best interests of the company; duty to exercise powers for proper purposes; duty to avoid conflicts of interest. It also includes the following statutory duties: *Corporations Act 2001* (Cth) ss 180(1), 181(1)(a), 181(1)(b), 182, 183, 184(2),(3), 191, 195, 209(2),(3).

104 CLA (NSW) s 50(1); CLA (Tas) s 22(1); CLA (SA) s 41(1); CLA (Qld) s 22(1). Cf *Wrongs Act* (Vic) s 59(1); CLA (WA) s 5PB(1).

105 See, eg, *King v Western Sydney Local Health Network* [2011] NSWSC 1025 [184]–[199], [217]–[235] (Garling J), where Australian practice was contrasted with international practices. See also *Hope v Hunter and New England Area Health Service* [2009] NSWDC 307.

106 [2009] NSWDC 307.

107 *Ibid* [170]–[171].

108 *Ibid* [172].

109 *Ibid* [171].

Widely accepted generally

It is also unclear whether ‘widely accepted’ will be cast wider than ‘widely accepted in Australia’, since the WA and Queensland cases thus far¹¹⁰ have not considered the content of the former term. However, the difference between these elements could mean that defendants in Queensland and WA can rely on international practices, whereas defendants in the other States cannot.

Are there any Additional Requirements on the Opinions that can be Relied Upon?

Apart from Queensland and Victoria, no other State imposes further consensus requirements on the common element of the Professional Practice Defence that the opinion must be widely accepted by the professional’s peers.

Queensland and Victoria require the practice to be accepted by a ‘*significant number of respected practitioners in the field*’,¹¹¹ without guidance as to what those terms mean.

The Ipp Panel, having recommended the adoption of these terms,¹¹² stated that the ‘significant number’ requirement is ‘designed to filter out idiosyncratic opinions’¹¹³ whilst the ‘respected practitioners’ requirement is ‘designed to ensure that the opinion deserves to be treated as soundly based.’¹¹⁴ Case law from these States have yet to consider what these elements entail.¹¹⁵

What is the Exception Threshold for Excluding Objectionable Opinions?

The State formulations of the Professional Practice Defence adopt four different Exception Thresholds. These are where the opinion relied upon is: irrational; contrary to a written law; unreasonable; or so unreasonable that no person in the defendant’s position could have acted or omitted to do something in accordance with that practice.

1. Irrational

NSW, Tasmania, SA and Queensland provide that the defence does not apply if the court considers that the opinion is irrational (‘Irrationality Exception’).¹¹⁶ The requirement that the peer professional opinion must not be irrational seems

110 *Leheste v The Minister for Health* [2012] WADC 92; *Mazza v Webb* [2011] QSC 163.

111 CLA (Qld) s 22(1) (emphasis added); Wrongs Act (Vic) s 59(1) (emphasis added).

112 Ipp Report, above n 5, 1, 41–2 (Recommendation 3).

113 *Ibid* [3.15].

114 *Ibid* [3.15].

115 *Mazza v Webb* [2011] QSC 163; *Goddard Elliott v Fritsch* [2012] VSC 87.

116 CLA (NSW) s 50(2); CLA (Tas) s 22(2); CLA (SA) s 41(2); CLA (Qld) s 22(2).

to impose a lower threshold than that of the reasonable person standard and ‘unreasonableness’.¹¹⁷ The NSW Premier suggested in his second reading speech that the Irrationality Exception makes it ‘much harder for the court to disregard experts in the field’.¹¹⁸

Thus far, only two cases have very briefly considered the meaning of ‘irrationality’ within this exception in *obiter dicta*.¹¹⁹ In *King v Western Sydney Local Health Network*,¹²⁰ Garling J stated that an irrational opinion is an opinion which cannot withstand ‘logical analysis’ based on the reasoning of Lord Browne-Wilkinson in *Bolitho v City and Hackney Health Authority* (‘*Bolitho*’),¹²¹ a case which formulated the ‘Modified *Bolam* Test’.¹²² Further, the Ipp Panel intended that the Irrationality Exception ‘follows the law ... in *Bolitho*.’¹²³ In the absence of further direction, academics suggest that courts will interpret irrationality consistent with illogicality.¹²⁴

117 See New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5765 (Bob Carr). See also Stuart Clark and Christina Harris ‘Australian civil liability reform- NSW delivers!’ (2002) 18(2) *Australian Insurance Law Bulletin* 13, 16–7; Explanatory Notes, Civil Liability Bill 2003 (Qld) 10. Cf Explanatory Memorandum, Wrongs and Other Acts (Law of Negligence) Bill 2003 (Vic).

118 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5765, (Bob Carr).

119 *Hope v Hunter and New England Area Health Service* [2009] NSWDC 307 (Levy DCJ); *King v Western Sydney Local Health Network* [2011] NSWSC 1025 [107]–[114] (Garling J).

120 [2011] NSWSC 1025.

121 [1998] AC 232, 243 (Lord Browne-Wilkinson). See also *Hope v Hunter and New England Area Health Service* [2009] NSWDC 307 [174], where Levy DCJ stated that an irrational opinion is construed to refer to opinions that are ‘illogical, unreasonable or based on irrelevant considerations’.

122 [2011] NSWSC 1025 [108] (Garling J). The Modified *Bolam* Test prescribes a test for the standard of care which suggested changes to the *Bolam* Test from the seminal case of *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582, 587 (McNair J). The *Bolam* Test provides that:

[a doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. ... [A] man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.

The Modified *Bolam* Test provides that:

[t]he court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a *logical* basis. In particular ... the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter (emphasis added).

123 Ipp Report, above n 5, 41 [3.18].

124 See, eg, Richard John Douglas, Gerard Raymond Mullins and Simon Richard Grant, *The Annotated Civil Liability Act 2003 (Qld)* (Butterworths, 2004) citing *Bolitho v City and Hackney Health Authority* [1988] AC 232, 243.

2. *Contrary to a Written Law*

The Queensland Professional Practice Defence is also excluded where the opinion is contrary to a written law. This exception therefore seems to be stricter than the NSW, Tasmania and SA because opinions that are contrary to a written law are not necessarily irrational.

This seems to indicate that the Queensland defence cannot apply where a defendant relies on a practice supported by widely accepted peer professional opinion, yet breaches a written law by conforming to that practice. Accordingly, the Queensland defence would not be available for breaches of statutory duty because any opinion that the practice of the defendant was widely accepted would be contrary to the statute prescribing that duty. Thus, a defendant in Queensland that followed a practice which contravened a statutory provision, will not be able to raise the Professional Practice Defence.

3. *Unreasonable*

In contrast, the Victorian defence will not apply where the court determines that the opinion is unreasonable ('Unreasonableness Exception').¹²⁵ The NSW and Victorian Parliaments considered that there was a difference between 'irrationality' and 'unreasonableness'.¹²⁶ Victorian Hansard debates further suggest that the Unreasonableness Exception has the potential to exclude reliance on the Professional Practice Defence in more cases than Irrationality Exception,¹²⁷ although it is unclear to what extent.¹²⁸

It is arguable that the Unreasonableness Exception completely negates the operation of the Professional Practice Defence by imposing the same effective standard as the negligence standard itself. Madden and McIlwraith have suggested that 'in choosing the term "unreasonable", it would appear that the Victorian law will depart little, if at all, from the pre-existing common law'¹²⁹ because courts

125 Wrongs Act (Vic) s 59(2).

126 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5765 (Bob Carr); New South Wales, *Parliamentary Debates*, Legislative Council, 19 November 2002, 6924 (Richard Jones); Explanatory Memorandum, Wrongs and Other Acts (Law of Negligence) Bill 2003 (Vic) 7. See also Stuart Clark and Christina Harris 'Australian civil liability reform- NSW delivers!' (2002) 18(2) *Australian Insurance Law Bulletin* 13, 16–7.

127 See Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 2003, 1423 (John Brumby); Victoria, *Parliamentary Debates*, Legislative Council, 25 November 2003, 1722, 1857–8 (John Lenders); Victoria, *Parliamentary Debates*, Legislative Council, 26 November 2003, 1855 (David Davis); Victoria, *Parliamentary Debates*, Legislative Council, 26 November 2003, 1856–7 (Christopher Strong).

128 See Victoria, *Parliamentary Debates*, Legislative Council, 26 November 2003, 1857–8 (John Lenders) where Lenders expresses concerns over the ambiguous meaning of irrational and unreasonable.

129 Bill Madden and Janine McIlwraith, *Australian Medical Liability* (LexisNexis Butterworths, 2008) 135–6.

will refuse to follow peer opinion where they deem it to be unreasonable as they have consistently done in pre-CLA cases.¹³⁰

4. *Wednesbury Unreasonable*

The WA defence will not apply where the practice relied upon is ‘so unreasonable that no reasonable health professional in the health professional’s position could have acted or omitted to do something in accordance with that practice’ (*Wednesbury* Unreasonableness’).¹³¹ This appears to adopt the administrative law concept of ‘*Wednesbury* unreasonableness’ from Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*¹³² to describe a decision that is so unreasonable that no reasonable decision-maker could have made it.

It is difficult to envisage a course of treatment which might be widely accepted by the health professional’s peers as competent professional practice pursuant to CLA (WA) s 5PB(1) while being so unreasonable that no reasonable health professional in their position could have acted or omitted to do something in accordance with that practice under CLA (WA) s 5PB(4).

In the public law context, the *Wednesbury* unreasonableness test has been used even where there is evidence that other authorities would have acted as the relevant authority did.¹³³ However, the notion that what the health professional did was ‘so unreasonable’ seems to directly conflict with the underlying requirement of the WA defence that the practice must be ‘widely held’ by a respected body of practitioners. Thus, this exception appears to define itself out of operation given the content of the defence.

The possibility that these Exception Thresholds impose substantively different limits may exclude the application of the Professional Practice Defence in some States. This may occur where the court considers that the practice is unreasonable, but not necessarily irrational or *Wednesbury* unreasonable; or irrational but not necessarily *Wednesbury* unreasonable.

130 See Sappideen, above n 60, 413.

131 CLA (WA) s 5PB(4).

132 [1948] 1 KB 223.

133 See, eg, Naomi Sidebotham, ‘Judicial Review: Is There Still a Role for Unreasonableness?’ (2001) 8(1) *eLaw Murdoch University Electronic Journal of Law* [25] <<http://www.murdoch.edu.au/elaw/issues/v8n1/sidebotham81.html>>; Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 3rd ed, 2004) 340. On the difference between the *Wednesbury* unreasonableness test and determining the standard of care in negligence: see, eg, Paul Craig and Duncan Fairgrieve, ‘Barrett, Negligence and Discretionary Powers’ (1999) 7 *Tort Law Review* 30; *Brodie v Singleton Shire Council* [2001] HCA 29 [310] (Hayne J).

What Cases does the Informing Exception Exclude?

In all States, the Professional Practice Defence contains an exception for liability arising in connection with informing or failing to inform of a risk,¹³⁴ however this Informing Exception is formulated differently between States.

The defence in NSW, SA and WA does not apply in relation to informing or failing to inform of a ‘risk of injury or death’, whereas the remaining States extend the exception to a ‘risk of harm’¹³⁵ or a ‘risk or other matter’.¹³⁶ Another difference is that the SA and WA Informing Exceptions can only exclude cases if the relevant risks are associated with providing a health care service and proposed health treatments or procedures, respectively. All other States’ Informing Exceptions can exclude cases where the relevant risks or matters are associated with providing a professional service.

Accordingly, the following conclusions can be drawn. The defence will not apply where liability arises in connection with informing or failing to inform of:

- (a) Risks of injury or death associated with providing health services in SA and WA;
- (b) Risks of injury or death associated with providing professional services in NSW;
- (c) Risks of harm associated with providing professional services in Tasmania and Queensland; and
- (d) Risks of other matters associated with providing professional services.

However, if the Informing Exception excludes a defendant from raising the Professional Practice Defence, the State CLAs generally provide that the defendant may otherwise avoid liability in limited circumstances¹³⁷ where the risk was ‘obvious’.¹³⁸ Analysis of these different formulations is beyond the scope of this article.

134 CLA (WA) s 5PB(2); Wrongs Act (Vic) s 60; CLA (Tas) s 22(5); CLA (SA) s 41(5); CLA (Qld) s 22(5); CLA (NSW) s 5P.

135 Tasmania and Queensland.

136 Victoria.

137 See CLA (NSW) s 5H, CLA (Qld) s 15, CLA (SA) s 38, CLA (Tas) 17, CLA (WA) s 5O. Cf CLA (Vic).

138 For the definition of ‘obvious risk’ see CLA (NSW) s 5F, CLA (Qld) s 13, CLA (SA) s 36, CLA (Tas) 15, CLA (WA) s 5F, Wrongs Act (Vic) s 53.

Summary of the Differences in Access and Application

Leaving the implementation of the Professional Practice Defence to individual State and Territory Parliaments has resulted in non-uniform formulations which have led to a vast range of differences concerning its access and application. These semantic differences have given rise to a severely fragmented regime for defendants seeking to rely on widely accepted competent professional practices in order to avoid negligence liability. The inconsistencies, uncertainties and potentially unprincipled outcomes that can arise from these enactments are explored in the next Part.

The findings of this Part are summarised in Figure 1 on the following page.

Figure 1. Key Similarities and Differences Between the State Formulations of the Defence

<i>Element</i>	<i>NSW</i>	<i>Tas</i>	<i>SA</i>	<i>Qld</i>	<i>Vic</i>	<i>WA</i>
Common Formulation						
Defendant must have acted in a manner that (at the time the service was provided) was widely accepted be peer professional opinion as competent practice	✓	✓	✓	✓	✓	✓
The peer professional opinion does not have to be universally accepted	✓	✓	✓	✓	✓	✓
A conflict of peer professional opinions does not prevent any of those opinions being relied on	✓	✓	✓	✓	✓	✓
Key Differences Between State Formulations						
ACCESS	Who can Access the Defence?					
	• Professionals	✓	✓		✓	✓
	• Persons Providing a Professional Service			✓		
	• Health Professionals					✓
APPLICATION	What Claims can the Defence be Raised Against?					
	• Only Civil Claims for Damages for Harm	✓	✓		✓	✓
	• Claims Generally			✓		
	What Liability can be Avoided?					
	• Negligence Liability	✓		✓		✓
	• Breach of Duty		✓		✓	
	What are the Geographical Limits on the Opinions that can be Relied Upon?					
	• Widely Accepted in Australia	✓	✓	✓		✓
	• Widely Accepted Generally				✓	✓
	Are there any Additional Requirements on the Opinions that can be Relied Upon?					
• Widely Accepted by a Significant Number of Respected Practitioners				✓	✓	
What is the Exception Threshold for Excluding Objectionable Opinions?						
• Irrational	✓	✓	✓	✓		
• Contrary to a Written Law				✓		
• Unreasonable					✓	
• <i>Wednesbury</i> Unreasonable						✓
What Cases does the Informing Exception Exclude?						
• Informing of Risks of Injury or Death Associated with Providing Health Services			✓			✓
• Informing of Risks of Injury or Death Associated with Providing Professional Services	✓					
• Informing of Risks of Harm Associated with Providing Professional Services		✓		✓		
• Informing of Risks or Other Matters Associated with Providing Professional Services					✓	

ISSUES RAISED BY THE FRACTURED STATE FORMULATIONS

Due to the differing State formulations of the Professional Practice Defence, various problems present themselves in determining who may be entitled to access the defence and in what circumstances it will apply. This manifests itself through particular terms lacking definitional certainty across jurisdictions, to different elements being required between each formulation. The net effect of this is to create inconsistency and uncertainty which severely impairs the predictability of the scope and operation of the defence. This is compounded by the fact that reliance is placed on future case law to interpret current liability provisions. The current situation is undesirable due to the lack of guidance and visibility, which may compound issues or require *ad hoc* resolutions which may result in unprincipled outcomes. As cases will be decided on a State-by-State basis, the existence of a fragmented and uncoordinated regime created by different formulations will adversely affect the development of a coherent body of common law.

Further, persons may be denied access to the defence for no other reason apart from the fact that they provide a professional service in a certain State whose defence they cannot establish, when they could have otherwise established another State defence. It is highly unsatisfactory that outcomes will depend on what State or Territory the alleged wrong occurs in for the same act in civil matters.

What issues arise in accessing the defence?

This Section exposes the issues that arise in accessing the Professional Practice Defence between States, considering its inconsistencies, interpretational issues and unprincipled elements of the defence in turn.

1. *Inconsistent scope*

There are significant inconsistencies between the accessibility of the defence between States and Territories.

Firstly, the greatest difference between jurisdictions is the complete absence of the defence in the Territories. Defendants from the Australian Capital Territory and the Northern Territory are denied access to the Professional Practice Defence for the mere fact that the Territories did not follow through with their agreement to enact it.¹³⁹

Secondly, among the States, a person's access to the defence will depend on whether they fall within the class specified by the terms of the relevant Professional Practice Defence. In WA the defence only applies to 'health professionals',¹⁴⁰ in SA that class extends broadly to 'persons providing a professional service' and in the remaining States all 'professionals' may raise the defence.

¹³⁹ *Joint Communiqué* (15 November 2002), above n 74.

¹⁴⁰ As defined in CLA (WA) s 5PA. See Part II.B.(c).

2. *Uncertainty in interpretation*

The availability of the defence to ‘professionals’ in NSW, Queensland, Victoria and Tasmania also raises a major interpretive problem. In the absence of any instructive statutory definition or clear parliamentary intention as to who constitutes a ‘professional’¹⁴¹ or what is a ‘profession’, it is only possible to speculate on those that might fall within that class unless and until courts determine the relevant case.¹⁴² Indeed, the term ‘profession’ has the potential to encompass any occupational group.¹⁴³

Apart from medical practitioners, it is very unclear what other occupational groups might be covered by the term ‘professional’. Despite this uncertainty, the four State Parliaments – which adopted the terms ‘professional’ and ‘profession’ – did not even contemplate that these terms would cause definitional issues for either parliament or the courts.

Parliamentary debates can only offer limited guidance, as it may be inferred that the occupational groups referred to as professionals in Parliament, will be taken to be professionals. In passing, the Queensland Parliament referred to engineers,¹⁴⁴ accountants,¹⁴⁵ architects,¹⁴⁶ surveyors and lawyers¹⁴⁷ as professionals, whilst the NSW Parliament similarly referred to lawyers¹⁴⁸ and accountants.¹⁴⁹ Further, the Victorian Parliament seemed to indicate that at least the professions ranging from medical practitioners to building or construction professionals would be covered,¹⁵⁰ given that the legislation was aimed at addressing the crisis in

-
- 141 See Part II.B.(a) in relation to the bare definition of ‘professional’ under the CLAs.
- 142 See Chief Justice James Spigelman, ‘Negligence and insurance premiums: Recent changes in Australian law’ (2003) 11(3) *Torts Law Journal* 291, 303; Justice Ipp, above n 14.
- 143 The Oxford English Dictionary offers multiple definitions for ‘profession’ which *inter alia* include: ‘any occupation by which a person regularly earns a living’; ‘by way of an occupation; professionally’; and ‘the body of people engaged in a particular occupation or calling...’
- 144 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 April 2003, 1120–2 (Mike Horan), 1125 (David Watson), 1124 (Linda Lavarch), 1145 (Margaret Keech), 1154 (Michael Choi); Queensland, *Parliamentary Debates*, Legislative Assembly, 3 April 2003, 1234 (Desley Boyle), 1250 (Phillip Reeves), 1256 (Lesley Clark), 1268 (Patrick Purcell); Explanatory Notes, Civil Liability Bill 2003 (Qld) 1.
- 145 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 April 2003, 1131 (Vaughan Johnson), 1124 (Linda Lavarch), 1145 (Margaret Keech); Explanatory Notes, Civil Liability Bill 2003 (Qld) 1.
- 146 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 April 2003, 1234 (Desley Boyle), 1250 (Phillip Reeves), 1256 (Lesley Clark); Queensland, *Parliamentary Debates*, Legislative Assembly, 2 April 2003, 1154 (Michael Choi).
- 147 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 April 2003, 1124 (Linda Lavarch).
- 148 New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2002, 6244 (Alan Ashton); New South Wales, *Parliamentary Debates*, Legislative Council, 19 November 2002, 6924 (Richard Jones).
- 149 New South Wales, *Parliamentary Debates*, Legislative Council, 19 November 2002, 6924 (Richard Jones).
- 150 Building or construction professionals include architects, engineers, surveyors and

professional indemnity, builders' warranty and medical indemnity insurance.¹⁵¹ Interestingly WA, the only State whose Professional Practice Defence does not apply to all 'professionals', was also the only State to acknowledge that this term was unclear.¹⁵² In debating whether the defence should apply to all professionals,¹⁵³ it was suggested that professionals might include engineers,¹⁵⁴ business brokers such as licensed real estate valuers,¹⁵⁵ lawyers, architects, accountants¹⁵⁶ and auditors.¹⁵⁷

Academic texts on professional liability by Walmsley et al¹⁵⁸ and Jackson and Stewart¹⁵⁹ support all these inferences from parliamentary debates. Accordingly, it is likely that these occupations will attract the operation of the Professional Practice Defence.¹⁶⁰

-
- builders.
- 151 Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 2003, 1421 (John Brumby); Victoria, *Parliamentary Debates*, Legislative Assembly, 19 November 2003, 1807 (Bob Stensholt); Victoria, *Parliamentary Debates*, Legislative Council, 25 November 2003, 1719 (John Lenders); Victoria, *Parliamentary Debates*, Legislative Council, 26 November 2003, 1842 (Christopher Strong), 1852–3 (Sang Minh Ngyuen), 1853–4 (David Davis).
- 152 Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 June 2003, p8992b-9003a, 1–4 (Brendon Grylls, Mark McGowan, Janet Woollard, Dan Barron-Sullivan, Paul Omodei)
- 153 Ibid. Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 June 2003, p8735b-8754a, 22 (Brendon Grylls).
- 154 Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 May 2003, p7339b-7354a, 4 (Dan Barron-Sullivan), p7339b-7354a, 6 (Brendon Grylls).
- 155 Ibid p7339b-7354a, 5–6 (Brendon Grylls).
- 156 Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 June 2003, p8992b-9003a, 2 (Brendon Grylls); Western Australia, *Parliamentary Debates*, Legislative Council, 19 August 2004, p5218b-5230a, 8 (Peter Foss); Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 June 2004, p3769c-3774a, 5 (Mark McGowan). Western Australia, *Parliamentary Debates*, Legislative Council, 26 June 2003, p9321c-9323a, 2 (Nick Griffiths).
- 157 Western Australia, *Parliamentary Debates*, Legislative Council, 26 June 2003, p9321c-9323a, 2 (Nick Griffiths).
- 158 Stephen Walmsley, Ben Zipser and Alister Abadee, *Professional Liability in Australia* (Lawbook, 2nd ed, 2007) suggest that professionals include doctors, solicitors, barristers, accountants and auditors, building professionals, valuers and financial services professionals.
- 159 John Powell and Roger Stewart (eds), *Jackson & Powell on Professional Liability* (Sweet & Maxwell, 7th ed, 2012) suggest that professionals include construction professionals, surveyors, solicitors, barristers, medical practitioners, financial services professionals, financial practitioners, insurance brokers, accountants and auditors, actuaries and information technology professionals.
- 160 Justice Ipp, above n 14, 165 where Justice Ipp questioned whether professions, such as engineers, architects, quantity surveyors and lawyers should have the benefit of the Professional Practice Defence.

However, there are many other groups that lie on the margin. It is less certain whether chiropractors, psychologists,¹⁶¹ teachers, journalists,¹⁶² politicians or company directors will be regarded as professionals.

Whilst many occupational groups may argue that they are professionals, the term 'professional' may not extend to all arguable classes, even if there is a good reason for why they should have access to the defence.

How will 'professional' be defined in the absence of a definition? What criteria will be applied to resolve this question? If there are defining characteristics of a 'profession', what are they?¹⁶³

The content of the term 'professional' may depend on the perspective taken, whether that is a singular or pluralistic view, a historical or modern basis, or a case law or sociological approach. A singular perspective may entail asking whether the person in question is a professional among an occupational group, whereas a pluralistic basis may involve asking whether the entire occupational group is a professional one. On a historical interpretation, the term may be limited to the traditional learned professions of medicine, law and the clergy.¹⁶⁴ However, a modern interpretation may extend to recognising professions as they gain acceptance in society.¹⁶⁵ Consideration may also be given to the interpretation of these terms in consumer protection and taxation legislation case law which suggests several attributes that are indicative of a profession,¹⁶⁶ or perhaps by

- 161 Ibid where Justice Ipp questioned whether psychologists, herbalists, acupuncturists, chiropractors, osteopaths, podiatrists and other groups on the fringes of the medical profession would have the benefit of the Professional Practice Defence.
- 162 See Chief Justice Spigelman, above n 142, 303 who also asks whether chiropractors, psychologists, teachers or journalists may be regarded as professionals.
- 163 See Western Australia, *Parliamentary Debates*, Legislative Council, 19 August 2004, p5218b-5230a, 9 (Peter Foss) where Foss suggested that a profession might be regulated by a professional standards Act, require the application of professional standards; require the accreditation for membership of a professional association; have disciplinary mechanisms to remove persons from practicing; and have a group insurance scheme. See also Justice Ipp, above n 14, 165, where Justice Ipp suggested that professions could be distinguished by their 'strict self-regulatory disciplines, which have strong ethical requirements and a tradition of service to the community'.
- 164 Powell and Stewart, above n 159, 2 [1-004]. Cf Chief Justice Spigelman, above n 142, 303 where he suggests that the clergy may face a challenge in claiming 'professional status'.
- 165 See *Water Industry Salaried Officers' Union v Professional Officers' Association (NSW)* (1987) 22 IR 414, where it was held that although particular draftsmen were previously considered to be performing the same work 'in a professional capacity', employees performing the same or similar work today were not considered to be employed 'in a professional capacity.' Similarly, in *Weber v Land Agents Board* (1986) 40 SASR 312, 317, O'Loughlin J expressed the view that land agents, while once not a profession, were 'moving in that direction'.
- 166 Case law interpreting these terms in consumer protection and taxation legislation suggest that a professional or profession usually performs work that is skilled and embraces intellectual activity: *Prestia v Aknar* (1996) 40 NSWLR 165, 186 (Santow J); *Commissioners of Inland Revenue v Maxse* [1919] 1 KB 647, 657 (Scrutton LJ) requires a period of study or training: *Robbins Herbal Institute v Federal Commissioner of Taxation*

reference to professional liability or professional standards Acts, notwithstanding differences in statutory context. Alternatively, the study of professions in sociology which identifies their essential attributes may also guide this inquiry.¹⁶⁷

The countless possibilities simply illustrate how unsatisfactory the use of the terms ‘profession’ and ‘professional’ are without any guiding definition. In light of this uncertainty, Chief Justice Spigelman stated that, ‘[t]his will now become a matter which requires determination by the courts in the full range of cases in which ‘professional’ status has been asserted’.¹⁶⁸ Thus far, a number of occupational groups including solicitors,¹⁶⁹ architects,¹⁷⁰ a finance broker,¹⁷¹ a fire protection engineer¹⁷² and an agronomist¹⁷³ have raised the defence without courts expressing any concerns over whether they might be professionals under the State CLAs.

State Parliaments should not have abdicated the policy question as to what professions should benefit from this defence,¹⁷⁴ leaving courts to tackle this

(1923) 32 CLR 457, 461 (Starke J); *GIO General Ltd v Newcastle City Council* (1996) 134 ALR 605, 615 (Kirby P with Sheller and Powell JJA agreed) to attain a professional standard of competence which is typically reinforced by some form of official accreditation accompanied by evidence of qualification: *Weber v Land Agents Board* (1986) 40 SASR 312, 317 (O’Loughlin J); *NRMA v John Fairfax Publications Pty Ltd* [2002] NSWSC 563 [145]–[152] (Macready J); is regulated by an association or collective organisation regarding admission and professional standards including ethical responsibilities: *Currie v Inland Revenue Commission* [1921] 2 KB 332, 340–3 (Scrutton J); and is perceived within society as a profession: *Carr v Inland Revenue Commissioners* [1944] 2 All ER 163, 166–7 (du Parcq LJ); *Bradfield v Federal Commissioner of Taxation* (1924) 34 CLR 1, 7 (Issacs J).

167 See Sappideen, above n 60, 394 where the author states that sociology suggests certain features that are typical of professional relationships, including trust and confidence, high levels of autonomy, significant levels of self-regulation by a professional organisation, rights of exclusive professional practice, professional altruism in the unbiased service to the general community and promotion of the client’s welfare. See further Allen R Dyer, ‘Ethics, advertising and the definition of a profession’ (1985) 11 *Journal of Medical Ethics* 72, 73–6; Harold Wilensky, ‘The professionalization of everyone?’ (1964) *The American Journal of Sociology* 10, 137; Paul Boreham, Alec Pemberton and Paul Wilson (eds), *The Professions in Australia* (University of Queensland Press, 1976) 2, 6–10, 45; Terrence James Johnson, *Professions and Power* (Macmillan, 1972); Edmund D Pellegrino and David C Thomasma, *The Virtues in Medical Practice* (Oxford University Press 1993) 155–6. Powell and Stewart believe that the definition of ‘the professions’ is pre-eminently a matter for social historians rather than lawyers: Powell and Stewart, above n 159, 2 [1-005]. See further Bryan Turner, *Medical Power and Social Knowledge* (Sage Publications, 1st ed, 1987) 131.

168 Chief Justice Spigelman, above n 142, 303.

169 *Permanent Custodians Ltd v King* [2009] NSWSC 600; *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505; *Goddard Elliott v Fritsch* [2012] VSC 87; *Weller v Phipps* [2010] NSWCA 323; *Djz Constructions Pty Ltd v Paul Pritchard* [2010] NSWSC 1024; *Sutton v Firth (No 2)* [2009] NSWDC 53.

170 *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2011] NSWSC 1423; *Indigo Mist Pty Ltd v Palmer* [2012] NSWCA 239.

171 *Perpetual Trustees Victoria v Belcastro* [2011] NSWSC 1418.

172 *Engineered Fire Safety Solutions Pty Ltd v the Owners Strata Plan 45205* [2009] NSWDC 309.

173 *Landmark Operations Ltd v Tiver Nominees Pty Ltd* [2008] SASC 322.

174 See Ipp Report, above n 5, 43 [3.30].

broad issue on a case-by-case basis. Moreover persons – who may be marginally regarded as professionals seeking to rely on the defence in NSW, Queensland, Victoria and Tasmania – should not be left to blindly litigate the matter or wait for an authoritative case to be handed down in favour of their occupational group being recognised as a ‘profession’.

The SA formulation also raises similar questions in relation to how a ‘professional service’ will be defined.

3. *Unprincipled elements*

Apart from the different class restrictions on the Professional Practice Defence between States and the definitional issues surrounding these classes, the choice of class further appears devoid of any principled basis.

Firstly, the WA restriction on the defence to health professionals lacks no well-reasoned policy backing. Indeed, when the Ipp Panel recommended that the Professional Practice Defence should apply exclusively to medical practitioners due to the special treatment accorded to them *historically*, they offered no policy reasons for the enactment of the Professional Practice Defence.¹⁷⁵ Justice Ipp¹⁷⁶ along with Chief Justice Spigelman¹⁷⁷ had indeed questioned whether there was an underlying rationale for restricting the defence to certain professions.

Further, the reasons that were advanced to support the enactment of a Professional Practice Defence for medical practitioners have not been proven.¹⁷⁸ It has also been suggested that the Professional Practice Defence should extend to medical practitioners due to their enduring status as an honourable profession¹⁷⁹ demarcated

-
- 175 Ibid.
- 176 See Justice Ipp, above n 14, 165.
- 177 See Chief Justice James Spigelman, ‘Negligence: the Last Outpost of the Welfare State’ (2002) 76 *Australian Law Journal* 440.
- 178 See Part I.A. Many academic writers have criticised the fact that Ipp Panel did not need to find evidence to support their recommendations, and have offered evidence that suggests there was no medical indemnity crisis. See, eg, Peter Underwood, ‘Is Ms Donoghue’s snail in mortal peril?’ (2004) 12 *Torts Law Journal* 1; Malcolm Parker, ‘Reforming the law of medical negligence: Solutions in search of a problem’ (2003) 11 *Torts Law Journal* 136; Loane Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (Butterworths, 1998) 16; Rob Davis, ‘The Tort Reform Crisis’ (2002) 25(3) *University of New South Wales Law Journal* 865, 866; K Clark, ‘Litigation: A Threat to Obstetric Practice?’ (2002) 9 *Journal of Law and Medicine* 303, 303; Sappideen, above n 60. See further Australian Plaintiff’s Lawyers’ Association, Submission No 042 to the Commonwealth of Australia Treasury, *Review of the Law of Negligence*, 2 August 2002, 19–20; Law Council of Australia, Submission No 033 to the Commonwealth of Australia Treasury, *Review of the Law of Negligence*, 2 August 2002, 3, 10–1 which cites G Atkins and E Pearson, *Public Liability Insurance Practical Proposals for Reform: Report to the Insurance Issues Working Group of Head of Treasuries* (Trowbridge Consulting, 2002) and Australian Productivity Commission, *Public Liability Insurance: Practical Proposals for Reform* (2002).
- 179 Lord Woolf, ‘Are the Courts Excessively Deferential to the Medical Profession?’ (2001) 9 *Medical Law Review* 1, 2.

by altruism and beneficence, with a tradition of service to the community¹⁸⁰ and placing the public interest above their own self-interest.¹⁸¹ Moreover, special protection might have also been justified by the fact that medical practitioners provide an essential social good, being affordable public health care and adhere to strict self-regulatory regimes in providing such services.¹⁸²

However despite these foundational difficulties, there were reasonable fears that judges were not well equipped to adjudicate medical negligence cases concerning treatment. These difficulties were said to extend from articulating the content of the standard¹⁸³ to determining whether that standard has been breached, which includes critically analysing and resolving competing evidence amongst medical practitioners.¹⁸⁴ As a result, the prevailing concern was that judges would impose an unrealistic standard of care on medical practitioners.¹⁸⁵

However due to lack of experience, judges cannot be expected to appreciate the true reality of participation in many professions,¹⁸⁶ not just the medical profession.

- 180 Justice Ipp, above n 14, 165; Jonathan Montgomery, 'Time for a paradigm shift? Medical law in transition' (2000) 53 *Current Legal Problems* 363, 378; *Roe v Minister for Health* [1954] 2 QB 66, 85, 83 (Lord Denning). See also *ibid* 1, where Lord Woolf stated that there was a prevailing attitude that 'doctor knows best'.
- 181 Sylvia R Cruess, Sharon Johnston and Richard L Cruess, 'Professionalism for Medicine: Opportunities and Obligations' (2002) 177(4) *Medical Journal of Australia* 208; Laura Empson, 'Professions' in Stewart Clegg and James Russell Bailey (eds), *International Encyclopedia of Organization Studies* (Sage Publications, 2007); Sappideen, above n 60, 397–8.
- 182 Justice Ipp, above n 14, 165.
- 183 It has been stated that judges lack the relevant training and experience to personally dictate the content of the standard in each case particularly due to the specialised nature of the medical profession: Wayne Martin, 'The Courts and Medical Practice – Teaching Granny to Suck Eggs?' (Speech delivered at the Royal Australasian College of Surgeons Annual Scientific Congress, Perth Convention and Exhibition Centre, 6 May 2010) 6, citing *Rosenberg v Percival* (2001) 205 CLR 434 (Gleeson CJ).
- 184 Joanna Manning, 'The standard of care and expert evidence of accepted practice in medical negligence' (2007) 15 *Journal of Law and Medicine* 394, 397; Nicola Castle, 'Applying Bolitho' (1998) *Journal of Personal Injury Litigation* 278, 281; *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 (Lord Scarman); Sappideen, above n 60, 389 citing Albert Matheny and Bruce Williams, 'Scientific Disputes and Adversary Procedures in Policy-Making' (1981) 3(3) *Law & Policy* 341; Margaret Brazier and Jose Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution' (2000) 8 *Medical Law Review* 85, 87. In a landmark study of Australian judicial perspectives on expert evidence found that 70% of judges had, on occasions, not understood expert evidence in the cases before them, and a majority of judges desired objective and reliable expert help: Ian Freckelton, Prasuna Reddy, Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Australian Institute of Judicial Administration, 1999).
- 185 Paul De Jersey, 'Owed on a Grecian Earn' (2000) 21 *University of Queensland Law Journal* 160, 163; S Girgis, C Thomson and J Ward, "'The Courts Expect the Impossible': Medico Legal Issues as Perceived by New South Wales General Practitioners' (2000) 7 *Journal of Law and Medicine* 273, 276; Australian Medical Association, Submission No 055 to the Commonwealth of Australia Treasury, *Review of the Law of Negligence*, 12 August 2002, 6–7; Australian Doctors' Fund, Submission No 001 to the Commonwealth of Australia Treasury, *Review of the Law of Negligence*, 10 July 2002, 13.
- 186 See *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 [189] (McHugh J).

Further, many other occupations faced and continue to face similar pressures from rises in professional indemnity insurance;¹⁸⁷ are affected by increased risks of negligence liability;¹⁸⁸ provide services that are necessary for the functioning of modern society;¹⁸⁹ owe duties of service to their clients, whether contractually or otherwise;¹⁹⁰ and are held to high standards through legislative regimes notwithstanding the fact that they might not be self-regulated.¹⁹¹

Critics have suggested that the Professional Practice Defence was the product of the medical profession wielding their power and political influence rather than a response to the justified need for special protection.¹⁹²

Whilst this article does not seek to establish the veracity of the reasons propounded, nor expresses a view as to whether such reasons, if true, have merit; it is simply suggested that many of these reasons are not unique to medical practitioners and

187 The Victorian and Queensland Parliaments recognised that professional indemnity insurance issues were not limited to the medical profession.

Many members of the Victorian Parliament recognised that the Wrongs and Other Acts (Law of Negligence) Bill 2003 (Vic) was the response to the broad crisis in the affordability and availability of insurance, particularly professional indemnity, medical indemnity, public liability and builders warranty insurance: see Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 2003, 1421 (John Brumby); Victoria, *Parliamentary Debates*, Legislative Assembly, 19 November 2003, 1807 (Bob Stensholt); Victoria, *Parliamentary Debates*, Legislative Council, 25 November 2003, 1719 (John Lenders); Victoria, *Parliamentary Debates*, Legislative Council, 26 November 2003, 1842, 1856 (Christopher Strong), 1853, 1854, 1857 (David Davis), 1852, 1853 (Sang Minh Ngyuen). The Queensland Parliament also overwhelmingly appreciated that the crisis concerned public liability insurance and related insurance areas, such as professional indemnity insurance: see Queensland, *Parliamentary Debates*, Legislative Assembly, 2 April 2003, 1117 (Peter Lawlor), 1118 (Lindel Nelson-Carr), 1143 (Margaret Keech), 1147 (John English), 1160 (Rachel Nolan); Queensland, *Parliamentary Debates*, Legislative Assembly, 3 April 2003, 1231 (Reginald Mickel).

188 For example, the increasing standards of negligence liability imposed on company directors have caused fears of boardroom exodus and the adoption of defensive practices: Corporations and Markets Advisory Committee, *Guidance for Directors* (2010) 12 citing F G Hilmer, *Strictly Boardroom: Improving Governance to Enhance Company Performance* (The Business Library, Melbourne 1993); Commonwealth of Australia Regulation Taskforce, *Report of the Taskforce on Reducing Regulatory Burdens on Business, Rethinking Regulation* (2006) 90; Pia Akerman, 'Landmark Centro Case Could Trigger Director Exodus - Buck Stops with the Board: Judge', *The Australian* (Canberra), 28 June 2011, 21; Damon Kitney, 'Go Easy on Directors: ASIC Chairman Raises Fear Laws May be Too Tough – Exclusive', *The Australian* (Canberra), 30 March 2011, 19.

189 For example, what would happen if engineers or accountants stopped offering their services?

190 For example, lawyers owe a duty to serve their client.

191 For example, many Acts regulate the conduct of engineers, accountants and company directors, yet they are not self-regulated. See Western Australia, *Parliamentary Debates*, Legislative Council, 19 August 2004, p5218b-5230a, 8–9 (Peter Foss). In any case, the medical profession is not the only occupation that is self-regulated. The legal profession is an example that also shares this characteristic.

192 See Sappideen, above n 60, 392; Kumaralingam Amirthalingam, 'Judging Doctors and Diagnosing the Law: Bolam Rules in Singapore and Malaysia' (2003) *Singapore Journal of Legal Studies* 125, 128.

that many good reasons may exist to justify the defence being made accessible to other occupational groups.

Indeed, the Ipp Panel suggested the possibility that the defence could apply more broadly to all ‘professionals’ or ‘all professions and trades’.¹⁹³ Leaving aside the determination of this issue for Parliaments, the Ipp Panel noted that the latter formulation would be consistent with the High Court decision of *Rogers v Whitaker* where the majority of the High Court held that the professional negligence standard applied to all professions and trades.¹⁹⁴

Whilst the reasons for the adoption of ‘health professional’ and ‘professional’ were not discussed at length, the WA parliamentary debates seem to indicate that the primary reasons for not extending the Professional Practice Defence to all professionals came down to the difficulties in defining a suitable class of defendants¹⁹⁵ and the perception that medical practitioners were the only class that ‘needed’ this defence.¹⁹⁶ Concerning the latter reason, it is notable that all States other than WA accepted that there was a substantial crisis in professional negligence more generally that needed to be addressed by this defence.¹⁹⁷

Thus, the difficulties in formulating a suitable definition, the failure to appreciate that other professionals or trades may have needed the defence, and the reliance on unproven or non-unique reasons for why a certain class of defendants should have access to the defence but not others, cannot satisfactorily justify limiting the defence to that confined class.

Accordingly, the unavailability of the defence in the Territories along with the varying restrictions and uncertainties on the class of persons who may access the Professional Practice Defence between States and the lack of principled reasons supporting those choices is highly problematic.

193 Ipp Report, above n 5, 43 [3.26]–[3.29]. Justice Ipp also raised these possibilities in Justice Ipp, above n 14, 165.

194 *Rogers v Whitaker* (1992) 175 CLR 479, 483 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) citing *Florida Hotels Pty Ltd v Mayo* (1965) 113 CLR 588, 593, 601. See Ipp Report, above n 5, 43 [3.30].

195 A major concern was that ‘there may be occupations that describe themselves as professions that we would not want to come within the parameters of the amendment ... We will not broaden the test because we do not have a definition of all the professions’: Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 June 2003, p8992b-9003a [2] (Mark McGowan).

196 See Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 June 2003, p8992b-9003a [2] (Mark McGowan) where McGowan stated that ‘[a]t the moment the area of need is medical’.

197 See, eg, Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 June 2003, p8992b-9003a, 2 (Mark McGowan); Western Australia, *Parliamentary Debates*, Legislative Council, 18 August 2004, p5077b-5079a, 1 (Peter Foss). Cf Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, p7235b-7238a, 1–3 (Dan Barron-Sullivan); Western Australia, *Parliamentary Debates*, Legislative Council, 26 June 2003, p9321c-9323a, 1 (Nick Griffiths). See above n 187 contrasting the WA Parliament with the perspectives of the Queensland and Victorian Parliaments.

What issues arise in the application of the defence?

The issues raised by the different State enactments concerning the application of the Professional Practice Defence can also be divided into inconsistencies, interpretational issues and unprincipled formulations.

1. *Inconsistent scope*

The circumstances in which the defence may apply between States is inconsistent due to the differences between State formulations. The defence may be raised:

- (a) Only against civil claims for damages for harm in all States but for SA;
- (b) To avoid breaches of duty that extend beyond negligence liability (i.e. the duty to exercise reasonable care and skill) in all States but for Queensland and Tasmania;
- (c) Where only opinions that are widely accepted ‘in Australia’ can be relied on in all States but for Queensland and WA;
- (d) Where only opinions that are widely accepted by a ‘significant number’ of ‘respected practitioners’ can be relied on in Queensland and Victoria;
- (e) Except where the opinions relied on are unreasonable in Victoria, *Wednesbury* unreasonable in WA, or irrational in the remaining States, or additionally contrary to a written law in Queensland;
- (f) Except where excluded by the various formulations of the Informing Exception between States. That is, where the case involves informing of risks of injury or death associated with providing health services in SA and WA; informing of risks of injury or death associated with providing professional services in NSW; informing of risks of harm associated with providing professional services in Tasmania and Queensland; and informing of risks or other matters associated with providing professional services in Victoria.

Thus, the application of the Professional Practice Defence depends on the specific terms of the States, creating a highly fragmented regime across the nation.

2. *Uncertainty in interpretation*

The defence is also uncertain due to the interpretational issues arising from the different geographical limits, additional consensus requirements and Exception Thresholds for excluding objectionable opinions adopted by the State formulations.

i) Different geographical limits

Another issue arises from the uncertainty as to how the terms ‘widely accepted’ (used in Queensland and WA) and ‘widely accepted in Australia’ (used in the remaining States) are to be interpreted.

The meaning of the term ‘widely accepted in Australia’ is not settled although it was recently considered by the New South Wales Supreme Court in *Vella Permanent Mortgages Pty Ltd*, which concerned the practice of solicitors in relation to the drafting of a mortgage. Young CJ held that evidence of the practice of NSW solicitors was sufficient for the purposes of establishing the Professional Practice Defence. Young CJ adopted a pragmatic interpretation focusing on the evidence of practices ‘in Australia’ rather than ‘throughout the whole of Australia’.¹⁹⁸ He held that it was not necessary to lead evidence of Australia-wide practice,¹⁹⁹ especially if there were regional variations in such practice²⁰⁰ or if a particular industry was only conducted in a particular region.²⁰¹ It is notable that Young CJ stated that the interpretation would accord with the ‘intention of the legislature’²⁰² although Parliament’s intention is not evident.

Moreover, it is unclear whether other State courts will adopt this definition or place greater emphasis on the word ‘widely’, requiring practices to be accepted more generally across Australia rather than in particular regions of Australia. However, what is less clear is the meaning of ‘widely accepted’ and whether that would permit defendants to rely on international practices that have not necessarily been adopted in Australia. Given there is no express limitation on locality of the accepted practice; there is scope to argue that persons could rely on a range of practices from within Australia and abroad.

It is also possible that competent professional practices, which have developed internationally, would not be supported by professional practice within Australia, particularly where lower standards are imposed on professionals overseas. Accordingly, if professionals in Queensland and health professionals in WA can rely on widely accepted competent international practices, they would have wider protection from the defence than that afforded by the other States.

ii) Additional requirement of ‘significant number’ and ‘respected practitioners’

It is also unclear what the elements ‘significant number’ and ‘respected practitioners’ require for the purposes of the Queensland and Victorian formulations. These terms add to the ambiguous content of the Professional Practice Defence, with

198 *Vella Permanent Mortgages Pty Ltd* [2008] NSWSC 505 [553] (Young CJ).

199 Ibid.

200 Ibid [555] (Young CJ).

201 Ibid.

202 Ibid.

academics stating that these terms need clarification.²⁰³

iii) Various exception thresholds for excluding objectionable opinions

It is also uncertain what difference, if any, exists between the differently worded Exception Thresholds imposed by the States. Some commentators have questioned whether there is a difference between the Irrationality (or illogicality), Unreasonableness²⁰⁴ and *Wednesbury* Unreasonableness²⁰⁵ thresholds.

Indeed, Hansard debates reveal the Parliaments' confusion and inability to define these terms. In Victoria, for example, parliamentarians stated that the term irrational is ambiguous²⁰⁶ and that the difference between 'irrationality' and 'unreasonableness' is unknown.²⁰⁷ In the face of these conflicting alternatives, the Victorian Government ultimately decided to adopt the Unreasonableness Exception as they thought it was preferable on balance.²⁰⁸ However, the Victorian Government had also clearly intended to adopt the Modified *Bolam* Test,²⁰⁹ which employed the illogicality benchmark subsequently interpreted as the irrationality exception.²¹⁰

Moreover, the WA Parliament adopted the *Wednesbury* Unreasonableness Exception, with Griffiths and McGowan, in their second reading speeches, expressing an intention to adopt the Exception Threshold from the Modified

-
- 203 See, eg, McIlwraith and Madden, above n 50, 202 [6.95].
- 204 See, eg, J Keown, 'Reining in the *Bolam* test' (1998) 57(2) *Cambridge Law Journal* 249, 249; M Jones, 'The *Bolam* Test and the Responsible Expert' (1999) 7(3) *Tort Law Review* 234, 238 and H Teff, 'The standard of care in medical negligence- moving on from *Bolam*?' (1998) 18(3) *Oxford Journal of Legal Studies* 474, 481. See also *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582, 587 where McNair J stated that unreasonable and irrational may be 'different ways of expressing the same thought.'
- 205 Bill Madden and Janine McIlwraith, *Australian Medical Liability* (LexisNexis Butterworths, 2008) 135–6.
- 206 Explanatory Memorandum, Wrongs and Other Acts (Law of Negligence) Bill 2003 (Vic) 7; Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 2003, 1423 (John Brumby); Victoria, *Parliamentary Debates*, Legislative Council, 25 November 2003, 1722 (John Lenders).
- 207 See Victoria, *Parliamentary Debates*, Legislative Council, 26 November 2003, 1857–8 (John Lenders).
- 208 There was a conflict in recommendations made by the Ipp Report, above n 5, which recommended the Irrationality Exception and the Australian Health Ministers Advisory Council Legal Process Reform Group, Australian Capital Territory Health Department, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package* (2002) ('Neave Report') which recommended an unreasonableness threshold. 'In the end the government came to a policy decision that it was a question of balance and that it was preferable to go with the term "unreasonable": Victoria, *Parliamentary Debates*, Legislative Council, 26 November 2003, 1857–8 (John Lenders).
- 209 Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 2003, 1423 (John Brumby); Victoria, *Parliamentary Debates*, Legislative Council, 25 November 2003, 1721 (John Lenders).
- 210 See Part II.C.(e).(i).

Bolam Test.²¹¹ However, in doing so, they mistakenly equated the *Wednesbury* Unreasonableness Exception with common law position in the United Kingdom, which is the Modified *Bolam* Test.²¹²

Although all States may have intended to adopt the same Exception Threshold, the fact that they have not been consistent in their choice of language raises uncertainties as to how each of the Exception Thresholds will be interpreted, whether in accordance with the irrationality or illogicality benchmark from the Modified *Bolam* Test or otherwise.²¹³

3. *Unprincipled elements*

The issues with the defence are further bolstered by the wealth of unprincipled elements that have been adopted by State formulations. These elements concern the claims that the defence may be raised against, the types of liability that may be avoided, the potential reliance on foreign practices, the exception for practices that are contrary to a written law and the scope of the Informing Exception.

i) *Civil claims for damages for harm*

The restriction amongst all States apart from SA to civil claims for damages for harm²¹⁴ may also be unprincipled given that the rationale for negligence liability provided under civil penalty regimes is not based on the traditional role that the tort of negligence has played in providing compensation for loss. This is because civil penalty regimes allow a regulator to take action without claiming compensation. For example, company directors are subject to such a regime imposed by Part 9.4B of the *Corporations Act 2001* (Cth) ('CA') which allows Australian Securities and Investments Commission ('ASIC') to take action against a director for breach of CA s 180(1),²¹⁵ which imposes liability for negligence. ASIC does not need to

211 Western Australia, *Parliamentary Debates*, Legislative Council, 22 June 2004, p3986b-3988a, 1 (Nick Griffiths); Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 April 2004, p1743b-1745a, 1 (Mark McGowan).

212 Ibid where both state, 'Part 2 of the Bill will introduce [the] modified Bolam principle ... Moreover, and consistent with the common law position in the United Kingdom, it is subject to the significant safeguard that a court will not be bound by the opinion of a body of professional peers if it forms the view that the conduct was so unreasonable that no reasonable practitioner in the defendant practitioner's position could have acted in accordance with that practice.'

213 Some guidance as to the potential interpretation of these Exception Thresholds is provided at Part II.C.(e).

214 CLA (NSW) s 5A; CLA (Tas) s 10; CLA (Qld) s 4; Wrongs Act (Vic) s 44; CLA (WA) s 5A. Cf CLA (SA) s 4.

215 ASIC can apply for declarations of contravention, pecuniary penalty orders, compensation orders and disqualification orders where a person has contravened CA s 180(1): ss 1317E(1)(a), 1317J(1), 206C.

prove that harm was suffered²¹⁶ nor claim for damages for harm.²¹⁷ In such cases, directors in all States (excluding SA) would not be able to raise the defence.

However, a defendant's ability to raise the defence should not depend on the claims sought against them. This is because the defendant is at no greater fault where a regulator takes the action in contrast to an action with identical content brought by a compensable plaintiff. Indeed, it is the *same* action on the *same* facts that must be established to the *same* standard of proof²¹⁸ and which is based on the *same* underlying rationale that skilled persons must be held to a standard of reasonable care in the provision of their skilled services.²¹⁹ This restriction is not only unfair from the perspective of the defendant, but is also unprincipled.

Thus the defence should not be restricted to cases where a claim for damages for harm is made; rather it ought to be available in all civil cases whatever order is sought.

ii) Breaches of duty beyond negligence liability

It is also unprincipled that persons in Queensland and Tasmania may raise the defence against all breaches of duty.

Given the divergent rationale for the imposition of duties as distinct from negligence, the availability of the defence to certain breaches would be anomalous. For example, it would undermine equity to allow a person to avoid liability for breaching a fiduciary duty on the basis that they acted in accordance with widely accepted peer professional opinion. However, a failure to exercise a professional standard of reasonable care is not inconsistent with the notion that they should be able to rely on practices that are widely accepted as competent.

216 See also *Vrisakis v Australian Securities Commission* (1993) 11 ACSR 162, 212 (Ipp J); *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1. See also J F Corkery, *Directors' Powers & Duties* (Longman Professional, 1987) 141; Susan Woodward, Helen Bird and Sally Sievers, *Corporations Law – In Principle* (Lawbook, 7th ed, 2005) 203. Accordingly, ASIC has been able to take action where no loss has been suffered. See, eg, *Australian Securities and Investments Commission v Fortescue Metals Group* (2011) 190 FCR 364.

217 ASIC will only seek compensation orders for private investors if it is in the public interest: Australian Securities and Investments Commission, *Information Sheet 151 ASIC's approach to enforcement* (February 2012), 6 <[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/INFO-151-ASIC's-approach-to-enforcement.pdf/\\$file/INFO-151-ASIC's-approach-to-enforcement.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/INFO-151-ASIC's-approach-to-enforcement.pdf/$file/INFO-151-ASIC's-approach-to-enforcement.pdf)>. Even where ASIC's claims refer to harm suffered by the company, ASIC has not, in some cases, sought compensation orders: see, eg, *Australian Securities and Investments Commission v Citrofresh International (No 3)* [2010] FCA 292 [12]. See further *Australian Securities and Investments Commission v Healey* (2011) 278 ALR 618.

218 See CA ss 1317L, 1332, which provide *inter alia* that the civil standard of proof applies in relation to civil proceedings commenced against company directors.

219 See generally McIlwraith and Madden, above n 50, 172 [6.05]; Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 2006) 236; J G Fleming, *The Law of Torts* (9th ed, 1998) 3–4.

Parliamentary debates from Queensland and Tasmania do not explain why the application of the defence extends beyond negligence claims, however the Explanatory Memorandum to the Civil Liability Bill 2003 (Qld) suggests that Queensland only intended to capture negligence claims however framed,²²⁰ in accordance with the majority of States.

It is therefore unprincipled that persons should be able to avoid liability in Queensland and Tasmania for any breach of duty outside negligence liability.

iii) Potential reliance on foreign practices

It may also be unprincipled to allow professionals in WA and Queensland to rely on practices that have gained wide acceptance outside Australia if the term ‘widely accepted’ permits such an interpretation. Indeed, a similar inter-jurisdictional problem was briefly noted by Young CJ in his consideration of the term ‘widely accepted in Australia’.²²¹

Given professional practices within a country will often be shaped by the relevant legislative regimes in force, there is the potential that such regimes could be less onerous in foreign countries as compared to Australia and therefore foreign practices may be less stringent. There are also strong policy reasons against this foreseeable outcome.

On the other hand, foreign regimes could be more onerous and therefore accordant practices may be more stringent than those in Australia. Therefore, it must be acknowledged that Australian and international practices may be converging or diverging over time. Nonetheless, there is no sound basis for allowing regulatory arbitrage to occur where defendants in WA and Queensland may enjoy or suffer a different defence than other defendants in other States. It is unprincipled to either allow defendants in WA and Queensland to rely on foreign practices that undermine Australian laws in order to avoid their liability or require defendants to meet a higher international standard; whereas defendants in other States would only be required to meet the relatively higher or lower Australian standard, respectively.

Certainty and predictability would be greatly enhanced by having a uniform, defined geographic source of professional opinion.

220 Explanatory Notes, Civil Liability Bill 2003 (Qld) 5. With regards to the application of the CLA 2002 (Qld) it states that, “The clause is drafted to include, through the definition of “claim”, *all breaches of a duty of care* in tort, those duties in contract that, whether express or implied, can be considered of the same effect as a *duty to take reasonable care* at the same time as would be found in tort, and any other duty, whether expressed under statute or otherwise, that likewise can be considered of the same effect as a *duty to take reasonable care*.”

221 See *Vella Permanent Mortgages Pty Ltd* [2008] NSWSC 505 [551] (Young CJ).

iv) Contrary to a written law

Another unprincipled element is the additional exception in Queensland that the opinion must not be ‘contrary to a written law’. This exception is inconsistent with the contemplated application of this defence to claims alleging breach of a statutory duty. Thus, where a negligence standard has been codified by statute, breach of that duty will disentitle a person from raising the defence. For example, directors are subject to a statutory duty of care in CA s 180(1) and therefore cannot raise the defence in Queensland.

v) Scope of the informing exception

The various formulations of the Informing Exception²²² reflect attempts to impose a different negligence standard on defendants in cases involving the provision of information and advice (‘Information Cases’) in contrast to cases concerning treatment (‘Treatment Cases’)²²³ on the basis that the nature of these tasks within a medical practitioner’s role are dichotomous.²²⁴ By excluding the operation of the Professional Practice Defence in Information Cases, the standard of care in these types of cases is effectively higher than in Treatment Cases.

The Ipp Panel stated that the provision of information by a medical practitioner to their patient is ‘not a matter that is appropriately treated as being one of medical expertise’ thus the court should ultimately decide the negligence standard in Information Cases involving medical practitioners.²²⁵ Whilst the High Court in *Rogers v Whitaker* had previously recognised this dichotomy,²²⁶ no such distinction has been recognised for other professionals.²²⁷ Indeed, unlike medical practitioners, other professionals have no general duty to inform of material

222 The State formulations of this exception are discussed in greater detail at Part II.C.(f).
 223 A brief description of Treatment Cases is provided above in Part I.C.(a) n 30.
 224 The Informing Exception partially reflects the Ipp Panel’s recommendation to maintain a distinction between Treatment and Information Cases. Compare Ipp Report, above n 5, 1, 41–2 (Recommendation 3) and 44–5 (Recommendation 4) with 2, 46 (Recommendation 5), however note that Recommendation 5 concerns the restatement of a medical practitioner’s duty to inform, rather than an express exception to the Professional Practice Defence provided in Recommendation 3. The Ipp Panel noted the importance of this distinction: 37 [3.1] providing reasons for treating Information Cases differently: 45–6 [3.35]–[3.40].
 225 Ipp Report, above n 5, 46 [3.39].
 226 In *Rogers v Whitaker* (1992) 175 CLR 479, Mason CJ, Brennan, Dawson, Toohey and McHugh JJ stated that, ‘The standard of reasonable care and skill [in Treatment Cases] is that of the ordinary skilled person exercising and professing to have that special skill’: 483, whereas in Information Cases, a medical practitioner owes a duty to warn of a risk ‘if, in the circumstances of the case, a reasonable person in the patient’s position, if warned of the risk would be likely to attach significance to it or if the medical practitioner is or should attach significance to it’: 490. However, note that the majority of the High Court held that in both cases, it is a matter for the court to determine whether the duty was breached: 490.
 227 Ipp Report, above n 5, 45 [3.37].

risks²²⁸ or give particular categories of information in particular circumstances,²²⁹ nor do the State CLAs impose such a duty.²³⁰

The State CLAs only recognise that the Professional Practice Defence will not apply for certain professionals in cases involving certain risks. However, among the States, the potential for exclusion of the defence, in the relevant circumstances, may deny defendants providing health services in WA and SA; and all professionals in Tasmania, Queensland and Victoria access to the defence. This is problematic to the extent that the services provided by a profession may be pure information or advice about risks or other matters. Although a clear dichotomy can exist within the medical profession whereby specialised tasks that involve the application of skill may be clearly separated from tasks that merely involve conveying information about associated risks, other professions have less clear demarcations. For other occupations, such as solicitors and financial advisers, the content of the information or advice will often be a highly specialist matter concerning risks. Professionals may be almost completely excluded by this exception because professional services provided by certain occupations necessarily entail the provision of advice about risks. This problem seems to be most pronounced in Victoria where professionals cannot rely on the defence insofar as their negligence involves informing or failing to inform of ‘risks or other matters’ associated with providing professional services.

Notwithstanding the different restrictions on the defence’s application caused by the differences in the Informing Exceptions,²³¹ there does not seem to be any principled reason why all professionals should be subject to an Informing Exception concerning risks associated with the provision of their professional services.

Accordingly, undesirable outcomes may result from the adoption of a wide range of unprincipled elements concerning the claims that the defence may be raised against, the types of liability that may be avoided, the potential reliance on foreign practices, the exception for practices that are contrary to a written law and the scope of the Informing Exception. This compounds the earlier issues raised by the inconsistencies in its application which are bolstered by the uncertainty in the terms used, which can unfairly deny persons of the defence’s application.

228 *Rogers v Whitaker* (1992) 175 CLR 479, 490 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

229 Ipp Report, above n 5, 46 [3.39]. The Ipp Panel also noted that while duties to inform from time to time have been imposed, they have yet to be analysed into a principled set of rules.

230 This is consistent with the Ipp Panel’s recommendation that ‘any legislative statement of duties to provide information should relate *only to medical practitioners*’: Ipp Report, above n 5, 46 [3.40] (emphasis added). Note that Queensland and Tasmania have now codified the duty of medical practitioners in Information Cases: CLA (Qld) s 21 (for a ‘doctor’); CLA (Tas) s 21 (for a ‘medical practitioner’).

231 These restrictions are discussed in greater detail at Part II.C.(f).

Summary of the issues concerning access and application

The conditions of access to the defence and the circumstances in which it can apply are fraught with much difficulty. The State enactments have created significant fissures in achieving consistency between States, have led to numerous interpretational problems with the use of ambiguous and undefined terms, and have adopted groundless elements that can result in unprincipled outcomes.

In light of the major issues arising out of this legislative framework, it seems highly uncertain who will be regarded as a professional and accordingly be entitled to access the defence. However, even if an entitlement to access is established, it is uncertain whether the opinion relied on will meet the requisite level of acceptance and non-objectionability in order to avail a defendant of the defence.

The myriad of inconsistencies denies persons within the Territories as well as non-medical professionals in WA access to the defence. Further, defendants will only be able to raise the defence against certain claims and may be excluded on the basis that their liability arose in connection with informing or failing to inform of certain risks.

Moreover, the unprincipled nature of the defence's application in many States – such as where claims for damages for harm must first be sought or where breaches of duty beyond negligence liability are allowed – highlights just how unsatisfactory it is to allow a defence that purports to protect professional against negligence liability to turn solely on the question of where the alleged wrong occurred. In light of these issues, it necessary to consider law reform.

RECOMMENDATIONS TO GUIDE REFORM

The introduction of the Professional Practice Defence has significantly changed the landscape of professional negligence liability across Australia. The various State formulations of this defence make up a highly complex mosaic, with many inconsistencies, uncertainties and unprincipled variations. This gives rise to a number of unresolved policy questions concerning their accessibility and applicability, the resolution of which requires a unified legislative response. Given these issues are too pervasive to be efficiently addressed by amending Acts, the current State enactments should be repealed and re-enacted to produce a nationally consistent, clearly defined and principled formulation of the Professional Practice Defence. This Part makes recommendations to guide the reform process.

How should issues of access and application be resolved?

Reform of the Professional Practice Defence requires a principles-driven approach which advocates 'general rules governing as many types of cases and ... potential defendants as is reasonably possible ... and requires special

provisions for particular categories of cases to be ... justified'.²³² This contrasts with underwriter-driven reform which merely proposes special rules governing particular types of cases or particular categories of potential defendants.²³³ Thus, the proposed legislative provisions must themselves be uniform, consistent and principles-based,²³⁴ and subsequently enacted in every Australian jurisdiction.²³⁵ The starting point is to consider the content of the legislation. The legislation requires a collaborative and soundly considered response to key questions concerning the intended accessibility and application of the Professional Practice Defence.

The following questions of access and application suggested in this Section for the consideration of the Commonwealth, State and Territory Parliaments directly address the issues raised by the current operation of the defence across Australia.

1. Questions of access

A principled approach to resolving the issues of access is to ensure that the answer to 'who *is* captured?' correlates with that of 'who *should* be captured?' Arising from the issues discussed in Part III.1, the primary question concerning access is as follows:

Question 1

Who should have access to the defence?

In answering this question, Parliaments should reconsider selecting, defining and justifying a class of defendants that should be entitled to the defence.

i) Selection

In selecting the class, Parliaments may extend the Professional Practice Defence to (1) all 'professionals', or more broadly to (2) all 'professions and trades', or more narrowly to (3) specific classes of professions such as health professionals.

ii) Definition

In defining the class, indicia-based definitions are favoured over an exclusive criteria, or a prescriptive list. The benefits of this type of definition are that it would be sufficiently flexible to encompass a broad range of persons that are intended to fall within the class of defendants and that the failure of any one indicia would not necessarily exclude certain persons from showing an entitlement to access the defence.

232 This accords with the Ipp Panel's recommended approach to reform: Ipp Report, above n 5, 30 [1.27] citing Chief Justice Spigelman, above n 177.

233 See *ibid*.

234 See also *ibid* 30 [1.27]; 35 [2.2].

235 See also *ibid* 1, 35 [2.1] (Recommendation 1), [2.2].

An indicia-based definition may be prefaced by the following terms:

‘In having regard to what constitutes [the chosen class of defendants], the Court must consider the [following elements:]’.

Parliaments will need to give close consideration to the elements which they believe define the chosen class, for the purposes of having this benefit against negligence liability. The indicia should not be drafted too widely or in vague terms at the risk of including persons that are not intended to be caught by the provisions.

In contrast, an exclusive or wholly determinative criteria may unintentionally disqualify groups that would otherwise be recognised as professionals.²³⁶ Similarly, an *ad hoc* approach of listing professions through regulations or requiring their registration may be unnecessary and unprincipled,²³⁷ as it could inadvertently exclude certain groups.²³⁸ Concerns over both of these types of definitions were criticised in WA parliamentary debates.²³⁹ Moreover, these types of definitions are more susceptible to *ex post facto* amendments triggered by novel cases, where the defence is ultimately unsuccessful but for policy reasons should not have been. Such cases may reactively catalyse amendments to the nature or substance of the exclusive criteria or result in additions to the regulations or register in order to rectify outstanding definitional issues.

iii) Justification

Lastly the class of defendants, as selected and defined, must also be rationally supported. The following questions may be instructive in scrutinising whether the Parliaments’ selection and definition decisions are principled:

- (a) If the Professional Practice Defence applies to health professionals only, is there a principled reason why it should and is that an equally principled reason why it should not apply to other professions?

236 For example, if regulation by a professional standards Act were a necessary criterion, it would exclude accountants and engineers: Western Australia, *Parliamentary Debates*, Legislative Council, 19 August 2004, p5218b-5230a, 8–9 (Peter Foss).

237 Indeed, this distinction is contrary to the *Bolam* Test, which applied to all health professions irrespective of their registration as a doctor: Western Australia, *Parliamentary Debates*, Legislative Council, 19 August 2004, p5218b-5230a, 9 (Peter Foss). See further Western Australia, *Parliamentary Debates*, Legislative Council, 18 August 2004, p5077b-5079a, 1–2 (Peter Foss).

238 Note that this approach has been adopted in part by CLA (WA) s 5PB which defines a ‘health professional’ as a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the health professions listed in CLA (WA) s 5PA(a). However, it also extends to ‘any other person who practises a discipline or profession in the health area that involves the application of a body of learning’: CLA (WA) s 5PA(b). See generally Part II.B.(c).

239 See Western Australia, *Parliamentary Debates*, Legislative Council, 19 August 2004 p5218b-5230a, 8–12 (John Fischer, Nick Griffiths, Peter Foss, Dee Margetts).

- (b) If the Professional Practice Defence applies to professions, what sorts of groups are intended to be included and excluded? And if applicable, is this a principled distinction?
- (c) If the Professional Practice Defence applies to professions, is there a principled reason why it should not apply to trades?²⁴⁰

Questions of application

Similarly, a principled approach to resolving the issues of application is to ensure that the answer to ‘what *are* the circumstances in which the defence applies?’ is consistent with that of ‘what *should* be the circumstances in which the defence applies?’

In light of the issues discussed in Part III.2, there are six key questions (Questions 2 – 7) that arise for consideration. These questions are as follows:

Question 2

What claims should the defence be allowed to be raised against?

Should the defence extend to (1) civil claims for damages for harm or to (2) all claims?

Question 3

What types of liability should the defence allow defendants to avoid?

Should the defence allow defendants to (1) avoid negligence liability or (2) all breaches of duty?

Question 4

What should be the geographical limit on the practices that can be relied upon?

Should the range of practices cover (1) regional, (2) statewide, (3) national and/or (4) international practices?

Question 5

What requirements should exist on the opinions that can be relied upon?

Should there be a threshold for the (1) quantum of opinions (e.g. a significant number) and/or (2) qualitative characteristics of those opinions (e.g. from respected practitioners)?

²⁴⁰ Justice Ipp also asked this question in Justice Ipp, above n 14, 165. The Ipp Panel suggested the possibility that the WAPPO apply to all professions and trades, following *Rogers v Whitaker* (1992) 175 CLR 479, 483 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) where the majority of the High Court held that the professional negligence standard applied to all professions and trades citing *Florida Hotels Pty Ltd v Mayo* (1965) 113 CLR 588, 593, 601: Ipp Report, above n 5, 43 [3.30].

Question 6

What should be the Exception Threshold for excluding objectionable opinions?

Should an (1) Irrationality, (2) Illogicality, (3) Unreasonableness or (4) *Wednesbury* Unreasonableness threshold be adopted?

Question 7

What should be the scope of the Informing Exception?

Should the Informing Exception exclude (1) all or certain types of harm and should it extend to (2) all or certain persons within the class of defendants?

For each question, it is recommended that Parliaments make a decision, clearly define the content of that decision and subsequently justify its bounds, as has been earlier illustrated in the context of resolving the questions of access.²⁴¹

In doing so, Parliaments will be able to draft a principles-based and clearly defined Bill that can be enacted uniformly across Australia.

How should the defence be re-enacted?

The next step is to consider how such a Bill can be enacted in order to realise the implementation of a nationally consistent Professional Practice Defence among all States and Territories.

Uniform legislation may be enacted by State Parliaments through mirror legislation or template legislation, or alternatively by the Commonwealth Parliament via a referral of State powers scheme.²⁴² These methods range from States completely relinquishing their sovereignty over certain subject matters to the Commonwealth, to States and Territories merely endeavouring to implement a consistent legislative scheme.²⁴³

1. Mirror legislation

Mirror legislation is ideally legislation that is enacted by all jurisdictions in identical terms.²⁴⁴ However in practice, this involves a collective agreement on

241 See Part III.A.(d).

242 See Anne Twomey 'Federalism and the Use of Cooperative Mechanisms to Improve Infrastructure Provision in Australia' (2007) 2 *Public Policy* 3. See further Standing Committee on Uniform Legislation and Intergovernmental Agreements, Parliament of Western Australia, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles* (1995) 4.

243 See Barry House, 'When a Nod and Wink Amounts to an Intergovernmental Agreement – Issues faced by the Legislative Council of Western Australia in the identification and scrutiny of uniform legislation' (Paper presented at the 41st Presiding Officers and Clerks Conference, Darwin, 7 July 2010) 3.

244 See, eg, the Legal Profession Acts which include *Legal Profession Act 2004* (NSW); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2008* (WA); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2006* (ACT); and the Professional Standards Acts which include *Professional Standards Act 1994* (NSW); *Professional Standards Act 2003* (Vic); *Professional Standards Act 2004* (NT); *Professional Standards Act 2004* (Qld); *Professional Standards Act 1997* (WA); *Professional Standards Act 2004* (SA); *Professional Standards Act 2005* (Tas); *Civil Law*

the terms of a model law which is then passed separately as a law enacted in similar terms in each State and Territory.²⁴⁵

The adoption of mirror legislation is the most favoured method for implementing uniform legislation.²⁴⁶ Indeed, this was the approach originally contemplated by all jurisdictions²⁴⁷ and loosely taken by the States in enacting individual statutes with similar content from the Ipp Panel's recommendations.

Although all Governments maintained an unwavering intention 'in principle' to adopt a nationally consistent response,²⁴⁸ the choice to enact mirror legislation could not mitigate against the wide-ranging discrepancies between the legislative responses taken by all Australian jurisdictions.

The quest for uniformity through mirror legislation is often illusive since the legislative process of individual enactments will almost inevitably result in differences as each Bill is debated. This has the potential to deeply undermine the uniformity of the scheme. Indeed, the Professional Practice Defence is but one small example of a wider and more persistent problem of inconsistent mirror legislation designed to uniformly implement the Ipp Panel's recommendations.²⁴⁹ Further, States and Territories may subsequently amend their component of the legislation which may create greater disconformity.²⁵⁰

Given the risk of different enactments to be passed initially and to become increasingly disparate through State-based amendments over time, mirror legislation is not recommended for re-enacting the Professional Practice Defence.²⁵¹

Instead, a more profound level of agreement and cooperation is needed between the Commonwealth, State and Territory Governments to enact nationally consistent

(Wrongs) Act 2002 (ACT) Sch 4.

245 Council for the Australian Federation, *Common Cause: Strengthening Australia's Cooperative Federalism Final Report to the Council for the Australian Federation* (2009) 18.

246 As at June 2012, the majority of uniform legislation in force had been implemented by mirror legislation followed by template legislation and referral of State powers schemes: Parliamentary Counsel's Committee, *National uniform legislation – Acts of jurisdictions implementing uniform legislation* (June 2012) <<http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf>>.

247 See *Joint Communiqué* (15 November 2002), above n 74.

248 The Governments jointly announced the *Review of the Law of Negligence*, framed the terms of reference of the review so as find ways of enacting a 'consistent national approach' and subsequently agreed to give effect to key recommendations of a 'nationally consistent basis': *Joint Communiqué* (15 November 2002), above n 74. Doepel and Downie, above n 76, 2; Doepel, above n 76, 1. See further Part II.A.

249 See Doepel and Downie, above n 76, 18–9. As at November 2006, 51 amending Acts had been passed among the States and Territories post-Ipp Report.

250 See generally Twomey, above n 242.

251 See Council for the Australian Federation, above n 245, 18.

legislation. It is suggested that this is best achieved by either template legislation or a referral of State powers scheme.

2. *Template legislation*

Template legislation²⁵² involves a jurisdiction known as the ‘host jurisdiction’, enacting the model legislation and the other jurisdictions subsequently passing legislation giving that law force in their jurisdictions.²⁵³ Unlike mirror legislation, jurisdictions cannot make unilateral changes to that legislation since amendments must be passed in the host jurisdiction.²⁵⁴ Although States may find themselves excluded from an area of legislative responsibility, complete consistency can be achieved by enacting the Professional Practice Defence via template legislation based on cooperation.²⁵⁵

3. *Referral of state powers scheme*

Alternatively, all State Parliaments may refer ‘matters’ to the Commonwealth under *Commonwealth Constitution* s 51(xxxvii) to enable the Commonwealth to legislate in regard those matters.²⁵⁶ Under this scheme, complete consistency will be achieved without requiring States and Territories to enact separate (and most likely, varied) laws providing the Professional Practice Defence, nor choose a host jurisdiction between them.

4. *Recommendation*

Whilst it is not impossible to achieve uniformity through mirror legislation,²⁵⁷ the

- 252 Also known as ‘applied laws legislation’ or ‘complementary applied laws’.
- 253 See, eg, *Health Practitioner Regulation National Law Act 2009* (Qld) (host legislation) adopted in *Health Practitioner Regulation (Adoption of National Law) 2009* (NSW); *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic); *Health Practitioner Regulation (National Uniform Legislation) Act 2010* (NT); *Health Practitioner Regulation National Law (WA) Act 2010* (WA); *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA); *Health Practitioner Regulation National Law (Tasmania) Act 2010* (Tas); *Health Practitioner Regulation National Law (ACT) Act 2010* (ACT); and *Occupational Licensing National Law Act 2010* (Vic) (host legislation) adopted in *Occupational Licensing (Adoption of National Law) Act 2010* (NSW); *Occupational Licensing National Law (Queensland) Act 2010* (Qld); *Occupational Licensing National Law (South Australia) Act 2011* (SA); *Occupational Licensing National Law Act 2011* (Tas).
- 254 Council for the Australian Federation, above n 245, 18.
- 255 See Twomey, above n 242. However, note that WA has taken a policy decision that it will not generally adopt the legislation of other jurisdictions. When template legislation is used WA will enact consistent legislation and update it by subsequently amending legislation when the template legislation is amended: Parliamentary Counsel’s Committee, *Protocol on Drafting Uniform Legislation* (July 2008) <<http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf>> 2 [2.2].
- 256 See, eg, *Corporations Act 2001* (Cth) enacted pursuant to a referral of State powers through *Corporations (Commonwealth Powers) Act 2001* (NSW); *Corporations (Commonwealth Powers) Act 2001* (Vic); *Corporations (Northern Territory Request) Act 2001* (NT); *Corporations (Commonwealth Powers) Act 2001* (Qld); *Corporations (Commonwealth Powers) Act 2001* (WA); *Corporations (Commonwealth Powers) Act 2001* (SA); *Corporations (Commonwealth Powers) Act 2001* (Tas).
- 257 Although each State adopted a differently formulated Professional Practice Defence, it

inconsistencies that it has created thus far for the Professional Practice Defence alone serves as a strong warning against it.²⁵⁸ Moreover case law interpreting and applying mirror legislation across jurisdictions will not be binding and may be a hindrance to the development of a coherent body of common law, whereas the issues faced by template legislation or a Commonwealth statute would not be as extreme.²⁵⁹

It follows that the most efficient and effective methods for achieving complete uniformity either requires all States and Territories to enact template legislation or for all States to refer their powers to the Commonwealth so as to allow the enactment of a single paramount law.²⁶⁰

Following these recommendations for reform, nationally consistent, clearly defined and principles-based legislation providing for the Professional Practice Defence can be successfully implemented.

SUMMARY OF RECOMMENDATIONS

Figure 3 summarises the recommended approach to guide the enactment of the Professional Practice Defence in uniform legislation.

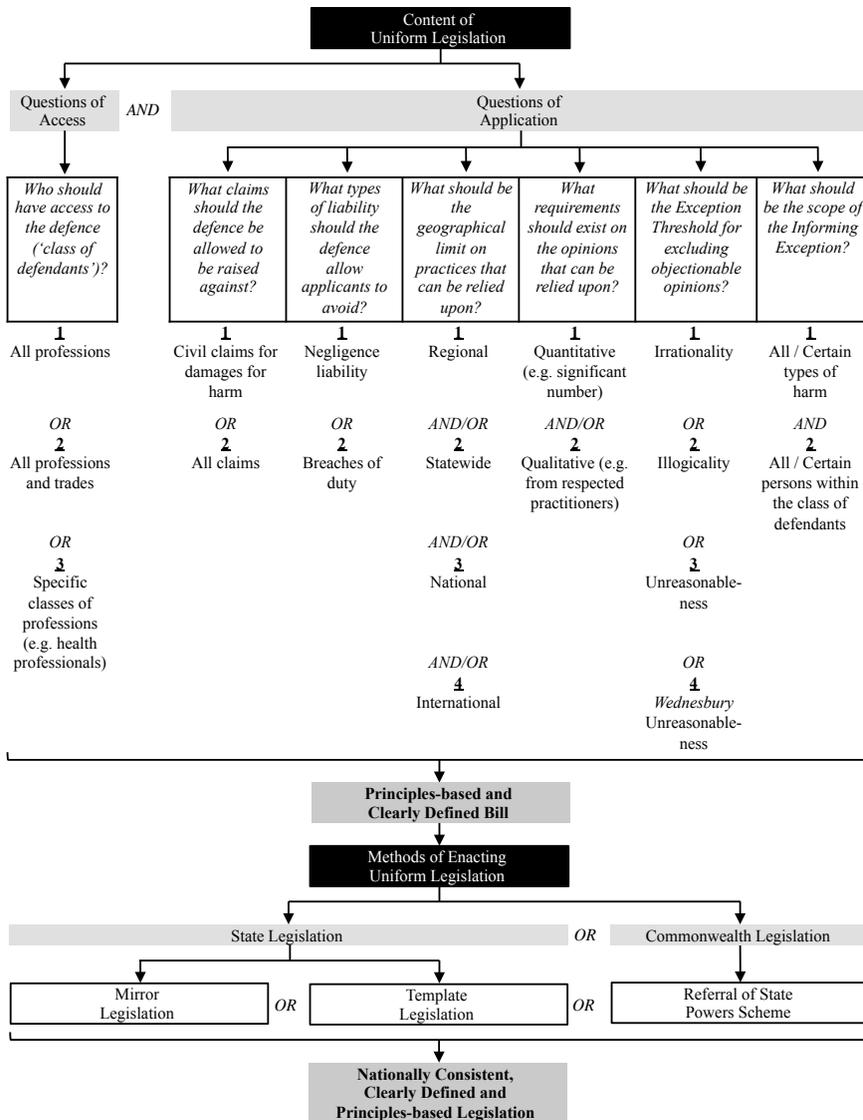
is notable that all jurisdictions – apart from the Northern Territory, which did not make any enactment – codified the common law negligence principles governing the standard of care in complete uniformity: CLA (NSW) s 5B; CLA (Tas) s 11; CLA (SA) s 32; CLA (Qld) s 11; Wrongs Act (Vic) s 48; CLA (WA) s 5B; Civil Law (Wrongs) Act 2002 (ACT) following Recommendation 28 of the Ipp Report, above n 5, 10, 106–7 [7.15]–[7.19].

258 See Justice Anthony Whealy, ‘Reviewing the Impact of Tort Reform at a State and National Level’ (Paper presented at the LexisNexis Health and the Law Conference, Sydney) 29 June 2004, 30, 41.

259 See *R v Parsons* [1983] 2 VR 499, 506 (Starke J).

260 The paramouncy of Commonwealth laws is provided for in *Commonwealth Constitution* s 109 which states that ‘[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.’

Figure 3. Overview of Recommendations to Guide Reform



CONCLUSION

This article has shown that the implementation of the Professional Practice Defence has created a complex network of problems, placing the law of professional negligence in complete disarray and calling urgently for reform. Unprincipled restrictions on the accessibility and applicability between jurisdictions and the inconsistencies and ambiguities of many elements of the State enactments can only superficially describe the intricacies inherent in the adopted formulations.

One decade after the Ipp Report and after 8 to 10 years of operation, time has not resolved the inconsistencies and uncertainties of the State formulations. Only very few cases have considered how the defence actually operates and in any case, unprincipled elements lay bare. Accordingly, the Professional Practice Defence is hardly understood and its problems are not well appreciated.

On a practical level, persons can be denied access to this valuable defence that was enacted in most States for the benefit of all ‘professionals’ – whether intentionally or unintentionally – simply due to the jurisdiction in which the alleged wrong occurs. The practical effect of this fragmented regime can significantly impact upon the range of persons who are entitled to have access to the defence and whether it can be successfully raised.

Accordingly, the Professional Practice Defence must be repealed and re-enacted on a nationally consistent, certain and principled basis in order to overcome these current problems.