

# MIXED MESSAGES ON SEXUAL ASSAULT AND THE STATUTE OF LIMITATIONS: *STINGEL V CLARK*, THE IPP 'REFORMS' AND AN ARGUMENT FOR CHANGE

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*[This article examines the application of limitation periods to civil actions for sexual assault, with particular reference to the High Court of Australia's decision in *Stingel v Clark* and the 'reforms' enacted pursuant to the recommendations of the Ipp Report. In *Stingel v Clark*, a majority of the High Court held that under the Limitation of Actions Act 1958 (Vic) as it stood at the relevant time, the limitation period would only begin to run from the time the survivor of the sexual assault recognised the connection between the assault and the harm resulting from it. This article argues that the case was correctly decided both on grounds of correct statutory interpretation and on sound public policy. It then reviews changes that have been enacted to limitation periods in Victoria and other Australian jurisdictions based on the recommendations of the Ipp Report. The article is critical of the fact that the effect of the changes in Victoria has been to erode the extension of time benefits conferred by the High Court's decision. It then examines the relevant statutory limitations provisions throughout Australia and argues that these are inconsistent, unduly complex and inadequate in the context of civil sexual assault actions. The article concludes that the only way to ensure that a consistent and just approach is taken to the issue is to enact simple and uniform legislation throughout Australia which completely eliminates the time bar in sexual assault actions.]*

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## I INTRODUCTION

The High Court of Australia's decision in *Stingel v Clark*<sup>1</sup> is an important step forward for survivors of childhood sexual assault who pursue a 'late'<sup>2</sup> civil claim against the perpetrator. The High Court decided that, based on the *Limitation of Actions Act 1958* (Vic) ('the Act') as it stood at the relevant time, the limitation period for bringing an action only began to run from the time the survivor recognised the connection between the assault and the harm resulting from it.<sup>3</sup> Unfortunately, legislative amendments introduced in Victoria following the *Review of the Law of Negligence: Final Report* ('Ipp Report')<sup>4</sup> have largely eroded the Victoria-specific extension of time benefits offered by the High Court's decision.<sup>5</sup> But for survivors like Ms Stingel who commenced late compensation proceedings before the 'reforms' took effect,<sup>6</sup> the decision provided a short-lived opportunity to at least have their cases heard. At a broader, continuing and symbolic level, the decision implicitly acknowledges that a delayed complaint of sexual assault is not to be treated with automatic suspicion and that, moreover, the delay in bringing an action is often a product of the consequences of the specific psychological harm suffered by the survivor. The decision supports the principle that the damage caused by sexual assault can be long lasting, suppressed and extremely serious. This article argues that it is high time for Australian state legislatures to also recognise this fact by following the lead of a number of overseas jurisdictions which have abolished the limitation period for civil sexual assault actions.<sup>7</sup>

The central issue in *Stingel v Clark* was whether an action for sexual assault could proceed in the context of a 31-year lapse from the alleged assault to the commencement of proceedings. This involved the resolution of two complex questions of statutory interpretation relating to the Act as it then stood. First, does an intentional trespass (the sexual assault) amount to a 'breach of duty'

<sup>1</sup> (2006) 226 CLR 442.

<sup>2</sup> By 'late' civil claim I mean a claim that is issued some time after the expiration of the usual limitation period for personal injuries actions.

<sup>3</sup> *Stingel v Clark* (2006) 226 CLR 442, 447–60 (Gleeson CJ, Callinan, Heydon and Crennan JJ), 482–5 (Hayne J).

<sup>4</sup> Panel of Eminent Persons ('Ipp Committee'), *Review of the Law of Negligence: Final Report* (2002).

<sup>5</sup> See especially *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003* (Vic) pt 3.

<sup>6</sup> That is, where proceedings were commenced before 1 October 2003: see *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003* (Vic) s 14, which inserted new transitional provisions into s 27N of the Act. The new provisions are also applicable if the assault occurred on or after 21 May 2003: s 27N(1). It should be noted that aspects of the decision may continue to be relevant to the interpretation of currently operative limitations provisions in the Australian Capital Territory, Western Australia and South Australia: see below Part IV.

<sup>7</sup> See below Part V.

within the meaning of the Act?<sup>8</sup> Secondly, is post-traumatic stress disorder ('PTSD') of delayed onset a 'disease or disorder contracted' within the meaning of the Act?<sup>9</sup> The High Court's affirmative answer to the first question<sup>10</sup> marked a departure from the problematic position taken by the House of Lords in *Stubbings v Webb*<sup>11</sup> and the Supreme Court of Ireland in *Devlin v Roche*<sup>12</sup> in their interpretation of similarly worded legislation.<sup>13</sup> On the second issue, the High Court accepted that PTSD of delayed onset is 'a disease or disorder contracted', even though it is a delayed consequence of a 'traumatic' (rape) rather than 'insidious' injury.<sup>14</sup> In doing so, the Court overruled a distinction that had been made in earlier authorities between 'insidious' injuries and 'traumatic' or 'frank' injuries, which had limited the benefits of the relevant statutory extension provision to cases of the former.<sup>15</sup>

This article argues that the decision of the High Court in *Stingel v Clark* should be applauded on the grounds of both correct statutory interpretation and public policy. It is, however, critical of the fact that Ms Stingel was only able to have her case heard after a complex and longwinded legal battle about the meaning of statutory language, rather than on the sound policy ground of giving childhood survivors of sexual assault the time *they* need to decide whether or not to bring an action. This article examines the complex, varied and (it is argued) inadequate nature of the relevant statutory limitations provisions applying throughout Australia and, in particular, the *Ipp Report*-inspired amendments to the Victorian Act that have eroded the benefits of *Stingel v Clark* in that state. The article then argues that the only way of ensuring a consistent and *just* approach for survivors is to enact simple and uniform legislation which completely eliminates the time bar in sexual assault actions.

## II *STINGEL V CLARK*

### A *The Background to the Case*

In August 2002, Carol Anne Stingel commenced an action for damages against Geoffrey Clark in the County Court of Victoria.<sup>16</sup> She alleged that in 1971, when she was 16 years of age, she was assaulted and raped on two occasions by a

<sup>8</sup> *Limitation of Actions Act 1958* (Vic) s 5(1A).

<sup>9</sup> *Limitation of Actions Act 1958* (Vic) s 5(1A).

<sup>10</sup> *Stingel v Clark* (2006) 226 CLR 442, 453–4 (Gleeson CJ, Callinan, Heydon and Crennan JJ), 485 (Hayne J). Gummow and Kirby JJ both dissented on this point: at 464 (Gummow J), 476 (Kirby J).

<sup>11</sup> [1993] AC 498.

<sup>12</sup> [2002] 2 IR 360.

<sup>13</sup> In January 2008 the House of Lords, citing *Stingel v Clark* with approval, took the relatively rare step of overturning its own decision of *Stubbings v Webb* in the case of *A v Hoare* [2008] 2 All ER 1: see below Part II(B)(3).

<sup>14</sup> *Stingel v Clark* (2006) 226 CLR 442, 459–60 (Gleeson CJ, Callinan, Heydon and Crennan JJ), 483–5 (Hayne J). It was not necessary for Gummow and Kirby JJ, who dissented on the 'breach of duty' point, to decide this issue. Nonetheless, Kirby J did express agreement with the majority on this issue: at 482.

<sup>15</sup> *Ibid* 455, 459 (Gleeson CJ, Callinan, Heydon and Crennan JJ), 485 (Hayne J).

<sup>16</sup> See *Clark v Stingel* [2005] VSCA 107 (Unreported, Warren CJ, Winneke P, Charles, Callaway and Eames JJA, 12 May 2005) [25] (Eames JA) (*'Clark v Stingel* [2005] VSCA 107').

group of men led by Mr Clark.<sup>17</sup> She alleged that the assaults and rapes occurred in the Warrnambool Municipal Gardens in March and at Lady Bay in Warrnambool in April.<sup>18</sup> She claimed that she suffered PTSD of delayed onset as a result of the alleged assaults and rapes.<sup>19</sup> Her cause of action was based on the tort of trespass to the person.

Ms Stingel claimed that it was only around 1999–2000 that she made a connection between her injuries and the alleged assaults and rapes.<sup>20</sup> She said in evidence that for most of her life she believed that she had recovered from the attacks, but when in 1999 she started seeing Mr Clark on television she began to suffer from panic attacks and nightmares.<sup>21</sup> She reported the alleged rapes and assaults to police in July 2000, after she saw the publicity received by Mr Clark as a consequence of his election as Chair of the Aboriginal and Torres Strait Islander Commission and after she had heard about accusations of sexual assault made against Mr Clark by another woman.<sup>22</sup> Mr Clark denied the factual allegations of assault and rape and pleaded that the proceedings were time-barred by the Act.<sup>23</sup>

In November 2002, Ms Stingel sought a declaration that her case was not statute-barred under s 5(1A) of the Act.<sup>24</sup> In the alternative she sought an order for an extension of time under the discretionary provisions of s 23A. The s 23A application was, however, abandoned at the commencement of the hearing.<sup>25</sup>

Section 5(1)(a) of the Act prescribed a limitation period of six years for actions in tort. This was qualified by s 5(1A), which provided as follows:

5. Contracts and torts

...

- (1A) An action for damages for negligence nuisance or *breach of duty* (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries consisting of *a disease or disorder contracted* by any person may be brought not more than six years from, and the cause of action shall be taken to have accrued on, the date on which the person first knows —

<sup>17</sup> Ibid [39].

<sup>18</sup> Ibid [25].

<sup>19</sup> Ibid [35].

<sup>20</sup> Ibid [39]–[41].

<sup>21</sup> Ibid [39].

<sup>22</sup> Ibid.

<sup>23</sup> Ibid [4] (Warren CJ), [27] (Eames JA).

<sup>24</sup> Ibid [30] (Eames JA).

<sup>25</sup> The wording of s 23A is, however, of some contextual relevance to the interpretation of s 5(1A). It is therefore referred to in the discussion below. By way of possible explanation for the abandonment of the s 23A aspect of the case, Eames JA stated in the Court of Appeal decision (at *ibid* fn 16):

The applicable version of s 23A was that introduced by the *Limitations of Actions (Personal Injuries) Act 1972* (No 8300 of 1972). Although its operation extended to causes of action which accrued or were claimed to have accrued before the commencement of that Act the benefit of that version of s 23A was much more limited for applicants than was the case with the version which was later substituted by s 5 of Act No 9884 of 1983.

- (a) that he has suffered those personal injuries; and
- (b) that those personal injuries were caused by the act or omission of some person.<sup>26</sup>

The effect of s 5(1A) then was to qualify the six-year limitation rule. For cases that could be brought within its terms, the limitation period would only start to run from the time that the person first knew both that they had suffered an injury and that the injury was caused by the act of a person. The question of whether Ms Stingel's claim could be brought within the section turned on the interpretation of the italicised words in the extract above. The first issue was whether the words 'breach of duty' encompassed the intentional tort of trespass. The second involved a consideration of whether PTSD of delayed onset was a 'disease or disorder contracted by any person'.

In the County Court,<sup>27</sup> Judge Hanlon held that the case fell within s 5(1A) of the Act, striking out the limitation period defence raised by Mr Clark. His Honour held that Ms Stingel suffered PTSD of delayed onset 'with onset time, knowledge of the events giving rise to her problems, as being in the first half of the year 2000, culminating with the police statements in July'.<sup>28</sup>

Mr Clark's appeal to the Court of Appeal was upheld by a majority of the Court.<sup>29</sup> Although the Court of Appeal unanimously held that trespass to the person was a 'breach of duty',<sup>30</sup> a majority of the Court held that PTSD of delayed onset was *not* 'a disease or disorder contracted by any person'.<sup>31</sup>

In the High Court, Ms Stingel succeeded on both of these issues by majority, with a joint judgment by Gleeson CJ, Callinan, Heydon and Crennan JJ ('joint reasons') and a separate judgment by Hayne J upholding the appeal; Gummow and Kirby JJ dissented in separate judgments.<sup>32</sup> The trial before a jury commenced in the County Court on 16 January 2007 and, on 31 January 2007, the jury found in favour of Ms Stingel, awarding damages of \$20 000.<sup>33</sup> Mr Clark's

<sup>26</sup> *Limitation of Actions Act 1958* (Vic) s 5(1A) (emphasis added). This is the wording that existed at the date when Ms Stingel commenced her action in August 2002. The relevant provisions of the Act have subsequently been amended by the *Limitation of Actions (Amendment) Act 2002* (Vic) and pt 3 of the *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003* (Vic). The effect of the amendments on the issues dealt with in this case will be discussed below in Part III. As already noted, the actual case was not affected because the date on which proceedings were commenced preceded the date on which the relevant amendments became operative.

<sup>27</sup> Judge Hanlon of the County Court of Victoria delivered judgment and gave oral reasons on 13 February 2004: cited in *Clark v Stingel* [2005] VSCA 107, [49] (Eames JA).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* [15] (Winneke P), [17] (Charles JA), [102] (Eames JA).

<sup>30</sup> *Ibid* [2] (Warren CJ), [15]–[16] (Winneke P), [17] (Charles JA), [18] (Callaway JA), [57], [59]–[61] (Eames JA).

<sup>31</sup> *Ibid* [15]–[16] (Winneke P), [17] (Charles JA), [76]–[77], [86]–[87] (Eames JA). Warren CJ and Callaway JA, in the minority, held that PTSD of delayed onset was a 'disease or disorder': at [11]–[12] (Warren CJ), [20]–[21] (Callaway JA).

<sup>32</sup> *Stingel v Clark* (2006) 226 CLR 442. The 'breach of duty' issue was again raised by Mr Clark's notice of contention. The 'disease or disorder' issue was the subject of Ms Stingel's appeal to the High Court.

<sup>33</sup> Jamie Berry, Karen Kissane and Ben Doherty, 'Clark a Rapist, Jury Rules', *The Age* (Melbourne), 1 February 2007, 1.

appeal against the decision of the jury was dismissed by the Court of Appeal on 11 December 2007.<sup>34</sup>

### B *Is an Intentional Trespass a Breach of Duty?*

Prior to *Stingel v Clark*, the question of whether the tort of intentional trespass was a ‘breach of duty’ within the meaning of s 5(1A) had been the subject of judicial consideration on a number of occasions in both Victoria and overseas. In *Kruber v Grzesiak*<sup>35</sup> and *Mason v Mason*,<sup>36</sup> the Victorian Supreme Court and the Victorian Court of Appeal respectively held that intentional torts were encompassed by the phrase ‘breach of duty’. Likewise, in *Letang v Cooper*, the Court of Appeal of England and Wales held that identical statutory language in the UK extended to actions of trespass.<sup>37</sup> In 1993, however, the House of Lords in *Stubbings v Webb* overruled the English Court of Appeal<sup>38</sup> — a decision subsequently followed in 2002 by the Supreme Court of Ireland in *Devlin v Roche*.<sup>39</sup> Nonetheless, upon reconsidering the issue in *Clark v Stingel*, the Victorian Court of Appeal chose to follow the existing Victorian rather than English or Irish authority.<sup>40</sup> The decision of the Victorian Court of Appeal on this issue was then upheld by the majority of the High Court.<sup>41</sup>

There are three main reasons underlying the division in judicial opinion on this issue of statutory interpretation.<sup>42</sup> The first relates to the interpretation of the legislative history of s 5(1A); the second to the jurisprudential analysis of the meaning of the phrase ‘breach of duty’; and the third to the significance that should be placed on the anomalous practical result which would occur should the phrase be held to exclude intentional trespass.

#### 1 *The Legislative History*

##### (a) *The Tucker Committee*

The legislative history of the Act and its relationship to similar legislation in the UK is an important backdrop to the interpretation of s 5(1A). In the *Limitation of Actions Act 1955* (Vic) (‘the 1955 Act’), which was the precursor to the present Act, s 5(6) qualified the general limitation period of six years by providing a less generous three-year limitation period for personal injury cases that

<sup>34</sup> *Clark v Stingel* [2007] VSCA 292 (Unreported, Warren CJ, Chernov and Kellam JJA, 11 December 2007).

<sup>35</sup> [1963] VR 621.

<sup>36</sup> [1997] 1 VR 325.

<sup>37</sup> [1965] 1 QB 232.

<sup>38</sup> [1993] AC 498. As mentioned above, *Stubbings v Webb* has now been overturned by *A v Hoare* [2008] 2 All ER 1: see above n 13. See below Part II(B)(3).

<sup>39</sup> [2002] 2 IR 360.

<sup>40</sup> *Clark v Stingel* [2005] VSCA 107, [15]–[16] (Winneke P), [17] (Charles JA), [57], [59]–[61] (Eames JA). Warren CJ and Callaway JA, who were in dissent in this case, agreed with the majority of the Court on this point: at [2] (Warren CJ), [18] (Callaway JA).

<sup>41</sup> *Stingel v Clark* (2006) 226 CLR 442, 453–4 (Gleeson CJ, Callinan, Heydon and Crennan JJ), 485 (Hayne J). Gummow and Kirby JJ both dissented on this point: at 464 (Gummow J), 476 (Kirby J).

<sup>42</sup> This tripartite analysis is adapted from the analysis provided by the High Court in the joint reasons: *ibid* 447–60 (Gleeson CJ, Callinan, Heydon and Crennan JJ).

were actions for ‘negligence, nuisance or breach of duty’. The words ‘negligence, nuisance or breach of duty’ were identical to the wording used in similar UK legislation, on which the 1955 Act was based.<sup>43</sup> The UK legislation was enacted following the recommendations of the Tucker Committee. In its report, although the Tucker Committee noted that the shorter limitation period should apply to ‘all actions for personal injuries’, it also stated that they ‘do not include in that category actions for trespass to the person, false imprisonment, malicious prosecution, or defamation of character’.<sup>44</sup>

Thus, the recommendations were intended to have the effect of reducing the limitation period for most personal injury cases while retaining the more generous limitation period of six years for cases involving trespass to the person (and certain other specified actions).<sup>45</sup> In Victoria, committee deliberations regarding the proposed content of the 1955 Act made reference to the *Tucker Report*.<sup>46</sup>

Judicial proponents of the view that intentional trespass is not encompassed by the phrase ‘negligence, nuisance or breach of duty’ emphasise this particular legislative history regarding the meaning of these words. In his dissenting judgment, Kirby J noted that:

For the Tucker Committee, the three year period was to apply to a number of causes of action loosely described as ‘personal accident cases’. Where the cause of action arose out of deliberate conduct, it fell outside the scope of the intended reforms.<sup>47</sup>

Lord Griffiths in his judgment in *Stubbings v Webb* said that:

the terms in which this Bill was introduced to my mind make it clear beyond peradventure that the intention was to give effect to the Tucker recommendation that the limitation period in respect of trespass to the person was not to be reduced to three years but should remain at six years.<sup>48</sup>

It is submitted, however, that the history of *subsequent* legislative amendments paints a different picture as to what these same words might mean in the contexts in which they were later placed.

*(b) The Context of Subsequent Legislative Amendments*

Section 5(6) of the Act appeared in the original 1958 enactment. It was later repealed in 1983, when s 5(1A) was added.<sup>49</sup> While s 5(6) had operated to make the limitation period for actions that fell within it less generous, s 5(1A) applied

<sup>43</sup> Ibid 478 (Kirby J). The UK legislation was the *Law Reform (Limitation of Actions) Act 1954*, 2 & 3 Eliz 2, c 36.

<sup>44</sup> The Committee on the Limitations of Actions (‘Tucker Committee’), *Report of the Committee on the Limitation of Actions*, Cmd 7740 (1949) [23] (‘*Tucker Report*’). The Tucker Committee recommendations were enacted (bar one variation which is not material to the current discussion) by the *Law Reform (Limitation of Actions) Act 1954*, 2 & 3 Eliz 2, c 36.

<sup>45</sup> *Tucker Report*, above n 44, [22]–[23].

<sup>46</sup> Statute Law Revision Committee, Parliament of Victoria, *Report from the Statute Law Revision Committee on the Limitation of Actions Bill* (1950) 947–8.

<sup>47</sup> *Stingel v Clark* (2006) 226 CLR 442, 479. See also at 469 (Gummow J).

<sup>48</sup> [1993] AC 498, 508.

<sup>49</sup> *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) ss 3(b), (c).

a six-year limitation period to actions within its scope, and provided even more generous treatment for such actions by specifying that time would only begin running when the claimant was aware both of their injuries and that some person had caused them.<sup>50</sup>

Personal injury actions involving ‘negligence, nuisance or breach of duty’ are also addressed within s 23A of the Act, a version of which was originally inserted in 1972.<sup>51</sup> This provision empowers a court to extend the limitation period on discretionary grounds. Thus, both ss 5(1A) and 23A provide for potentially more generous limitation periods for those personal injury actions that fall within their scope. This is in contrast to their similarly-worded predecessors, s 5(6) and its UK equivalent, which were more *restrictive* than the general limitation period.

In this respect, the legislative historical context of s 5(1A) (and s 23A) differs markedly from the context in which the Tucker Committee made its comments. The effect of those comments was to exclude actions for trespass to the person (and certain other specified actions) from the more *restrictive* effects of the limitation provision that was under consideration, and to ensure that trespass to the person retained the more generous limitation period. Thus, as they were dealing with a totally different legislative context, the reliance by both the House of Lords in *Stubbings v Webb* and the dissenting judges in *Stingel v Clark* on the Tucker Committee’s comments regarding the meaning of certain words, was, with respect, misguided.<sup>52</sup>

The majority of the High Court in *Stingel v Clark* did not make this particular point explicitly. Rather, their Honours focused on what they called the ‘decisional context’ in which ss 5(1A) and 23A were passed.<sup>53</sup>

(c) *The ‘Decisional Context’ in Which s 5(1A) Was Enacted*

Prior to the enactment of ss 23A and 5(1A), there existed both Victorian and English case law that affirmed that trespass was encompassed by the concept of ‘breach of duty’. In 1963, the Supreme Court of Victoria held in *Kru-*

<sup>50</sup> *Limitation of Actions Act 1958* (Vic) s 5(1A).

<sup>51</sup> *Limitation of Actions Act (Personal Injuries) 1972* (Vic) s 3, amended by *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 5.

<sup>52</sup> Interestingly, Gummow J in *Stingel v Clark* (2006) 226 CLR 442, 468 picked up on this point, noting that: ‘No attention appears to have been given ... to the significance of the carrying over, to a quite different setting, of the form of words used in s 5(6)’. But his Honour concluded that ‘this is not a case of the class’ where the result ‘may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake’: at 468, quoting *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1980) 147 CLR 297, 304 (Gibbs CJ). On the contrary, Gummow J said that ‘this is a case where the words of s 5(1A) which are in question can be intelligibly applied to the subject matter with which the sub-section deals’: at 468. Cf Kirby J’s approach to this issue — Kirby J stated that the legislative history ‘contradicts any suggestion that the contested phrase was a mistake or involved an oversight by the drafter’: at 477. It should also be noted that the legislation considered by the Supreme Court of Ireland in *Devlin v Roche* [2002] 2 IR 360 had the effect of the old s 5(6) in Victoria — that is, of providing for a more *restrictive* three-year limitation period for personal injuries actions caused by ‘negligence, nuisance or breach of duty’. The Court in that case decided that an assault and battery was not caught by the section and therefore the more *generous* six-year limitation period applied to it. Thus, the decision in *Devlin v Roche* did not contradict the context of the legislative history of the provision under consideration in that case.

<sup>53</sup> *Stingel v Clark* (2006) 226 CLR 442, 449–51 (Gleeson CJ, Callinan, Heydon and Crennan JJ).

*ber v Grzesiak* that trespass to the person was a ‘breach of duty’ within the meaning of s 5(6).<sup>54</sup> That decision was followed in 1965 in the case of *Hayward v Georges Ltd*.<sup>55</sup> In England, a parallel line of authorities from the 1940s to the 1960s affirmed this interpretation of the same phrase.<sup>56</sup>

In *Stingel v Clark*, the joint reasons considered that this ‘decisional context’ was relevant to the interpretation of ss 5(1A) and 23A. Their Honours stated that:

It is at least as reasonable to attribute to the Victorian Parliament, in 1972 and 1983 [when ss 23A and 5(1A) were enacted], an awareness of the decisions of Adam J [in *Kruber v Grzesiak*] and McInerney AJ [in *Hayward v Georges Ltd*] as it is to attribute to it an awareness of the Report of the Tucker Committee ... The fact that the decision of Adam J had been approved and followed by the English Court of Appeal in relation to the United Kingdom legislation was also a significant part of the context.<sup>57</sup>

Hayne J also emphasised this point in his separate concurring judgment:

the critical fact is that the received understanding in Victoria of the reach of s 5(6) was that it embraced all forms of action for damages for personal injury. It was in that setting that those who drafted ... ss 5(1A) and 23A drafted provisions intended to confer advantages on plaintiffs.<sup>58</sup>

It is submitted that the decisional context in which s 5(1A) was enacted should be given more weight in its interpretation than the discussions of the Tucker Committee. Why place such significance on the discussions of the latter (which related to UK legislation) when the phrase used in s 5(1A) had been the subject of a specific definition in *Victorian* case law at the time the provision was enacted?<sup>59</sup>

<sup>54</sup> [1963] VR 621.

<sup>55</sup> [1966] VR 202.

<sup>56</sup> See *Billings v Reed* [1945] KB 11; *Letang v Cooper* [1965] 1 QB 232; *Long v Hepworth* [1968] 3 All ER 248. Note, however, that *Billings v Reed* [1945] KB 11 dealt with the interpretation of the phrase ‘negligence, nuisance or breach of duty’ in a different statutory context: see *Personal Injuries (Emergency Provisions) Act 1939*, 2 & 3 Geo 6, c 82, s 3.

<sup>57</sup> *Stingel v Clark* (2006) 226 CLR 442, 451.

<sup>58</sup> *Ibid* 484–5.

<sup>59</sup> It is interesting to note that this particular argument is not easily reconcilable with the argument made above regarding the context of the legislative amendments: see above Part II(B)(1)(b). The earlier argument accepts that s 5(6) may have been intended to exclude trespass because its effect was restrictive, in contrast to ss 5(1A) and 23A, both of which were intended to expand the limitation period. On the other hand, the High Court majority’s focus on the case law history emphasises the fact that Victorian courts (in *Kruber v Grzesiak* [1963] VR 621 and *Hayward v Georges Ltd* [1966] VR 202) had interpreted s 5(6) as *including* actions for trespass. This apparent inconsistency can be addressed by making the point that even if the Victorian cases on s 5(6) were wrong, this does not detract from the argument made by the majority of the High Court that Parliament must have had an awareness of the Victorian decisions when enacting ss 5(1A) and 23A. Hayne J acknowledges this point (at 483–4) (emphasis in original) (citations omitted):

The language used ... in ss 5(1A) and 23A ... appears in provisions intended to ameliorate the effect of the general bar ... But that has not always been so. The language found in ss 5(1A) and 23A was originally used in s 5(6) ... a provision prescribing a *shorter* limitation period for the actions with which it dealt than the general limitation period of six years for actions founded on tort. ... The purpose of s 5(6) ... was to provide a shorter limitation period for some actions than would otherwise have applied. As an exception to a general rule, it may well have been open to argue that it should be narrowly construed. Yet, in the Victorian courts, the provision was construed as engaged in actions alleging trespass to the person ...

## 2 *Jurisprudential Analysis of the Phrase 'Breach of Duty'*

There has also been a division of judicial opinion on whether intentional trespass accords with the notion of 'breach of duty' as a matter of jurisprudential analysis. Those who argue against the inclusion of intentional torts within the notion emphasise the conceptual difficulty of framing such torts as a breach of a duty *not to intentionally inflict harm on anyone*. In *Stubbings v Webb*, Lord Griffiths made this point as follows:

I should not myself have construed breach of duty as including a deliberate assault. The phrase lying in juxtaposition with negligence and nuisance carries with it the implication of a breach of duty of care not to cause personal injury, rather than an obligation not to infringe any legal right of another person. If I invite a lady to my house one would naturally think of a duty to take care that the house is safe but would one really be thinking of a duty not to rape her?<sup>60</sup>

In his dissenting judgment in *Stingel v Clark*, Kirby J also made this point with some force (but without the offensive example):

the phrase 'breach of duty' should be given its ordinary legal meaning. That meaning is not engaged by intentional torts, such as assault and battery. To suggest otherwise is to debase the notion of 'breach of duty' and to reduce it to a meaningless expression such as 'breaches of a duty owed generally to one's fellow subjects'. It seems unlikely that this would have been the purpose of Parliament in enacting a limitation statute, a species of so-called 'lawyers' law'.<sup>61</sup>

In the joint reasons, their Honours bypassed the conceptual untidiness involved in framing intentional trespass as a breach of duty by stating that, as a matter of jurisprudential analysis,

eminent judges may disagree about whether ... the expression 'breach of duty' is apt in the case of trespass, but statutes of limitation are more concerned with practical justice than with jurisprudential analysis, and, at the very least, the language is ambiguous.<sup>62</sup>

It is submitted that while there may be a degree of conceptual clumsiness in conceiving of intentional torts as breaches of duty, the joint reasons rightly point out that there is some ambiguity in the language. This ambiguity creates space in which to construe the words in a way that better accords with the legislative history of the provision, and, as we shall see, that better promotes practical justice by avoiding an anomalous result.

## 3 *An Anomalous Result*

Finally, to exclude trespass to the person from the ambit of s 5(1A) (and s 23A) would result in treating plaintiffs in intentional trespass actions less generously than plaintiffs in negligence actions. In *Stingel v Clark*, the joint reasons considered that such a reading would produce a 'surprising result'.<sup>63</sup> Their Honours said that this would mean that 'the statute extends the limitation

<sup>60</sup> [1993] AC 498, 508.

<sup>61</sup> *Stingel v Clark* (2006) 226 CLR 442, 476 (citations omitted).

<sup>62</sup> *Ibid* 453.

<sup>63</sup> *Ibid* 450.

period in the case of a person who was neglected as a child, but not one who was sexually abused. It is difficult to understand why the policy of the Act would be to discriminate in that fashion.<sup>64</sup>

Kirby J, in dissent, acknowledged the anomalous effect of such an interpretation. His Honour said:

I am conscious that the outcome which I favour involves anomalies and could sometimes work an injustice on persons who claim late onset conditions causing damage years or decades after the initial intentional infliction of injury.<sup>65</sup>

His Honour nonetheless concluded that the text of s 5(1A) could not ‘fairly be read to respond to the type of claim brought by [Ms Stingel]’.<sup>66</sup> In contrast to this conclusion, the joint reasons held that ‘[t]here being ... two constructions reasonably open, that should be preferred which produces a fair result that promotes the purpose of the legislation.’<sup>67</sup>

It is indeed difficult to accept as correct an interpretation which would work to extend the limitation period for victims of negligence, but not for those who have suffered harm as a result of intentional wrongdoing. It is submitted that the interpretation of ‘breach of duty’ by the majority of the Court strikes an appropriate balance between sense, justice and history on the one hand, and a strictly formalist textual reading on the other.

Further support for this interpretation was provided in January of this year when the House of Lords took the relatively rare step of overturning its own decision in *Stubbings v Webb*.<sup>68</sup> In *A v Hoare*, the House of Lords referred to the reasoning in *Stingel v Clark* with approval, holding that an action for an intentional trespass is an action for ‘negligence, nuisance or breach of duty’.<sup>69</sup> This interpretation gave the plaintiff who alleged sexual assault in that case the advantage of more generous limitation periods.<sup>70</sup> In this author’s view, it was a decision that was a long time coming.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid 480.

<sup>66</sup> Ibid. Gummow J expressed a similar view, stating that one should not ‘rely upon such instances to read the expression “negligence, nuisance or breach of duty” as encompassing any tort action in a disease case to which s 5(1A) otherwise speaks’: at 470.

<sup>67</sup> Ibid 454.

<sup>68</sup> See *A v Hoare* [2008] 2 All ER 1. A number of other appeals on the same issue were heard by the House of Lords at the same time: see *X v Wandsworth London Borough Council* [2006] 1 WLR 2320; *H v Suffolk County Council* [2006] 1 WLR 2320; *Young v South Tyneside Metropolitan Borough Council* [2007] QB 932.

<sup>69</sup> *A v Hoare* [2008] 2 All ER 1, 12–13 (Lord Hoffmann).

<sup>70</sup> Specifically, this interpretation gives plaintiffs alleging intentional trespass access to the discretionary extension of time provisions under s 33 of the *Limitation Act 1980* (UK) c 58, which was not available under the *Stubbings v Webb* interpretation. It also gives such plaintiffs a period of three years from the ‘date of knowledge’ of the injury (*Limitation Act 1980* (UK) c 58, ss 11–14) as opposed to six years from when the tort occurred (*Limitation Act 1980* (UK) c 58, s 2). It should be noted, however, that the House of Lords interpreted the specific ‘date of knowledge’ provision very narrowly, and the plaintiffs in the appeals before the House only won their cases based on the exercise of the discretion under s 33: see, eg, *ibid* 15–17 (Lord Hoffmann).

*C Is PTSD of Delayed Onset a 'Disease or Disorder Contracted'?*

Having decided that intentional trespass fell within the purview of s 5(1A), the majority then had to determine whether the injury alleged by Ms Stingel was covered by that provision. The resolution of this issue hinged on whether PTSD of delayed onset was 'a disease or disorder contracted by any person'.

The majority of the High Court held that PTSD of delayed onset fell within the section<sup>71</sup> and, in doing so, overruled the majority decision of the Court of Appeal on this point.<sup>72</sup>

1 *The Court of Appeal Majority: Section 5(1A) Applies to Insidious Diseases Only*

The majority of the Court of Appeal had drawn a distinction between 'insidious' diseases or disorders, which were said to be encompassed by the wording of the section, and 'traumatic' or 'frank (ie not disguised) diseases or disorders, the contraction of which are neither unduly delayed nor disguised.'<sup>73</sup> The majority held that Ms Stingel's claim involved frank injury — that is, rape and assault — and that it therefore fell outside the provision.<sup>74</sup>

Eames JA, delivering the leading judgment of the majority in the Court of Appeal (Winneke P and Charles JA concurring), stated that:

the condition of post-traumatic stress disorder of delayed onset was not a disease or disorder contracted by [Ms Stingel] within the meaning required by s 5(1A). It was a disorder not of an insidious kind to which the section applies, and was suffered at a time later than the act or omission relied on by [Ms Stingel] as the ... breach of duty constituting the cause of action in this case.<sup>75</sup>

His Honour described 'insidious' disease or disorder as that which 'is contracted but not known to exist until much later'.<sup>76</sup>

The majority of the Court of Appeal was of the view that parliamentary debates and committee reports surrounding the enactment of s 5(1A) made it clear that the aim of the section was to extend the time bar in cases of insidious diseases such as asbestosis and pneumoconiosis.<sup>77</sup> The majority also placed emphasis on the use of the word 'contracted' in the provision. Eames JA noted that 'contracted' suggests that there is 'a close *temporal* link between the tortious

<sup>71</sup> *Stingel v Clark* (2006) 226 CLR 442, 454–60 (Gleeson CJ, Callinan, Heydon and Crennan JJ), 483, 485 (Hayne J). As Kirby and Gummow JJ dissented on the 'breach of duty' issue, their Honours did not need to decide this question. On their view, s 5(1A) could not apply to Ms Stingel's trespass action in any case, regardless of the type of injury she might have suffered. Kirby J did, however, note that he was inclined to agree with the majority on this point: at 482. Gummow J did not express a view on this issue.

<sup>72</sup> *Clark v Stingel* [2005] VSCA 107, [86]–[87], [90] (Eames JA). Winneke P and Charles JA concurred on this point, while Warren CJ and Callaway JA were in dissent: at [11]–[12] (Warren CJ), [15]–[16] (Winneke P), [17] (Charles JA), [20]–[21] (Callaway JA).

<sup>73</sup> *Ibid* [88] (Eames JA). In drawing this distinction, the majority of the Court of Appeal followed previous Victorian authority in *Mazzeo v Caleandro Guastalegname & Co* (2000) 3 VR 172.

<sup>74</sup> *Clark v Stingel* [2005] VSCA 107, [86]–[87], [90] (Eames JA). Winneke P and Charles JA concurred with Eames JA on this point: at [15]–[16] (Winneke P), [17] (Charles JA).

<sup>75</sup> *Ibid* [90].

<sup>76</sup> *Ibid* [89].

<sup>77</sup> *Ibid* [64]–[72].

act or omission',<sup>78</sup> indicating that the word describes 'the moment of origin of the pathology of the disease.'<sup>79</sup> His Honour stated that 's 5(1A) is concerned with contraction of the disease or disorder at or proximate to the time of the tortious act or omission, but where there would be long delayed awareness of the very injury which is the subject of the claim.'<sup>80</sup>

His Honour opined that such factors do not apply to PTSD, or other claims for 'late onset of injuries', because such injuries 'were "caused" or were "suffered" by reason of the act or omission but were not "contracted" in the terms of s 5(1A).'<sup>81</sup> His Honour noted that such injuries could be the subject of an application under the discretionary extension provisions of s 23A.<sup>82</sup>

## 2 *The High Court: Unambiguous Language*

The High Court, agreeing with the minority in the Court of Appeal,<sup>83</sup> considered that the relevant words of s 5(1A) are unambiguous and that PTSD of delayed onset amounts to a personal injury 'consisting of a disease or disorder contracted'.<sup>84</sup> The Court considered that even if

lung disease was the paradigm case to which s 5(1A) was directed ... [i]t is the text of s 5(1A) which is to be applied; not the prevailing opinion as to what was likely to be the most common kind of case in which it would be invoked. ... There is no reference in s 5(1A) to insidious disease. ... If post-traumatic stress disorder of delayed onset falls within the language of s 5(1A), the fact that it was not something to which Parliament adverted in 1983 may not be surprising. If changes in medical knowledge reveal that s 5(1A) creates a wider exception to s 5(1) than was originally contemplated ... the courts must [still] apply that language.<sup>85</sup>

Thus, the High Court considered that PTSD of late onset fell squarely within the type of injury covered by s 5(1A). The Court was not persuaded that the section should be read as applying only to so-called 'insidious diseases'.

It is submitted that the High Court's straightforward focus on the text of s 5(1A) is to be preferred to the Court of Appeal's problematic and conceptually strained distinction between insidious diseases, on the one hand, and late onset injuries derived from frank or traumatic events, on the other. It is at least arguable that there is neither a physiologically nor conceptually tenable distinction between diseases or disorders that are contracted at the time of the tortious act or omission ('insidious diseases') and those that are late onset injuries suffered or caused by reason of an earlier physical event ('frank or traumatic injuries'). Thus, not only is the High Court's interpretation 'truer' to the language

<sup>78</sup> Ibid [75] (emphasis in original).

<sup>79</sup> Ibid [63], in which Eames JA paraphrases and presumably accepts the argument of counsel for Mr Clark.

<sup>80</sup> Ibid [76].

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> *Stingel v Clark* (2006) 226 CLR 442, 457 (Gleeson CJ, Callinan, Heydon and Crennan JJ).

<sup>84</sup> Ibid.

<sup>85</sup> Ibid 458–9 (Gleeson CJ, Callinan, Heydon and Crennan JJ).

of the section, it also avoids possibly unsolvable medical arguments about ‘the moment of origin of the pathology’ of particular diseases and disorders.

### 3 PTSD as a ‘Disease or Disorder’: Taking PTSD Seriously

Moreover, the High Court’s refusal to exclude PTSD from the purview of the beneficial treatment afforded to claimants by s 5(1A) amounts to an implicit recognition of the reality and seriousness of the psychological harm suffered as a result of traumatic events such as rape. At a normative level, the High Court’s approach supports the principle that the psychological harm caused by sexual assault can be long lasting, suppressed and extremely serious.<sup>86</sup>

The High Court’s inclusion of PTSD as a ‘disease or disorder’ sits well with the available psychological evidence. The *Diagnostic and Statistical Manual of Mental Disorders* (‘DSM’), published by the American Psychiatric Association, formally recognises PTSD as a ‘disorder’ and classifies it as an ‘anxiety disorder’.<sup>87</sup> The DSM relevantly describes PTSD as

characterized by the reexperiencing of an extremely traumatic event accompanied by ... avoidance of stimuli associated with the trauma. ... [Symptoms may include] efforts to avoid thoughts, feelings, or conversations about the traumatic event ... and to avoid activities, situations, or people who arouse recollections of it ... [and] amnesia for an important aspect of the traumatic event ...<sup>88</sup>

Thus, PTSD may involve attempts to avoid anything at all associated with the traumatic event, as well as possible difficulties in remembering aspects of it.<sup>89</sup> Given these symptoms, it is not surprising that it can be extremely difficult for survivors to commence legal proceedings at all, let alone without considerable delay.<sup>90</sup> Ben Mathews makes this point succinctly:

<sup>86</sup> The High Court’s decision on the meaning of ‘disease or disorder contracted’ is also significant for survivors of the collision between HMAS *Melbourne* and HMAS *Voyager* in February 1964. Those survivors who developed PTSD have sought to use s 5(1A) to extend the limitation period so as to enable them to make late claims for compensation: see, eg, *Wright v Commonwealth* (2005) 13 VR 155. The parties involved in *Wright v Commonwealth* successfully sought leave to intervene in *Stingel v Clark*, and their submissions were taken into consideration in the High Court’s decision: see *Stingel v Clark* (2006) 226 CLR 442, 460 (Gleeson CJ, Callinan, Heydon and Crennan JJ). See also *Cavenett v Commonwealth* [2007] VSCA 88 (Unreported, Maxwell ACJ, Chernov and Nettle JJA, 10 May 2007). However, further consideration of the impact of the High Court’s decision in *Stingel v Clark* on the HMAS *Melbourne* and HMAS *Voyager* litigation is beyond the scope of this article.

<sup>87</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* (4<sup>th</sup> revised ed, 2000) 429.

<sup>88</sup> *Ibid* 429, 464. Other diagnostic features and criteria for PTSD are described at 463–8.

<sup>89</sup> For a detailed and specific discussion of PTSD in survivors of childhood sexual abuse, see Ben Mathews, ‘Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse’ (2004) 27 *University of New South Wales Law Journal* 631, especially 634–5. For an outline and analysis of other psychological injuries resulting from childhood sexual abuse, see Annette Marfording, ‘Access to Justice for Survivors of Child Sexual Abuse’ (1997) 5 *Torts Law Journal* 221 (see especially 222–5 and the extensive psychological and social literature referred to in fnn 1–39).

<sup>90</sup> There is considerable expert research that demonstrates that delay in bringing an action for redress is usually a symptom and product of this form of abuse: see Ben Mathews, ‘Assessing the Scope of the Post-Ipp “Close Associate” Special Limitation Period for Child Abuse Cases’ (2004) 11 *James Cook University Law Review* 63, 75–83, and the extensive social and psychological literature cited in fnn 41–73 of the article; Ben Mathews, ‘Limitation Periods and Child Sexual Abuse Cases: Law, Psychology, Time and Justice’ (2003) 11 *Torts Law Journal* 218.

the avoidance response means that many adult survivors of child sexual abuse will need a significant period of time to develop the capacity to make even a confidential disclosure of the abuse, or a tentative foray into psychological counselling. Many survivors will never be able to disclose the abuse. ... [M]any adult survivors who eventually desire civil legal remedies will not be psychologically ready to pursue the perpetrator through the courts until some time into their 20s, 30s or even 40s.<sup>91</sup>

It is submitted that the High Court's interpretation of 'disease or disorder' as including PTSD of delayed onset is consistent with the psychological evidence on the nature of the disorder. That evidence also shows that the harm caused by PTSD can be serious and persistent, and it provides an explanation for why disclosure of the sexual abuse, let alone legal action, may not occur until long after the event (if at all). Although the reasoning in the case centres on the rules of statutory interpretation, the implicit effect of that reasoning is to 'elevate' such injury to the status accorded 'physical' diseases and disorders (such as asbestosis) which are clearly (and rightly) considered serious and deserving of redress, despite any delay in bringing proceedings.

### III THE CURRENT POSITION IN VICTORIA: THE *IPP REPORT* AND SUBSEQUENT AMENDMENTS TO THE *LIMITATION OF ACTIONS ACT 1958* (VIC)

#### A *The Ipp 'Reforms' in Victoria*

In 2003 the Victorian Parliament passed a series of amendments to tort law which included amendments to the Act.<sup>92</sup> One of the significant changes made to the Act was to remove *most* personal injury claims from the ambit of the limitations provisions in Part I of the Act and to deal with them under a new Part IIA.<sup>93</sup> Section 5(1A), the provision that Ms Stingel successfully relied on, remains in Part I of the Act. The effect of the 'reforms' is to restrict the application of s 5(1A) to a very limited range of specified personal injuries actions such as dust and tobacco-related injuries.<sup>94</sup> Sexual assault claims (and all other

<sup>91</sup> Mathews, 'Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse', above n 89, 634–5 (citations omitted).

<sup>92</sup> The most significant amending legislation with respect to the Act was the *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003* (Vic). See especially pt 3 of the amending Act.

<sup>93</sup> See *Limitation of Actions Act 1958* (Vic) pt IIA, especially s 27B. See also ss 5(1AA), (1A), (1C), (9). The new pt IIA applies to 'a cause of action for damages that relate to the death of or personal injury to a person, regardless of whether the action for damages is founded in tort, in contract, under statute or otherwise': s 27B(1).

<sup>94</sup> Section 27B(2) of the *Limitation of Actions Act 1958* (Vic) specifies that pt IIA does not apply to the following —

- (a) actions for damages to which Part IV of the *Accident Compensation Act 1985* applies;
- (b) actions for damages in respect of an injury which entitles, or may entitle, a worker within the meaning of the *Workers Compensation Act 1958* to compensation under that Act;
- (c) actions for damages to which Part 6 or Part 10 of the *Transport Accident Act 1986* applies;
- (d) actions for damages in respect of an injury that is a dust-related condition within the meaning of the *Administration and Probate Act 1958*;

personal injury claims that are not explicitly included) are therefore now excluded from the potentially beneficial treatment offered by s 5(1A).

Relevantly, the 'reforms' apply to actions for alleged tortious acts or omissions occurring on or after 21 May 2003,<sup>95</sup> and to actions for alleged tortious acts or omissions which occurred before that date but for which proceedings were commenced on or after 1 October 2003.<sup>96</sup> Thus, actions commenced before 1 October 2003 for alleged tortious acts or omissions which occurred before 21 May 2003 are not covered by the 'reforms'.<sup>97</sup> As Ms Stingel commenced proceedings in 2002, her case fell into this latter category and thus escaped the effects of the changes. As will be discussed below, the most likely effect of the 'reforms' on Ms Stingel's case had she issued proceedings 14 months later (on or after 1 October 2003), would have been to bar her claim in 1983, 12 years after the rapes occurred.<sup>98</sup>

The 'reforms' closely followed the recommendations of the *Ipp Report*.<sup>99</sup> The Ipp Committee, which was chaired by Justice David Ipp, was commissioned by the federal government with the support of the states. The anti-plaintiff impetus behind the commissioning of the Ipp Committee was made clear in the introduction to its Terms of Reference, which read as follows:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.<sup>100</sup>

Relevantly, the *Ipp Report* recommended a general limitation period of three years for personal injury actions,<sup>101</sup> with this period commencing on the date of 'discoverability'.<sup>102</sup> The date of discoverability was defined as:

- (e) actions for damages in respect of an injury resulting from smoking or other use of tobacco products (within the meaning of the *Tobacco Act 1987*) or exposure to tobacco smoke.

These actions are still addressed in pt I of the Act and the potential benefits of s 5(1A) are still available in relation to them.

<sup>95</sup> *Limitation of Actions Act 1958* (Vic) s 27N(1).

<sup>96</sup> *Limitation of Actions Act 1958* (Vic) s 27N(2).

<sup>97</sup> *Limitation of Actions Act 1958* (Vic) s 27N(3).

<sup>98</sup> It is arguable that Ms Stingel could have brought her claim under the new 'close associate' provisions in s 27I, which would have extended the limitation period in her case until 1992. See below n 124 and accompanying text regarding the new 'close associate' provisions in s 27I and how they might have been of relevance to the facts of the case.

<sup>99</sup> *Ipp Report*, above n 4.

<sup>100</sup> *Ibid* ix.

<sup>101</sup> *Ibid* 94.

<sup>102</sup> *Ibid* 90. See also at 91, 93.

The date on which the plaintiff knew, or ought to have known, that personal injury or death:

- (a) Had occurred; and
- (b) Was attributable to negligent conduct of the defendant; and
- (c) In the case of personal injury, was sufficiently significant to warrant bringing proceedings.<sup>103</sup>

The *Ipp Report* also recommended that there be a ‘long-stop’ or ‘ultimate bar’ of 12 years from the date on which the act or omission occurred.<sup>104</sup> This would bar an action after this time, regardless of the date of discoverability. The *Ipp Report* justified the inclusion of a long-stop period on the basis that otherwise ‘the date of discoverability could extend interminably into the future’, which would be ‘potentially unfair to defendants.’<sup>105</sup>

The *Ipp Report* acknowledged that there was a need to ‘provide fairly for cases (including cases of diseases with a long latency period) in which damage is not discoverable until after the expiry of the long-stop period.’<sup>106</sup> Its view was that this should be done via a discretionary power to extend the long-stop period which would require the plaintiff to ‘seek the permission of the court’ so that the court would be able to ‘take account of the defendant’s interest in securing a fair trial of the claim’.<sup>107</sup>

On the question of how the limitation period should operate in relation to minors and incapacitated persons, the *Ipp Report* recommended that, contrary to the position taken in most states at that time,<sup>108</sup> the limitation period and the long-stop period ‘should run against minors and incapacitated persons’<sup>109</sup> except for periods when those persons are not in the custody of a parent, guardian or administrator.<sup>110</sup> For the purposes of the discoverability rule, ‘the relevant knowledge would be that of the parent, guardian or administrator’.<sup>111</sup>

The *Ipp Report* recognised that there might be cases where the parent or guardian of a minor, or someone in a close relationship with the parent or guardian,<sup>112</sup> might themselves be the defendant and recommended that in such cases, the limitation period should only commence to run when the plaintiff turns 25 years of age (the ‘close-relationship’ limitation period).<sup>113</sup> In these cases the *Ipp Report* recommended that the limitation period should be three years, regardless of

<sup>103</sup> Ibid 90.

<sup>104</sup> Ibid 92. See also at 93.

<sup>105</sup> Ibid 92.

<sup>106</sup> Ibid 93.

<sup>107</sup> Ibid.

<sup>108</sup> Cf *Limitation Act 1974* (Tas) s 26.

<sup>109</sup> *Ipp Report*, above n 4, 95 (emphasis added).

<sup>110</sup> Ibid 95–6.

<sup>111</sup> Ibid 96.

<sup>112</sup> ‘Close relationship’ is defined in the *Ipp Report* as a relationship such that (ibid):

- (a) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or
- (b) the minor might be unwilling to disclose to the parent or guardian the nature of the actions that allegedly caused the damage.

<sup>113</sup> Ibid.

discoverability, but that a court should have a discretion to extend this period to three years after the date of discoverability.<sup>114</sup>

In Victoria, the relevant recommendations of the *Ipp Report* were largely adopted via the insertion of the new Part IIA into the Act.<sup>115</sup> As noted above, most personal injury actions now fall under that Part, and s 5(1A), which remains in Part I of the Act, only applies to certain specified actions such as those relating to tobacco and dust-related injuries. For other personal injuries actions, including those based on sexual assault, s 27D provides that the limitation period is three years from the date of discoverability,<sup>116</sup> with a long-stop period of 12 years from the date of the act or omission which caused the injury. The court is also given a discretion to extend time beyond this period.<sup>117</sup>

Section 27I provides for a special limitation period for minors injured by a parent, guardian or a ‘close associate’ of such person. A ‘close associate’ is defined as

a person whose relationship with the parent or guardian is such that —

- (a) the parent or guardian might be influenced by the person not to bring an action on behalf of the victim against the person; or
- (b) the victim might be unwilling to disclose to the parent or guardian the act or omission alleged to have resulted in the death or personal injury.<sup>118</sup>

In such cases, discoverability is deemed to occur at 25 years of age or the actual date of discoverability (whichever is the later) and a long-stop period of 12 years applies from when the plaintiff turns 25 years of age.<sup>119</sup> This provision

<sup>114</sup> Ibid 96–7.

<sup>115</sup> See *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003* (Vic) pt 3. As noted above, Victoria maintained its ‘as of right’ extension of the limitation period under s 5(1A) for specific injuries such as asbestos and tobacco-related diseases, contrary to the recommendation in the *Ipp Report* that such cases should be dealt with through discretionary extension provisions once the long-stop period has expired: see *ibid* 92–4.

<sup>116</sup> The definition of ‘discoverability’ in s 27F of the Act largely follows the definition recommended by the *Ipp Report*:

27F Date cause of action is discoverable

(1) For the purposes of this Part, a cause of action is *discoverable* by a person on the first date that the person knows or ought to have known of all of the following facts —

- (a) the fact that the death or personal injury concerned has occurred;
- (b) the fact that the death or personal injury was caused by the fault of the defendant;
- (c) in the case of personal injury, the fact that the personal injury was sufficiently serious to justify the bringing of an action on the cause of action.

<sup>117</sup> Section 27K provides a discretion to the court to extend time where it is ‘just and reasonable to do so’. Section 27L lists the factors that the court shall have regard to in exercising this discretion. These include the length of and reasons for the delay, the reasonableness of the plaintiff’s conduct and any prejudice to the defendant as a result of the delay. This largely replicates s 23A, which remains in pt I of the Act. It should be noted that this provision is more generous than the discretionary extension of time provisions adopted in New South Wales and Tasmania, which more closely followed the *Ipp Report*’s recommendations in this regard. The NSW and Tasmanian provisions only permit a judicial discretion to extend beyond the long-stop period for up to three years post-discoverability: see *Limitation Act 1969* (NSW) ss 62A, 62B; *Limitation Act 1974* (Tas) s 5A(5).

<sup>118</sup> *Limitation of Actions Act 1958* (Vic) s 27I(2).

<sup>119</sup> *Limitation of Actions Act 1958* (Vic) ss 27I(1)(a), (b).

is more generous than that recommended by the *Ipp Report*, as it gives a person injured as a minor a potential ‘as of right’ limitation period up to the time that they reach 37 years of age. The *Ipp Report* recommended that, in such circumstances, there only be a three-year limitation period once a plaintiff reaches 25 years of age.<sup>120</sup>

In other cases involving minors (or others under a ‘disability’), the new provisions do not suspend the running of the limitation period during the period of disability, as was the case before the amendments. Rather, the limitation period continues to run while the minor is in the custody of the parent or guardian, and for the purposes of the discoverability doctrine, it is the parent or guardian’s state of mind that is relevant.<sup>121</sup> In such cases the limitation period is extended to six years from the date of discoverability, with a long-stop period of 12 years.<sup>122</sup>

### B *Evaluation of the Ipp ‘Reforms’ in Victoria*

The introduction of the concept of ‘discoverability’ for all personal injury actions, together with the ostensibly generous ‘close associate’ provisions and the retention of a discretionary extension of time provision, may give the initial impression that the ‘reforms’ are relatively generous to survivors. In this Part of the article, however, it will be argued that the ‘reforms’ are in fact a step backwards for survivors in Victoria, particularly because of the introduction of the long-stop period. It will also be argued that the discretionary extension of time provisions do not provide an adequate solution for survivors where the long-stop period has expired.

#### 1 *The 12-Year Long-Stop Period: A Step Backwards for Survivors in Victoria*

It was noted above that, had Ms Stingel instituted proceedings 14 months later than she did, her action would have been covered by the Ipp ‘reforms’, which would have rendered it statute-barred in 1983.<sup>123</sup> Even though the application of the new discoverability provisions in ss 27D and 27F would appear to give her until 2003 to bring an action (that is, three years after she discovered her injury in 2000), the operation of the long-stop period would have reduced this to 12 years after the relevant tortious act (that is, 12 years after the assaults in 1971). At best, it may have been possible for her to have argued that Geoff Clark’s prominent position in the Aboriginal community in Warrnambool meant that she could access the ‘close associate’ provisions in the Act, which would have given her until she was 37 years of age (until 1992) to commence proceedings.<sup>124</sup> In any case, even on the most generous reading of the Act, her action would have long been statute-barred by 2002. Apart from a possible claim to extend time via

<sup>120</sup> *Ipp Report*, above n 4, 96.

<sup>121</sup> *Limitation of Actions Act 1958* (Vic) s 27J. See also s 27E.

<sup>122</sup> *Limitation of Actions Act 1958* (Vic) s 27E.

<sup>123</sup> See above Part III(A).

<sup>124</sup> For an in-depth analysis of the ‘close associate’ provisions, see Mathews, ‘Assessing the Scope of the Post-Ipp “Close Associate” Special Limitation Period for Child Abuse Cases’, above n 90, 66–75.

the discretionary extension of time provisions (which will be dealt with below), it is clear that Ms Stingel's action would not have been allowed to proceed.

It would seem that, given the enactment of the 'reforms' in Victoria, the Victorian government was either of the view that Ms Stingel's action should not have been allowed to proceed (thus the 'reforms' ensure that in the future someone in her position does not have the opportunity to have their case heard), or it was unaware that the 'reforms' would actually make things worse for survivors of sexual assault. Each of these issues will be dealt with in turn.

Should someone in Ms Stingel's position be allowed to proceed with their case? Or is it acceptable that the expiration of the limitation period should deny them this opportunity? The *Ipp Report* made reference to the four rationales for having limitation periods as described by McHugh J in *Brisbane South Regional Health Authority v Taylor*.<sup>125</sup> These are as follows:

- (a) As time goes by relevant evidence is likely to be lost.
- (b) It is oppressive to a defendant to allow an action to be brought long after the circumstances that gave rise to it occurred.
- (c) It is desirable for people to be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them after a certain time.
- (d) The public interest requires that disputes be settled as quickly as possible.<sup>126</sup>

Annette Marfording has persuasively argued that such rationales do not and should not apply in the context of sexual assault actions.<sup>127</sup> She makes the obvious point that there is no public benefit in protecting those who commit sexual assault from the consequences of their actions, and that it cannot be seen as oppressive to such defendants to make them accountable for the abuse, regardless of the time that has expired.<sup>128</sup> She also notes that there is usually no issue in relation to evidence being lost as in such cases there is rarely evidence other than the plaintiff's word as against the defendant's.<sup>129</sup> While there may be rare cases where the specific factual circumstances make it possible that the delay may cause some prejudice to the defendant in the presentation of their evidence (for example, where an alibi is alleged), judges hearing such cases will no doubt be able to exercise their expertise to fairly assess the available evidence, taking any alleged prejudice into account. Where such cases are heard by a jury, then carefully worded directions by the presiding judge regarding delay and prejudice will help ensure that the evidence is assessed fairly and appropriately.

Finally, given the nature of the injuries suffered by survivors and the fact that such injuries may be suppressed or may only become apparent or manifest many years later, there is no relevant public interest argument that disputes should be

<sup>125</sup> (1996) 186 CLR 541, 552.

<sup>126</sup> *Ipp Report*, above n 4, 85–6 (citation omitted).

<sup>127</sup> Marfording, above n 89, 250–2.

<sup>128</sup> *Ibid* 251–2. See also *M(K) v M(H)* [1992] 3 SCR 6.

<sup>129</sup> Marfording, above n 89, 251–2.

settled quickly.<sup>130</sup> As Marfording has put it, '[i]t is thus fundamentally wrong to claim that child sexual abuse victims who do not commence litigation within the limitation period "sleep on their rights".'<sup>131</sup>

As it is clear that the rationales for having limitation periods are not persuasive when it comes to sexual assault actions, survivors should be given the opportunity to present their evidence to a court. In Ms Stingel's case, this meant that it was left to a County Court jury to assess the evidence presented at the trial. It is difficult to fault that process. If the government's goal in enacting the 'reforms' was to stop someone in Ms Stingel's position from having the opportunity to go through this process in the future, then it is submitted that that goal is, at best, misguided.

The problematic nature of the government's approach to this issue is further highlighted by the fact that while it was rightly prepared to retain the generous s 5(1A) pre-Ipp limitation provisions for tobacco and dust-related diseases (and therefore not adopt the *Ipp Report* recommendations in this regard), it was not prepared to do so for sexual assault actions. In his second reading speech for the amending Bill, Premier Steve Bracks outlined the sensible policy rationale for retaining the generous provisions for tobacco and dust-related diseases and exempting them from the 12-year long-stop period:

The government is particularly concerned to protect the interests of those people suffering a dust-related condition or tobacco-related disease which would often go undetected until after the expiration of the long-stop limitation period. Consequently, part IIA will not apply to plaintiffs with a cause of action based on a dust-related condition or tobacco-related disease. Plaintiffs in this category will remain subject to the provisions contained in sections 5, 23 and 23A of the *Limitation of Actions Act 1958*.<sup>132</sup>

Given that the harm caused by sexual assault will often go undetected until after the expiration of the long-stop period,<sup>133</sup> it is difficult to see why the government was not similarly 'concerned to protect the interests of those people suffering' from such harm. One can only speculate that this was due to a lack of understanding about the nature and seriousness of such harm, or a lack of regard for the rights and wellbeing of survivors.

Of further concern is the fact that the government arguably went even further than the recommendations of the *Ipp Report* in its curtailment of the rights of survivors. The *Ipp Report* recommended that the revised limitation periods should apply to all claims 'for negligently-caused personal injury and death', whether 'brought under contract, statute and various other causes of action, as well as under the tort of negligence.'<sup>134</sup> Significantly, the scope of the *Ipp Report* did not extend to 'liability for intentionally or recklessly caused personal injury

<sup>130</sup> Ibid.

<sup>131</sup> Ibid 252.

<sup>132</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 21 May 2003, 1785 (Steve Bracks, Premier).

<sup>133</sup> See above Part II(C)(3).

<sup>134</sup> *Ipp Report*, above n 4, 87 (emphasis added).

and death.<sup>135</sup> However, the ‘reforms’ to the Act encompassed *all* personal injuries actions, whether based on alleged negligent conduct, intentional conduct or otherwise.<sup>136</sup>

This slippage from negligently caused personal injuries towards all personal injuries is evident in Premier Steve Bracks’ second reading speech for the amending Bill:

The *Review of the Law of Negligence* indicated that it is desirable that the limitation periods relating to *all actions for personal injury* and death, irrespective of the formal causes of action on which they are based, should be the same.<sup>137</sup>

This misrepresentation of the *Ipp Report* is significant in the context of how sexual assault claims have been dealt with in the Act. While such claims will sometimes be brought in negligence against, for example, an institution that has employed the abuser, claims will often also be brought against the actual abusers themselves, as in *Stingel v Clark*. In the latter case, the action will be brought as an *intentional* tort, and while some may argue that the *Ipp Report*’s pro-defendant and pro-insurance bias is acceptable in the context of negligence-based actions (where the defendant does not intend to cause harm), such an approach is hardly supportable in the context of intentional infliction of harm on plaintiffs by defendants. The slippage from a clear focus on *negligence* in the *Ipp Report* to the inclusion of *all* personal injuries actions in the amendments to the Act points to a real flaw in the ‘reform’ process. The consequence of this slippage is that the legal rights of survivors are curtailed so as to reduce any perceived disadvantage to the abuser.

It is possible, on the other hand, that the government may not have been aware that the ‘reforms’ would have a reductive effect on the rights of survivors. The ‘reforms’ preceded the decision in *Stingel v Clark*, which means that at the time of their enactment it would have been reasonable to have held the view that sexual assault actions did not come within the more generous provisions of s 5(1A) of the Act.<sup>138</sup> If this was the view of the government, then it is reasonable to expect that it may have considered that it was enhancing the rights of survivors by extending the concept of discoverability to such actions, as well as by enacting the longer limitation period in the ‘close associate’ provisions. The idea that the ‘reforms’ actually enhanced the rights of plaintiffs in some ways is reflected in the following extract from Premier Steve Bracks’ second reading speech:

Under the *Limitation of Actions Act 1958* the concept of discoverability only applies where the injury which is the subject of a claim for personal injury damages is a disease or disorder. The concept of discoverability recognises the difficulties faced by plaintiffs who have latent diseases or disorders in bringing claims within standard limitation periods. For other types of injuries the limitation period currently runs from the date the injury is sustained. Part IIA will ex-

<sup>135</sup> Ibid 27.

<sup>136</sup> *Limitation of Actions Act 1958* (Vic) s 27B(1).

<sup>137</sup> Victoria, *Parliamentary Debates*, above n 132, 1784 (Steve Bracks, Premier) (emphasis added).

<sup>138</sup> On the assumption that trespass is not a ‘breach of duty’ and/or because PTSD is not a ‘disease or disorder’.

tend the concept of discoverability to all injuries and in this sense is *more generous* than the current limitation periods.<sup>139</sup>

If the contraction of the rights of survivors was in fact an unintended and unanticipated consequence of the ‘reforms’, then the government could remedy this unintended consequence through a simple amendment to the Act that explicitly places sexual assault actions back within the ambit of s 5(1A). This would give back to survivors in Victoria the full benefits of the High Court’s decision in *Stingel v Clark*.

## 2 *The Problem with Leaving the Extension of Time up to the Court’s Discretion: The Story of Joanne McGuinness*

It may be argued that the Act nevertheless adequately caters for survivors who fall outside the ‘as of right’ limitation period through the inclusion of discretionary extension of time provisions that permit the court to grant an extension in appropriate cases.<sup>140</sup> When the new Part IIA was inserted into the Act, the relevant discretionary extension of time provision for personal injury actions became s 27K.<sup>141</sup> This section largely replicates s 23A, which remains in Part I of the Act. Section 27K provides that a court may extend the limitation period where it is just and reasonable to do so. Section 27L lists the factors that the court shall have regard to in exercising this discretion. These include the length of and reasons for the delay, the reasonableness of the plaintiff’s conduct and any prejudice to the defendant as a result of the delay.<sup>142</sup>

At first blush, the availability of discretionary extension of time provisions may appear to provide survivors with an appropriate vehicle for redress when the limitation period has expired with respect to their claim. In practice, however, it is highly problematic for survivors to rely on the courts’ discretion in this regard. This is because, as Mathews has convincingly demonstrated, the considerable

<sup>139</sup> See Victoria, *Parliamentary Debates*, above n 132, 1784 (Steve Bracks, Premier) (emphasis added).

<sup>140</sup> This argument was used by John Lenders, Minister for Finance, in his response to the Scrutiny of Acts and Regulations Committee, which advised him of concerns about the amending Bill raised by the Women’s Legal Service and the Northern Centre against Sexual Assault. The Minister said in ‘Minister’s Response to the Scrutiny of Acts and Regulations Committee’ (Alert Digest No 5 of 2003, 25 August 2003) <[http://www.parliament.vic.gov.au/sarc/Alert\\_Digests\\_03/03alt5.htm](http://www.parliament.vic.gov.au/sarc/Alert_Digests_03/03alt5.htm)>:

the court may approve the bringing of proceedings outside the limitation period, having regard to the circumstances of the case. The court must consider the factors set out in [the] new section 27L ... The issues to which the Women’s Legal Service and the Northern Centre Against Sexual Assault refer would be included in the circumstances of the case to be considered by the court. I am therefore satisfied that the legislation does not prejudice such a claimant.

<sup>141</sup> Personal injury actions here do not include those for tobacco and dust-related diseases. Section 23A continues to be the relevant discretionary extension of time provision for these actions.

<sup>142</sup> These extension of time provisions are arguably more generous than provisions in the Northern Territory, Queensland and South Australia, where the exercise of discretion is more closely tied to the plaintiff having only recently discovered material facts regarding the injury and its cause: see *Limitation Act 1981* (NT) ss 44(1), (3)(b); *Limitation of Actions Act 1974* (Qld) ss 30–1; *Limitation of Actions Act 1936* (SA) ss 48(1), (3). The Victorian provisions are also more generous than the NSW and Tasmanian provisions, which only permit a judicial discretion to extend beyond the long-stop period for up to three years post-discoverability: see *Limitation Act 1969* (NSW) ss 62A, 62B; *Limitation Act 1974* (Tas) s 5A(5). See also *Limitation Act 1985* (ACT) s 36(5)(a) (no discretionary extension of time); *Limitation Act 2005* (WA) ss 39, 44.

time delay in the bringing of some actions for abuse, together with judicial considerations of what constitutes reasonable conduct on the part of the survivor, frequently results in decisions not to extend time.<sup>143</sup> Indeed, there are a considerable number of sexual assault cases that have not been allowed to go to trial because the court has refused to exercise its discretion to extend time.<sup>144</sup> One case that provides a good example and is of particular pertinence to the present discussion involved another civil action for sexual assault against Geoff Clark, brought against him by his first cousin, Joanne McGuinness.

The case involved an application by Ms McGuinness for an extension of time pursuant to s 23A of the Act to bring proceedings for alleged sexual assaults in 1981 and 1987 (when she was 16 and 23 years of age respectively).<sup>145</sup> The alleged assaults were reported to the police on both occasions shortly after they occurred, but the matters were not ultimately pursued at that time by the police.<sup>146</sup> In 1987, Ms McGuinness consulted solicitors about the assaults.<sup>147</sup> Although they advised her that she could pursue a civil claim for the 1987 rape, no claim was pursued by Ms McGuinness at that time. In 2000, however, after having seen Mr Clark in the media, Ms McGuinness began counselling and only then realised the serious nature of the injuries she has suffered as a result of the alleged assaults. She again reported the matter to the police, who charged Mr Clark with sexual assault.<sup>148</sup> These charges were dismissed<sup>149</sup> and, in 2002, Ms McGuinness issued civil proceedings against Mr Clark.<sup>150</sup> On 7 May 2003, the County Court granted an extension of time in relation to the 1981 incident only.<sup>151</sup> Mr Clark appealed this decision and the Victorian Court of Appeal allowed the appeal, holding that the Court below had erred in the exercise of its discretion to extend time.<sup>152</sup>

<sup>143</sup> Mathews, 'Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse', above n 89, 637–44, 659–63.

<sup>144</sup> See, eg, *Clark v McGuinness* [2005] VSCA 108 (Unreported, Warren CJ, Winneke P, Charles, Callaway and Eames JJA, 12 May 2005); *Calder v Uzelac* [2003] VSCA 175 (Unreported, Buchanan and Chernov JJA and Ashley AJA, 14 November 2003); *Hopkins v Queensland* (2005) 25 Qld Lawyer Rep 209; *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton* [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001). Cf *SB v NSW* (2004) 13 VR 527; *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (Unreported, Simpson J, 7 May 2007); *NF v Queensland* [2005] QCA 110 (Unreported, Williams and Keane JJA and Holmes J, 15 April 2005).

<sup>145</sup> *Clark v McGuinness* [2005] VSCA 108 (Unreported, Warren CJ, Winneke P, Charles, Callaway and Eames JJA, 12 May 2005) [1]–[2] (Warren CJ).

<sup>146</sup> *Ibid* [5]–[6].

<sup>147</sup> *Ibid* [6].

<sup>148</sup> *Ibid* [8].

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

<sup>150</sup> *Ibid*.

<sup>151</sup> *McGuinness v Clark* (Unreported, County Court of Victoria, Duckett J, 7 May 2003). See also *Clark v McGuinness* [2005] VSCA 108 (Unreported, Warren CJ, Winneke P, Charles, Callaway and Eames JJA, 12 May 2005) [9] (Warren CJ).

<sup>152</sup> *Clark v McGuinness* [2005] VSCA 108 (Unreported, Warren CJ, Winneke P, Charles, Callaway and Eames JJA, 12 May 2005) [51]–[53] (Warren CJ), [75]–[77] (Winneke P), [81]–[82] (Charles and Callaway JJA), [88] (Eames JA).

The Court of Appeal considered that the time that had elapsed made it ‘extremely difficult’<sup>153</sup> to prove a causal relationship between the alleged assault and the plaintiff’s injuries. Warren CJ stated:

In cases such as these, where psychiatric disturbance and alcohol and substance abuse is claimed to result from ... an event which happened many years before, it is imperative that there be conducted a thorough investigation into the potential plaintiff’s medical history. This is so that diagnosis of any condition can be sufficiently linked to any alleged incident and a causal relationship possibly found. ... [T]he respondent fail[ed] to seek medical treatment directly following the alleged attack, so that there are now no records at all of physical injuries which may or may not have been sustained ... There is also an extensive gap of some nineteen years between the alleged incident and the time at which the respondent finally received counselling. Not only does this make it extremely difficult to relate a patient’s history to the alleged attack, it does nothing to dismiss the notion that there could be other causes ...<sup>154</sup>

The Court also emphasised that difficulty in obtaining witness testimony due to the time that had elapsed created prejudice for Mr Clark:

the absence and/or unwillingness of witnesses ... constituted significant prejudice against [Mr Clark]. ... [T]he very long delay in bringing legal proceedings would prevent his ability to call alibi evidence ...<sup>155</sup>

The reasons given by the Court of Appeal for denying relief provide an example of the significant obstacles faced by survivors who rely on the exercise of the courts’ discretion to extend the time bar. It will often be the case that survivors do not receive medical treatment for the assault and that counselling is only received many years later, if at all.<sup>156</sup> Moreover, the very reason for extension of time proceedings will be that a significant amount of time has passed, which means that if a defendant alleges that alibi witnesses are now unobtainable, there is little the plaintiff can do to persuade a court that the elapsed time does not create prejudice for the defendant.

It is interesting to note that, in an abstract sense, Ms McGuinness probably had a stronger case than did Ms Stingel for a discretionary extension of time. Less time had elapsed between the alleged assault and the commencement of proceedings in her case (21 years as opposed to 31 years for Ms Stingel) and she had reported the assaults to police shortly after they had allegedly occurred (whereas Ms Stingel had not). Given that Ms McGuinness failed in her extension of time application, it is highly probable that Ms Stingel also would have failed had she relied on the Court’s discretion. It is therefore likely that it was only Ms Stingel’s ability to bring her action ‘as of right’ (based on s 5(1A)) that enabled her to put the evidence before a jury and have her case heard. Reliance on the Court’s discretion meant that Joanne McGuinness was not given this opportunity.

<sup>153</sup> Ibid [47] (Warren CJ).

<sup>154</sup> Ibid.

<sup>155</sup> Ibid [48], [50] (Warren CJ).

<sup>156</sup> See Mathews, ‘Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse’, above n 89, 634–5; Mathews, ‘Limitation Periods and Child Sexual Abuses Cases: Law, Psychology, Time and Justice’, above n 90, 233; Mathews, ‘Assessing the Scope of the Post-Ipp “Close Associate” Special Limitation Period for Child Abuse Cases’, above n 90, 78.

For those who believe that it is important for survivors to be given the opportunity to present their case, the existence of discretionary extension of time provisions in the Act does not provide an adequate solution. The fact is that when courts have this discretion, they far too often fail to exercise it in favour of the survivor.

#### IV THE POSITION IN OTHER AUSTRALIAN STATES AND TERRITORIES

Outside Victoria, the other Australian states and territories each have their own approach to limitation periods. This makes for an uneven, complex and uncertain national picture. Like Victoria, both New South Wales and Tasmania have extensively adopted the *Ipp Report's* recommendations, providing for a three-year post-discoverability limitation period for personal injury actions, coupled with a long-stop period of 12 years.<sup>157</sup> These states have also adopted similar provisions in relation to minors and 'close associates'.<sup>158</sup> In contrast to Victoria, however, these states had no discoverability provisions whatsoever prior to their implementation of the *Ipp* reforms. Prior to the reforms, survivors who brought late claims in NSW and Tasmania had to rely on discretionary extension of time provisions. Thus, the effect of the *Ipp* reforms in these states has been to improve the position of survivors who now have the benefit of both the discoverability and the 'close associate' provisions.

The Australian Capital Territory has adopted some, but not all, of the limitation period recommendations of the *Ipp Report*. The changes in the Territory arguably (and possibly inadvertently) place survivors with late claims in a much better position than existed previously. The previous six-year limitation period for personal injury actions<sup>159</sup> has been replaced by a three-year period (with no discoverability provision and no discretion to extend) or, if the personal injury consists of a *disease or disorder*, then it is three years from discoverability, with *no* long-stop period (and no discretion to extend).<sup>160</sup> Given the High Court's decision in *Stingel v Clark* — that the meaning of 'disease or disorder', at least for the purposes of the Victorian Act, can encompass PTSD of delayed onset — it is likely that survivors in the Territory can use the 'disease or disorder' provisions in the legislation to get the benefit of this discoverability provision, which has no long-stop period applicable to it.<sup>161</sup> This would place survivors in

<sup>157</sup> *Limitation Act 1969* (NSW) ss 50C, 50D; *Limitation Act 1974* (Tas) s 5(A). There are also discretionary extension of time provisions in these states: see *Limitation Act 1969* (NSW) ss 62A, 62B; *Limitation Act 1974* (Tas) s 5A(5).

<sup>158</sup> *Limitation Act 1969* (NSW) ss 50E, 62A, 62B; *Limitation Act 1974* (Tas) s 26.

<sup>159</sup> *Limitation Act 1985* (ACT) s 11, amended by *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT) s 58. This inserted a new s 16B into the Act.

<sup>160</sup> *Limitation Act 1985* (ACT) ss 16B, 36(5)(a). Cf special provisions including long-stop period of 12 years regarding children injured by a health service: s 30B. There are also special provisions relating to minors generally: s 30A.

<sup>161</sup> The 'disease or disorder' provision was added to the *Limitation Act 1985* (ACT) in 2003 (by the *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT)) before the High Court's ruling in *Stingel v Clark* that PTSD of delayed onset could constitute a 'disease or disorder' within the meaning of the Victorian Act. It is possible that if the ACT government did not anticipate the

the Territory in the same position as that enjoyed by survivors in Victoria post-*Stingel v Clark* but pre-Ipp.

Western Australia has implemented some aspects of the *Ipp Report* recommendations, but in many respects it has followed its own particular limitation provision path. Whereas previously there existed a four-year limitation period for trespass<sup>162</sup> and a six-year limitation period for other torts,<sup>163</sup> there is now a uniform three-year limitation period for personal injury actions, with time beginning to run from the time when the cause of action ‘accrues’.<sup>164</sup> A cause of action for personal injury claims ‘accrues’ when the plaintiff becomes aware that they have sustained a ‘not insignificant’ injury or at the first sign or symptom of such injury.<sup>165</sup> Thus the definition of ‘accrual’ introduces the concept of discoverability into the Western Australian Act, albeit in a slightly different form from that adopted in Victoria, NSW and Tasmania. Therefore, this legislation is potentially more generous to survivors than the legislation that it replaced, even though on its face it reduces the limitation period from four or six years to three years. Furthermore, unlike Victoria, NSW and Tasmania, there is no long-stop provision in the Western Australian Act. The reforms in Western Australia also introduced a discretionary extension of time provision, where no such general provision had existed before.<sup>166</sup>

South Australia has not adopted any *Ipp Report* recommendations of relevance to the present discussion.<sup>167</sup> Section 36(1) of the *Limitation of Actions Act 1936* (SA) provides for a three-year limitation period for personal injury actions, and time does not run against minors.<sup>168</sup> There is also a discretion to extend the limitation period.<sup>169</sup> Reforms unrelated to the *Ipp Report* recommendations introduced a new s 36(1a) in 2005.<sup>170</sup> This section provides for a separate limitation period of three years from when a person has *knowledge* of a *latent* injury. As no definition of ‘latent injury’ is provided in the legislation, it is difficult to speculate on whether this provision might successfully be used to extend the time bar for sexual assault actions.<sup>171</sup>

Queensland and the Northern Territory have not adopted any of the limitation provision recommendations of the *Ipp Report*. Both jurisdictions provide for a

outcome of *Stingel v Clark*, then the possible beneficial effects of this provision from the point of view of survivors may also have not been anticipated.

<sup>162</sup> *Limitation Act 1935* (WA) s 38(1)(b), repealed by *Limitation Legislation Amendment and Repeal Act 2005* (WA).

<sup>163</sup> *Limitation Act 1935* (WA) s 38(1)(c), repealed by *Limitation Legislation Amendment and Repeal Act 2005* (WA).

<sup>164</sup> *Limitation Act 2005* (WA) ss 14, 16. See also s 33 (‘close relationship’ provision).

<sup>165</sup> *Limitation Act 2005* (WA) s 55.

<sup>166</sup> *Limitation Act 2005* (WA) s 39.

<sup>167</sup> See *Limitation of Actions Act 1936* (SA); *Law Reform (Ipp Recommendations) Act 2004* (SA).

<sup>168</sup> *Limitation of Actions Act 1936* (SA) s 45.

<sup>169</sup> *Limitation of Actions Act 1936* (SA) s 48.

<sup>170</sup> See *Dust Diseases Act 2005* (SA) sch 1 pt 2.

<sup>171</sup> The amending legislation which introduced this provision was clearly aimed at addressing the issue of late discovery of dust-related diseases, as the title to the amending Act makes clear: see *Dust Diseases Act 2005* (SA).

three-year limitation period for personal injury actions as well as a discretion to extend.<sup>172</sup>

This brief outline of the relevant legislation in the various states and territories of Australia shows that the national limitations regime for survivors is uneven and complicated. It also shows that it is only in Victoria that the implementation of the Ipp ‘reforms’ has resulted in a significant reduction in the rights of survivors compared to the position that existed before the enactment of the ‘reforms’. In NSW, Tasmania, Western Australia and the ACT, the implementation of the ‘reforms’ has actually improved the rights of survivors by introducing discoverability provisions where none had previously existed. Moreover, the position in Western Australia, the ACT and possibly South Australia is more generous in that there is no long-stop period in these jurisdictions. In this way these jurisdictions may enjoy a similar position to that in Victoria post-*Stingel v Clark* and pre-Ipp. Queensland and the Northern Territory remain the least generous jurisdictions in terms of limitation provisions for survivors with late claims. These jurisdictions have never had relevant discoverability provisions and have not implemented the *Ipp Report* recommendations.

Thus, while Victoria does not at this point in time have the least generous limitation provisions relating to late claims for sexual assault, it has been the only jurisdiction in Australia to legislate *against* the rights of survivors. The unique effect of implementing the Ipp ‘reforms’ in that state has been to *take away* benefits conferred by the High Court’s decision in *Stingel v Clark*. Overall, however, it is accurate to say that survivors *Australia-wide* are faced with an unduly complicated and often restrictive limitations regime.

#### V THE NEED FOR CHANGE: TOWARDS THE ABOLITION OF THE TIME BAR

There is clearly a need for legislative change that creates a nationally consistent, simplified and just system which gives survivors of sexual assault a chance to argue their case before a court. One option might be to nationally implement the pre-Ipp Victorian provisions that were the subject of the High Court’s expansive interpretation in *Stingel v Clark*. But while this would be an easy option for Victoria (sexual assault actions could simply be placed back within the purview of s 5(1A)),<sup>173</sup> it would involve significant redrafting in other states and territories given the diverse nature of their limitations regimes. Another option would be to ensure that all jurisdictions enact discoverability provisions but *without* a long-stop period. This would be relatively easy for those jurisdictions that have already adopted the Ipp ‘reforms’ (the long-stop provision could simply be removed), but it would require significant redrafting in those jurisdictions that have not done so. A more straightforward and effective approach for all jurisdictions would be to follow the lead of the majority of the provinces and territories in Canada that have effectively abolished the limitation period for sexual assault

<sup>172</sup> See *Limitation of Actions Act 1974* (Qld) ss 11 (three years), 31 (discretion to extend); *Limitation Act 1981* (NT) ss 12 (three years), 44 (discretion to extend).

<sup>173</sup> It would simply involve adding ‘sexual assault’ to the list in s 27B(2) of the Act. This would then place such actions (together with dust and tobacco-related injuries) within the ambit of s 5(1A).

actions.<sup>174</sup> A good example is provided by s 3(4) of British Columbia's *Limitation Act*. It provides as follows:

The following actions are not governed by a limitation period and may be brought at any time:

...

- (k) for a cause of action based on misconduct of a sexual nature, including, without limitation, sexual assault,
  - (i) where the misconduct occurred while the person was a minor, and
  - (ii) whether or not the person's right to bring the action was at any time governed by a limitation period;
- (l) for a cause of action based on sexual assault, whether or not the person's right to bring the action was at any time governed by a limitation period.<sup>175</sup>

The effect of this provision is to *explicitly* abolish the time bar for all sexual assaults (including other forms of sexual misconduct when committed against a minor). It thus sends a clear message that such claims will not be thwarted due to the passage of time, and thus validates the experience of survivors by implicitly acknowledging that the nature of their injuries may mean that many years may pass before an action is even contemplated. It also saves survivors from having to argue through complex issues of statutory interpretation. Basically, it takes sexual assault seriously and gives survivors an opportunity to have their case heard. A provision of this kind, were it to be adopted by Australian jurisdictions, would also send a clear message that our governments take the issue of justice for survivors seriously.

<sup>174</sup> See *Limitation Act*, RSBC 1996, c 266, s 3(4)(k)(i), referring to sexual misconduct against a minor; *Limitation Act*, RSBC 1996, c 266, s 3(4)(l), referring to sexual assault generally; *Limitations Act*, SO 2002, c 24, sch B ss 10(1)–(3), which effectively abolish limitation periods for assault and sexual assault through a presumption that plaintiffs are incapable of bringing proceedings until they actually bring proceedings; *Limitations Act*, SNL 1995, c L-16.1, s 8(2), which provides that there is no limitation period for sexual misconduct where the plaintiff was in care, or dependant or a beneficiary under a fiduciary relationship; *Limitation of Actions Act*, RSNWT 1988, c L-8, s 2.1(2), which provides that there is no limitation period where there is an intimate relationship or relationship of trust or dependence; *Limitation of Actions Act*, RSNWT 1988, c L-8, ss 2.1(3)–(4), which effectively abolish the limitation period for such actions generally through a presumption that the plaintiff is incapable of bringing proceedings until they actually bring proceedings; *Limitation of Actions Act*, RSNS 1989, c 258, s 2(5), which is a generous provision based on discoverability for sexual abuse; *Limitations Act*, SS 2004, c L-16.1, s 16(1)(a), which provides that there is no time bar for misconduct of a sexual nature; *Limitations Act*, SS 2004, c L-16.1, s 16(1)(b), which provides that there is no time bar for any assaults if plaintiff was in an intimate or dependant relationship; *Limitation of Actions Act*, RSY 2002, c 139, s 2(3)(a), which provides that there is no time bar for any sexual misconduct against minors; *Limitation of Actions Act*, RSY 2002, c 139, s 2(3)(b), which provides that there is no time bar for any sexual assault; *Nunavut Act*, SC 1993, c 28, s 29, which adopts all the laws of the Northwest Territories; *Limitation of Actions Act*, RSM 1987, c L150, s 2.1(2)(a), which relates to assaults of a 'sexual nature'; *Limitation of Actions Act*, RSM 1987, c L150, s 2.1(2)(b), which relates to any assaults by someone in an intimate or dependant relationship. For other academic proponents of the view that limitation periods for such actions should be abolished altogether, see Gary Hood, 'The Statute of Limitations Barrier in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution' (1994) 2 *University of Illinois Law Review* 417, 441; Marfording, above n 89, 252–3.

<sup>175</sup> *Limitation Act*, RSBC 1996, c 266, ss 3(4)(k)(i), (l).

## VI CONCLUSION

Ms Stingel's long and tortuous journey towards legal justice took years of battling through the courts before she could finally have her case heard. It was only after having endured a complex and legalistic battle about the meaning of statutory language that she was able to put her evidence before a jury, and win. As if this was not sufficiently poor treatment meted out to a survivor by our 'justice' system, this article has shown that the Victorian government has now placed further time bar hurdles in the way of survivors through its enactment of the Ipp 'reforms' which, through the imposition of a long-stop limitation period, have taken away some of the benefits conferred by *Stingel v Clark*.

This article has also argued that the overall national limitations regime in Australia is unduly complex and restrictive for survivors, and therefore in need of reform. Given the nature and seriousness of the harm suffered by survivors, it has been argued that it is simply unjust (and misinformed) to make them jump over time bar hurdles or to place them at the mercy of a court's discretion before they can have their case heard. While a simple legislative amendment to the Victorian Act would reinstate the gains made in that jurisdiction by the decision in *Stingel v Clark*, a more appropriate long-term solution for all Australian legislatures would be to abolish the limitation period altogether for sexual assault claims. This would send a clear message that the state recognises that the harm resulting from sexual assault is serious, long-term and deserving of redress.