THE UNIVERSITY OF MELBOURNE

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Victorian Law Reform Commission

Dear Commission,

I am an academic at Melbourne Law School, specialising in all aspects of criminal justice. I am also the author of *Modern Criminal Law of Australia* (2nd ed, Cambridge, 2017), which focusses on statutory criminal law.

Introduction

> *What did he actually do?* He performed oral sex on me with his tongue.
>
> *Can you elaborate on that? Where did his tongue go?* On my vagina.
>
> *You say on your vagina?* In my vagina, yeah.
>
> *Do you say there was actual penetration of your vagina?* Yes.[1]

This submission argues that the latter questions put to an alleged rape victim should never have to be asked of anyone in Victorian sexual offence investigations, prosecutions or trials. One of the reasons those questions must currently be asked in some Victorian sexual offence matters is because of the way Victoria's parliament defines some sexual offences.

My submission is a partial answer to question 1 of Issues Paper C: 'Is there a need to change any of Victoria's sexual offences, or their application? If so, what changes?' I'll describe the way the element of sexual penetration is defined in Victorian law; explain the confusing, arbitrary and intrusive discussions this element can prompt; detail the particular sexual offences where this problem arises; and outline the pros and cons of some possible solutions to this problem.

The 'sexual penetration' element

Section 35A(1) of the *Crimes Act 1958* states:

> A person (A) ***sexually penetrates*** another person (B) if—
>
> (a) A introduces (to any extent) a part of A's body or an object into B's vagina; or
>
> (b) A introduces (to any extent) a part of A's body or an object into B's anus; or
>
> (c) A introduces (to any extent) their penis into B's mouth…

Provisions like this have been used to define Victorian sexual offences for forty years.[2] They reflect a rejection of outdated and poor terminology (e.g. *carnal knowledge*) and a recognition that forms of sexual conduct beyond penis-vagina sex can be wrong or damaging (when committed without consent, or with children, family members, people with cognitive impairments or mental illness, or animals.)

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[1] *Platt v The Queen* [2020] VSCA 130, [11].

[2] *Crimes (Sexual Offences) Act 1980*, s. 4(d).

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[redacted]

However, in achieving this goal, provisions like s35A create a different problem: they impose a difficult and arbitrary defining line between two tiers of sexual offences (and, in some instances, between criminal and non-criminal behaviour), one that may result in confusing, arbitrary and intrusive discussions between participants in the criminal justice system, including lay participants and especially alleged sexual offence victims.

The most important word in section 35A is *into*. Its presence means that merely touching someone's *vagina* or *anus* (or, with a *penis*, their *mouth*) isn't *sexual penetration*: instead, *a part of [a] body or an object* must go *into* someone's body.[3] This means that investigations, prosecutions and trials of some sexual offences must, in part, be an investigation, prosecution and trial or whether something went *into* someone's (usually the alleged victim's) body. Typically, police must ask an alleged sexual offence victim whether a particular thing went *into* their body; prosecutors will likewise have to question the alleged victim to same effect (and defence counsel may cross-examine on that point); and jurors will be directed to determine whether the evidence establishes beyond reasonable doubt that fact beyond reasonable doubt.

The other significant words in section 35A are *vagina*, *anus* and *mouth*, as those are the specific parts of the body that something – *a part of [a] body or an object*, i.e. anything at all – must be introduced *into*. *Anus* and *mouth* aren't defined, but – since 1991[4] – *vagina* has been defined to include *external genitalia,* which, in turn, isn't defined. In a 2017 case in New South Wales (whose law likewise requires proof that something *penetrated… external genitalia*), a trial judge directed the jury:[5]

> As a matter of law, the actual legal test is the female genitalia. Now, you have got women on your jury. I am not about to give you an anatomy lesson, except to say that, obviously, the female genitalia involves

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[3] Section 35A also extends the concept of sexual penetration in three ways, to cover:

- a person introducing anything into their own vagina or anus
- penetration of or by an animal, and
- continuations of all of these acts (defined as 'continu[ing[to *keep it there*.')

For these extensions, the investigators must determine, the prosecution must call evidence and the jury must find beyond reasonable doubt that something went *into* or was *kept* in a person's (or animal's) *vagina*, *anus* or (in the case of a *penis*) *mouth*.

[4] *Crimes (Rape) Act 1991*, s. 3.

[5] *Johnson v R* [2017] NSWCCA 278, [31]. The judge's summing up of the facts included the following discussion:

> I am just going to give you a brief argument from both sides in relation to why the Crown says you would so be satisfied of there being penetration, despite the fact she specifically says "not inside my vagina but on the outside" and why the accused says you would not be satisfied. So the Crown relies on this rubbing that takes place for about two, three, four minutes where his is rubbing between her vagina – and it is matter for you what you think she meant by "between my vagina" because she was not really asked any further questions about what she meant by "between my vagina". The Crown says, well, if he is rubbing for two, three, four minutes and he is rubbing to the extent that he ends up ejaculating between her legs, how did he not penetrate to any extent, even for a second, the female genitalia? How did he manage to rub it and not just even penetrate to any extent – any extent the female genitalia? How did that occur? The Crown essentially says the only rational inference that you can draw if he was doing that act is that it must have penetrated her female genitalia to some extent.
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> Mr Lowe on behalf of the accused say, well look "I mean, just reading her evidence literally" she says "not inside but on the outside. He was just rubbing his penis on my vagina". Now, people probably do not tend to use the word female genitalia. That is a legal term in some respects. Probably a medical term as well in many respects, but it is not for the accused to inquire any more into this. The accused simply just says to you through his counsel, well, look, this is the evidence. There is not sufficient evidence for you to be satisfied that her female genitalia was penetrated.

> the outer aspects of the female vaginal cavity. So, it is not whether he penetrated, ultimately, the vagina itself, it is whether he penetrated the female genitalia.

The NSW Court of Criminal Appeal rejected an appeal ground that the jurors 'needed to be a direction "directly going to anatomy" and "describing" the "area"', including giving a specific reference to labia majora and 'add[ing] a diagram':[6]

> There must be due recognition of the ordinary wisdom, knowledge, and life experience of the members of the public who make themselves available to serve as jurors. That is, after all, one of the asserted benefits of the jury system. There is little point in the criminal justice system claiming to value the contribution of members of the public, whilst at the same time devaluing the intelligence of jurors to the extent where trial judges are required to extensively explain, and even draw diagrams, to aid in the understanding of matters within ordinary knowledge.[7]

By contrast, in 2005, 14 years after the present definition of *vagina* was first introduced in Victoria, the Court of Appeal ruled: [8]

> The phrase "external genitalia" is not in ordinary usage. It could not be assumed that every member of the jury would readily understand what the phrase connoted. In our view, it was essential – given the contest over what had actually occurred – that the Judge be quite explicit in explaining to the jury the distinction –
>
> > "between penetration of the vulva, as denoted by the labia majora, or outer lips, and penetration of the vagina itself."
>
> This distinction was drawn as long ago as 1844, in a direction by Parke B which has been cited ever since in textbooks and judgments dealing with the physical requirements of rape. In the present case, the prosecution had called a medical practitioner who had given evidence about the anatomy of the female genitalia. That evidence ought to have been referred to.

More recently, the same Court specified that 'penetration to any extent beyond the outer lips of the complainant's vagina — the labia majora —… would establish the element of penetration'.[9]

Finally, s. 35A includes the parenthetical *(to any extent)* alongside the word *introduces*. These are not limiting words, but rather extend the word *into* to include 'any penetration… as defined, no matter how slight, and no matter how fleeting'.[10] The parenthetical removes the need for questions about the extent and length of time of any penetration. However, as will be discussed below, it also makes the distinction between slight penetration and no penetration – and precise discussions of that difference – critical in some sexual offences matters.

Section 35A does not specify a corresponding *mens rea* or fault element. Twenty-five years after the section was first enacted, Victoria's Director of Public Prosecutions disputed whether or not the penetration element had any fault element; however, the Court of Appeals, citing 'fundamental

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[6] Ibid [109].

[7] In my view, this is a silly stance. Judges (and prosecutors) should be entirely willing to provide adult jurors with anatomical information and diagrams in all cases where anatomy matters, whether or not those matters are part of 'ordinary wisdom, knowledge and life experience'. The trial judge's seeming idea of burdening female jurors with an education role is obviously inappropriate. It is possible that the NSW Court of Criminal Appeal took this stance on appeal because of their views on the merits of this particular accused's appeal, or perhaps their own squeamishness about discussions of anatomy; neither should govern future trials, at least in Victoria.

[8] *R v A J S* [2005] VSCA 288, [59].

[9] *Harrison (a pseudonym) v The Queen* [2020] VSCA 157, [5].

[10] *Anderson v R* [2010] VSCA 108, [77].

principles', ruled that 'the prosecution must establish that the act of penetration was a voluntary and intentional (or willed) act on the part of the accused'.[11] Very recently, the Victorian Court of Appeal seemingly accepted that the intended type of penetration (e.g. vaginal penetration) does not have to be the same as the actual type of penetration (e.g. anal penetration); however, where non-consent and a corresponding fault element must be proved (e.g. to prove rape), the relevant belief about non-consent must be about the intended, not actual, sexual act .[12]

Discussions of sexual penetration

The purpose of my submission is to draw attention to a negative consequence of the definition of sexual penetration for some Victorian sexual offence trials: requiring participants (including lay participants and especially the alleged victim) to engage in confusing, arbitrary and intrusive discussions of sexual acts and anatomy.

Confusion

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[11] *R v A J S* [2005] VSCA 288, [19]-[25].

[12] *Star v The Queen* [2020] VSCA 331. During a police interview, one accused, while maintaining that he and another had had consensual vaginal and oral sex with the complainant, said:

> Because I was just — positioning wasn't the greatest so I was struggling to just keep it in anyway ... and there was just one stage where I've come out and then sort of, like, as I was, I guess, trying to put it back in, I just sort of felt something just sort of push and she said, 'ow, that hurt' and I was like 'sorry'.

Later in the interview, the police officer (asking the accused about an earlier incident and seemingly confuse about the timing) asked whether that was when the accused penetrated her anus and the accused answered 'possibly, yeah.' This seemingly minor aspect of the allegations ultimately loomed loomed large, because the jury acquitted the accused of all charges, apart from a single count of rape, particularised as the accused penetrating the complainant's anus with his penis. It is possible that the jury had reasoned that the complainant had consented to vaginal sex, that the accused was aware that the complainant didn't consent to anal sex and that the accused's penis had (presumably slightly) penetrated the complainant's anus. However, the Court of Appeal held that this scenario was not tenable on the evidence:

> Plainly enough, the cogency of that explanation depended on the jury's having concluded that S specifically intended an act of anal penetration. Otherwise, his awareness of her objection to that particular form of penetration would have been irrelevant. We concluded that the path of reasoning propounded by the Crown was beyond the scope of reasonable possibility. The fundamental problem was that it postulated the jury's having come to a unanimous conclusion that S was deliberately, and specifically, intending an act of anal penetration rather than vaginal penetration.

This is a complex case, and precisely went wrong in the jury room is a matter the Court of Appeal did not have to determine. However, it may be that the jury were confused by the trial judge's direction on intention to penetrate:

> direct you that if you are satisfied that he intended to sexually penetrate [K] at that time then it does not matter that the penetration occurred to a different part of her body. It is not necessary for the element to be made out for the prosecution to prove an intention to sexually penetrate a particular part of the body. The type or place of where the penetration occurred is a detail, it is not part of the element that the prosecution must prove. So proof of this element that [S] intentionally sexually penetrated only requires proof to intentionally sexually penetrate, not proof of an intention to sexually penetrate the vagina, anus or mouth as the case may be.

While it is likely right that the corresponding fault element for the element of penetration does not require an intention to penetrate in a specific way, the further fault element corresponding to the further element (in rape cases) of non-consent is clearly act-specific. If the complainant consented to a specific type of penetration (or the accused reasonably believed that) and that was the only type of penetration the accused intended, then the accused could not be convicted of rape, even if a different type of penetration actually occurred.

Sexual acts are often hard to talk about precisely for many reasons, including embarrassment and the complexities of language, reasons that are heightened in the context of alleged sexual offences, because the discussions are often with strangers (such as police, lawyers, judges or jurors) and often about events affected by trauma, time and surrounding circumstances like tiredness or intoxication. Some acts, such as some instances of penis-vagina sex, finger-vagina sex, penis-anus sex, finger-anus sex or penis-mouth sex can nevertheless be described in simple terms that fit well with the language of s. 35A (*penetrates*, *introduces*, *into*) and common lay synonyms such as put, place, push, insert or thrust. But this isn't true for all sexual acts, which can be hard to describe in simple terminology.

Discussions of sexual acts that involve slight penetration can create particular confusion, because lay people may not think of them or describe them as involving penetration at all. A recent NSW case describes a complainant who had told a witness that a stranger '"tried to penetrate me but he couldn't and gave that a statement to police that the man tried to put his penis into my vagina but he couldn't" and "The tip of his penis touched the outside of my vagina", but, "He tried to force it inside my vagina but it couldn't go in. My body just closed up"'. In a hearing after the accused was ruled unfit to be tried, the trial judge held:[13]

> I do not regard her evidence that the tip of his penis touched the outside of her vagina as evidence of penetration, even of the external genitalia, without some further evidence, detail or explanation. Accordingly, Ms Martin's initial statement gives an account of attempted sexual intercourse, and asserts that there was no penetration. It may be that in the period after the incident when she asserted that there was no penetration, Ms Martin has adopted a meaning of "penetration" different from the minimal, fleeting penetration of the external genitalia sufficient to constitute penetration for the purpose of the offence of sexual intercourse without consent. But there was no evidence of this. Her account in the witness box of penetration is not supported by any complaint at or about the time of the incident, and the content of her complaints in several instances tends to disprove penetration.

Accordingly, the trial judge acquitted the accused of the NSW offence of sexual assault (largely equivalent to Victoria's rape offence.)

The problem is starker for sexual acts involving contact between soft body parts. Not only do words like *penetrates* or *into* risk confusion in that context, but resolving that confusing requires much more precise discussions of sexual acts and anatomy. That in turn risks more confusion or imprecision because of the array of typically imprecise terms for both those actions (e.g. licking, rubbing, touching) and precise anatomy (e.g. vulvas, inner or outer labia, clitorises, sphincters, foreskins.) These discussions may also be affected by difficulties in fine-tuned perception of acts and body parts (because witnesses may be recounting from memory of touch, rather than sight) and embarrassment (because of the particular acts described or the explicitness of the discussion.) An example is detailed in a recent judgment from Queensland (which, for non-penile intercourse, requires – much like Victoria – that the accused *penetrates the vulva, vagina or anus of the person to any extent*.) The judgment describes the police's interview with the complainant and her confusion about it as follows:[14]

> [I]n her statement to police she said "my legs were spread quite widely and bent and [the appellant's] head was between my legs and he was going down on me so mouth on the vagina". When asked by police what he was doing, the complainant replied "licking". The police officer asked "did he penetrate your vagina at the time?", to which she replied "I don't think so". She had agreed, when the police officer said

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[13] *R v WM (No 2)* [2019] NSWDC 861, [68]-[70].
[14] *R v Silcock* [2020] QCA 118, [91].

> "just licking the outside area". The complainant said her understanding was that penetration of the vagina actually meant putting the tongue in the vaginal fold. She did not, at that stage, realise that licking the clitoris was classed as penetration.

The imprecision also affected the judge's direction to the jury. According to the judgment, the judge:[15]

> instructed the jury on Count 2 that the complainant's evidence that the appellant was licking her clitoris "would involve penetration of the vulva or the vagina, if you accept that that happened – that is what she says happened". This became the subject of a redirection when the judge told the jury that the defence accepted that the appellant was giving her oral sex and that if the jury accepted her evidence that he was licking her on the clitoris then the jury had to decide whether that involved penetration of the complainant's vagina or vulva. The jury was reminded of certain parts of the evidence about what the complainant said to police and her evidence about licking her clitoris and penetration.

The appeal judgment elaborated that: 'a distinction between the "outside" and the clitoris subsequently assumed significance in the course of the trial, as the trial judge initially directed the jury that licking the clitoris would involve some penetration of the vulva or the vagina'.[16]

It later emerged that the defence team, both lay and professional, were also confused. The appeal judges outlined fresh evidence introduced at the appeal as follow:[17]

> The solicitor's evidence in this Court, which commands acceptance, is that by the time the cross-examination of the complainant commenced on 17 October 2019, the appellant's instructions were that he agreed the defence case at his trial on Count 2 should be presented on the basis that "the appellant accepted the allegation that he licked the complainant's vagina, to the extent that he licked the outside of her vulva, but not accepting any penetration". In their evidence to this Court, the appellant and the appellant's father effectively accepted that instructions of this kind were given. The fact that such instructions were given is confirmed in the solicitor's letter to the appellant dated 9 December 2019 which recorded that counsel reminded the appellant that the case put on his instructions to the complainant in respect of Count 2 was "oral stimulation of her vulva – something like that did occur, with her consent, and without penetration."…
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> [T]o the best of his memory, in pre-trial conferences trial counsel said that the jury was likely to believe on Count 2 that something did happen and that the defence strategy would be to say "There was licking on the outside of the clitoris not on the inside". If there was reference in those pre-trial conferences to the "outside", it probably was based upon the complainant's statement to police in which she accepted that he was "just licking the outside area". The appellant's recollection that trial counsel referred to "the outside of the clitoris" may be inaccurate. It is more likely, and consistent with the solicitor's contemporaneous notes, that the instructions were to accept that there was oral stimulation on the outside of her vulva and without penetration. The trial solicitor's evidence in this Court, which was considered and impressive, was that, upon reflection, he could not say that the appellant had given instructions about accepting that he made contact with the clitoris….
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> The solicitor's recollection was that there was some discussion with the appellant about what would be required to effect penetration for the purpose of the charge of rape, the subject of the oral sex component. The case strategy discussed with the appellant was to admit there had been oral sexual contact but to assert that did not involve penetration. That would mean the charge of rape would not be made out. When counsel put that the clitoris was licked, it crystallised an acceptance of penetration. The solicitor could not say the appellant had given instructions accepting that he made contact with the clitoris. There was no basis for the putting to the complainant that the appellant had licked her clitoris

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[15] Ibid [23].
[16] Ibid [20].
[17] Ibid [12], [21], [158]-[159].

> other than the instructional basis of accepting the licking of the outside without any penetration. When the issue of penetration arose in the course of the summing up, there was some discussion about anatomy. He undertook some internet searches about the mechanics of stimulating the clitoris, but could not recall any discussions about whether or not the matter had been put on the basis of the appellant's instructions.

The judgment also described the trial barrister's evidence as follows: 'Counsel accepted that when he specifically put to the complainant that the appellant had licked the clitoris, he did not give consideration to the consequence that that would amount to penetration.'[18] The court noted that, had counsel recognised and informed the court of the lack of instructions and its significance, the prosecution could have been told not to pursue the issue or the jury could have been discharged.

The Queensland case demonstrates that this confusion can have stark consequences. First, the confusion may have affected the complainant's mental health; she testified that she 'was absolutely hysterical' at the police interview and that 'memories had come flooding back of what had happened' ahead of the trial examination. Second, the appeal court noted that the defence could have (although didn't) challenge the complainant's credibility because she had allegedly changed her account. Third, the complainant's initial confusion instead seemingly prompted confused legal advice to the accused about what to admit and not admit (something that could potentially have resulted in an inappropriate plea.) Finally, the confusion also led to a misunderstanding of the accused's instructions to his lawyers about questions to put to the complainant:[19]

> The case conducted by counsel at trial was not merely that the appellant accepted the complainant's account of an act of oral sex on the night in question. Specific allegations were put to the complainant as part of the defence case, namely, that the appellant had licked her clitoris, that the appellant had not used his fingers to open her vagina and that she had pressed the appellant's head and he had stopped performing the act of oral sex. Nothing in the appellant's instructions or acceptance of the trial strategy permitted counsel to put such specific allegations. They were not based on instructions. They were, in fact, inconsistent with the instructions that had been given by the appellant, namely, that the acceptance of an act of oral sex did not involve acceptance of there having been penetration.

The final confusion had an especially extreme legal consequence: the appeal court ruled that the trial had miscarried and ordered a retrial on all counts, including ones where sexual penetration was not in dispute.

These particular consequences will often be manageable by clearer interviews, instructions and directions, although none of these is foolproof. But I fear that the broader problem – the difficulty of people relating discussions of cunnilingus and other slightly penetrative acts to an offence's sexual penetration element – cannot be fully managed even through the best of practices. Notably, the Queensland Court of Appeal did not resolve what appears to be a significant legal ambiguity: what exactly is (and isn't) the 'inside' of someone's *vulva*? As noted earlier, Victoria's Court of Appeal has held that sexual penetration of *external genitalia* requires 'penetration to any extent beyond the outer lips of the complainant's vagina'.[20] But this formulation does not resolve whether touching someone's clitoris or labia majora (or particular parts of them) amounts to *introduc[ing]* something *into* their *external genitalia*.[21] Resolving that ambiguity may well require a difficult exercise of

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[18] Ibid [173].

[19] Ibid [203]-[204].

[20] *Harrison (a pseudonym) v The Queen* [2020] VSCA 157, [5].

[21] But see *DPP v Woods* [2018] VCC 2131, [42]: 'In my opinion the concept of mutual masturbation is well understood in the Australian adult community. The Oxford English Dictionary defines 'mutual masturbation' as being the 'stimulation

statutory interpretation by a senior court, and it is also possible that the High Court may overrule the current Victorian formulation; there is no guarantee when or whether a settled judicial clarification will occur.

Even if the legal ambiguity was resolved, intractable factual ambiguities would likely remain. First, there is considerable variation in genitals (including surgically constructed or modified genitals), and in the location, size and shape of parts of genitals (including clitorises and labia majora), that may complicate a 'one size fits all' legal solution. Second, any more precise legal definition risks a deviation from lay terminology or understandings of both genitals and penetration, and in particular there may be variations in how different people (including different genders, ages, cultures, etc) describe these things. Finally, some participants in acts involving slight penetration will inevitably be unaware of the precise location of any contact, due to the ordinary limitations of perception and memory of some sexual acts, limitations that will be exacerbated during an alleged sexual offence, and a subsequent criminal investigation and prosecution. Similar legal and factual ambiguities about what is inside and outside a person's body may also apply to some forms of contact with a person's *mouth* or *anus*.

Arbitrariness

In late 2019, the High Court of Australia rejected an argument that the word *clitoris* in NSW's female genital mutilation legislation does not include a clitoris's hood, noting that mutilating practices 'are not generally carried out by surgeons or with any precision' and that the legislature did not intend 'any narrow or technical meaning be applied so as to exclude anatomical structures that are closely interrelated with the labia majora, labia minora or clitoris.'[22] While the text and the purpose of female genital mutilation laws are quite different to sexual offence laws, the Court's reasoning about both offenders' lack of precision and the need to avoid 'narrow or technical meaning' when it comes to related 'anatomical structures' is applicable, at least to some extent, to sexual offences. Sexual acts are usually lay, imprecise acts, and their effects are not demarcated precisely by anatomical distinctions.

As set out earlier, the present definition of sexual penetration was introduced to override earlier arbitrary distinctions between penis-vagina sex and other forms of penetrative sex, and between different degrees of penetration. However, in its place, the definition used since 1980 distinguishes between touching someone's genitals, anus or mouth and 'slight and fleeting' introduction of something *into* those parts of the body, while the definition of *vagina* used since 1991 distinguishes between touching someone's vulva and touching 'beyond' their labia majora. In effect, the definition draws a distinction between touching different parts of a person's genitals, anus or mouth, with some contact between some parts classified as sexual penetration and contact between others counting as sexual touching. The question is whether these distinctions equate to meaningful differences in terms of wrongdoing or harm to victims.

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of the genitals of one person by another in order to produce an orgasm without sexual intercourse'. The Macquarie Dictionary provides a similar definition. In a woman, this usually involves manual stimulation of the clitoris, which, in turn, would at least require penetration of the external genitalia and therefore the 'vagina' as defined'. (The latter comment seems to be an error, as *vagina* does not seem to have been defined in that way until 1991, while the charged events occurred in 1984/5. Conversely, the judge's treatment of penetration as a sentencing aggravation appears to be a breach of the rule in *De Simoni*'s case.

[22] *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35, [67].

This question was recently addressed in Canada. As will be discussed below, that country does not define sexual offences in terms of sexual penetration and sexual touching, instead using a single offence to describe the conduct that Victoria separates into two offences, rape (and other offences of sexual penetration) and sexual assault (and other offences of sexual touching.) Earlier this year, the Supreme Court of Canada deprecated sentencing practices that sharply distinguish between penetrative and non-penetrative acts:[23]

> [W]e would strongly caution provincial appellate courts about the dangers of defining a sentencing range based on penetration or the specific type of sexual activity at issue. In particular, courts must be careful to avoid the following four errors.
>
> First, defining a sentencing range based on a specific type of sexual activity risks resurrecting at sentencing a distinction that Parliament has abolished in substantive criminal law. Specifically, attributing intrinsic significance to the occurrence or non-occurrence of penetrative or other sexual acts based on traditional notions of sexual propriety is inconsistent with Parliament's emphasis on sexual integrity in the reform of the sexual offences scheme…

(This first factor is not directly applicable in Victoria, which, unlike Canada, does continue to distinguish between penetrative and non-penetrative acts in eleven of its sexual offences; however, the same point can be made about the the statutory 'objects' of Victoria's sexual offences laws introduced in 2016, which don't draw such distinctions, instead referring only to *sexual behaviour*, *sexual activity* and *sexual exploitation.*[24])

> Second, courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim. In assessing the significance of the degree of physical interference as a factor, as Christine Boyle writes, "judges should think in terms of what is most threatening and damaging to victims" (p. 180). Judges can legitimately consider the greater risk of harm that may flow from specific physical acts such as penetration. However, as McLachlin J. explained in McDonnell, an excessive focus on the physical act can lead courts to underemphasize the emotional and psychological harm to the victim that all forms of sexual violence can cause (paras. 111-15). Sexual violence that does not involve penetration is still "extremely serious" and can have a devastating effect on the victim (Stuckless (1998), at p. 117). This Court has recognized that "any sexual offence is serious" (McDonnell, at para. 29), and has held that "even mild non-consensual touching of a sexual nature can have profound implications for the complainant" (R. v. J.A., 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 63, per McLachlin C.J., and para. 121, per Fish J.). The modern understanding of sexual offences requires greater emphasis on these forms of psychological and emotional harm, rather than only on bodily integrity (R. v. Jarvis, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 127, per Rowe J.).
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> The decision of the Ontario Court of Appeal in Stuckless (2019) provides an example of judicial recognition that harm to the victim is not dependent on the type of physical activity involved. In that case, the offender digitally penetrated certain children, sexually touched others, and subjected others to fellatio. The sentencing judge determined the appropriate sentence for each offence largely by reference to the type of physical act involved. The majority found that the sentencing judge had erred in doing so because the sexual violence was "no less harmful to the victims" simply because it involved sexual touching or fellatio rather than penetration (paras. 68-69, per Huscroft J.A., and paras. 124-25, per Pepall J.A.). As Pepall J.A. wrote, "if sentencing courts are to focus on the 'harm caused to the child by the offender's conduct' . . ., distinctions among these forms of sexual abuse may be unhelpful and are not determinative of the seriousness of the offence" (para. 124, quoting Woodward, at para. 76).

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[23] *R. v. Friesen*, 2020 SCC 9, [140]-[146].

[24] *Crimes Act 1958* (Vic), s. 37A.

> Specifically, we would strongly caution courts against downgrading the wrongfulness of the offence or the harm to the victim where the sexually violent conduct does not involve penetration, fellatio, or cunnilingus, but instead touching or masturbation. There is no basis to assume, as some courts appear to have done, that sexual touching without penetration can be [translation] "relatively benign" (see R. v. Caron Barrette, 2018 QCCA 516, 46 C.R. (7th) 400, at paras. 93-94). Some decisions also appear to justify a lower sentence by labeling the conduct as merely sexual touching without any analysis of the harm to the victim (see Caron Barrette, at paras. 93-94; Hood, at para. 150; R. v. Iron, 2005 SKCA 84, 269 Sask.R. 51, at para. 12). Implicit in these decisions is the belief that conduct that is unfortunately referred to as "fondling" or [translation] "caressing" is inherently less harmful than other forms of sexual violence (see Hood, at para. 150; Caron Barrette, at para. 93). This is a myth that must be rejected (Benedet, at pp. 299 and 314; Wright, at p. 57). Simply stating that the offence involved sexual touching rather than penetration does not provide any meaningful insight into the harm that the child suffered from the sexual violence.
>
> Third, we would emphasize that courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced. Of course, increases in the degree of physical interference increase the wrongfulness of the sexual violence. However, sexual violence against children remains inherently wrongful regardless of the degree of physical interference. Specifically, courts must recognize the violence and exploitation in any physical interference of a sexual nature with a child, regardless of whether penetration was involved (see Wright, at p. 150).
>
> Fourth, it is an error to understand the degree of physical interference factor in terms of a type of hierarchy of physical acts. The type of physical act can be a relevant factor to determine the degree of physical interference. However, courts have at times spoken of the degree of physical interference as a type of ladder of physical acts with touching and masturbation at the least wrongful end of the scale, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful end of the scale (see R. v. R.W.V., 2012 BCCA 290, 323 B.C.A.C. 285, at paras. 19 and 33). This is an error — there is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference. As the Ontario Court of Appeal recognized in Stuckless (2019), physical acts such as digital penetration and fellatio can be just as serious a violation of the victim's bodily integrity as penile penetration (paras. 68-69 and 124-25). Similarly, it is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus, or penetration. For instance, depending on the circumstances of the case, touching that is both extensive and intrusive can be equally or even more physically intrusive than an act of fellatio, cunnilingus, or penetration.

In short, the Supreme Court of Canada argues that the determinative issue is the extent or intrusiveness of any sexual contact (in the particular circumstances of the case), rather than the line between penetration and touching.

My point is not to argue that questions about types of physical intrusion, including penetration, are always, or even often, arbitrary. That clearly isn't true, as the Supreme Court of Canada itself observes:[25]

> We acknowledge that the degree of physical interference is a recognized aggravating factor. This factor reflects the degree of violation of the victim's bodily integrity. It also reflects the sexual nature of the touching and its violation of the victim's sexual integrity. The degree of physical interference also takes account of how specific types of physical acts may increase the risk of harm. For instance, penile penetration, particularly when unprotected, can be an aggravating factor because it can create a risk of disease and pregnancy (see Hess, at p. 948; R. v. Deck, 2006 ABCA 92, 384 A.R. 106, at para. 20; T. (K.), at para. 18). Penetration, whether penile, digital, or with an object, may also cause physical pain and physical injuries to the victim (see Stuckless (2019), at para. 125, per Pepall J.A.; T. (K.), at paras. 10-11). Children's bodies are especially vulnerable to physical injuries from penetrative sexual violence

[25] *R. v. Friesen*, 2020 SCC 9, [138]-[139].

Rather, it is to question whether s35A's distinction between touching and 'slight and fleeting' penetration – a distinction that prompts confusing discussions it requires participants in sexual offence investigations, prosecutions and trials to engage in – is, or often is, arbitrary. Specifically: is touching or licking someone's labia majora meaningfully different to touching their labia minora? Is touching or licking one side of someone's clitoris meaningfully different to touching or licking the other side? Is touching or licking the a person's anal verge different to touching or licking their anal canal? Is kissing or licking the side of someone's penis different to kissing or licking the tip?

Whatever the correct answer to these questions, Victorian law bars prosecutors from treating any of the above non-penetrative acts as sexual penetration. They can, however, effectively treat of the above penetrative acts as mere sexual touching by opting to bring lesser charges. A possible high profile example from Queensland is the decision to charge a former professional footballer in relation to an assault on a croupier at Brisbane's casino. An appeal judgement describes the croupier's complaint as follows:[26]

> After taking a break, she was returning to her rostered position on the casino floor when a man "appeared to bump into [her] and wipe his hand between [her] legs as he passed". The complainant gave the following further details of this touching:
>
> (a) "It was in between my legs at the – at the tip of my clitoris."
>
> (b) "I felt a finger. It wouldn't have been any more than just a finger."
>
> (c) "I mean, the rest of his hand was around that general area up against my pants, yes."
>
> (d) She said that by "general area" she meant "[her] vagina."
>
> (e) "It went up to my hip as he's gone past me so he slithered from my vagina to my right hip."
>
> The complainant said that she stood frozen for a moment, feeling confused, and then reported the matter to two of her supervisors. In cross-examination she was pressed with the suggestion that the touching may have been accidental. She responded, "You don't accidentally get someone in the middle of their legs." In answer to the question where the man's hand first made contact, she said, "He went straight for my clitoris." It was put to the complainant that the "male person didn't actually push his fingers into your vagina, did he?", to which she replied, "Yes. I felt that. That's what made me feel his finger." There was some cross-examination about what was said to have been a prior inconsistent description of the touching. This led to the prosecutor's eliciting from the complainant that she had said at the committal: "If you're asking if I felt his fingers move, I felt his fingers touching my freaking clitoris, like that's not okay."

Nevertheless, the prosecution charged the accused with indecent assault (defined in an equivalent way to Victoria's current sexual touching offences) rather than rape (which requires proof of sexual penetration.) That charging decision could be based on a view that what the croupier described wasn't penetration of her vulva, or that the evidence on that point was unclear, or that the accused's intention to penetrate (as opposed to touch) was in doubt, or that it was not in the public interest to charge the accused with rape. But, because of the primacy of the element of sexual penetration. it is impossible to know whether this decision was based on a relevant distinction between more and less intrusive sexual conduct, or an arguably arbitrary distinction between slight penetration and sexual touching.

Intrusion

Sexual offence investigations and prosecutions inevitably involve intrusive questions, both because of the alleged violence being discussed and because of the intimate nature of that violence. The

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[26] *R v Sologinkin* [2020] QCA 271, [2]-[4].

embarrassment that many feel about discussions of sex and sexual anatomy in non-criminal contexts pales in comparison to the difficult nature of discussing those things when recounting an account of alleged violence to strangers (including police, lawyers, judges and jurors.) These problems could be exacerbated in the case of discussions of slight penetration for several reasons.

First, the confusion outlined above may require more discussion to resolve and may itself increase the distressing nature of the discussions. Second, to clarify any conclusion, the resulting discussion may need to be considerably more explicit than (say) a description of either fully penetrative acts or entirely non-penetrative acts. Third, not only may the discussion be more explicit, but – to establish whether anything went *into* a person's body – it may also be more intimate, describing feelings and sensations and complex and subtle conduct such as licking or rubbing, and explicit surrounding circumstantial evidence, such as movements, positioning, sounds, pain, hair or ejaculation. Fourth, perhaps more so than fully penetrative sexual acts, slight penetrative acts may involve stigma (such as the stigma directed towards oral sex or masturbation), which will in turn be heightened by confusing, detailed, explicit and intimate discussion.

Every one of these problems is significantly heightened when the discussions are with children. The examples of discussions of sexual acts and anatomy I have set out so far in this submission all involve discussions with adults:

- the opening four questions about oral sex from a Victorian rape case were about events when the complainant was 20, and were put to her at a trial when she was aged 27
- the NSW case about slight penile-vaginal penetration involves an anonymous, but seemingly adult, complainant.
- the NSW case on defining external genitalia involved alleged events when the complaint was 15, but the testimony at issue was given at a trial four years later.
- the Queensland case where there was confusion about cunnilingus involved events when the accused and complainant were aged 25, and a trial two years later
- the other Queensland case about the assault of a croupier almost certainly involved an adult complainant.

By contrast, most of the Victorian cases where appeal courts have focused on the definition of sexual penetration involve alleged crimes against children. They make for very difficult reading.

In the 1995 Victorian case where the Court of Appeal ruled that jurors should be directed about what *external genitalia* are, the alleged victim was 13 at the time of the alleged offence and 15 when she testified. The prosecution's re-examination of her is described as follows:[27]

> *Could I please ask whether you also recall earlier on when you were asked questions at the committal hearing, and this is when you were being cross-examined, were these question asked and did you give these answers (p.14, line 25, your Honour): 'But if you can just tell the court where exactly your grandfather was touching you?' Answer: 'In my vagina.' Was that question asked and did you give that answer?* Yes.
>
> *'When you say 'in', do you mean your grandfather actually put his fingers inside your vagina?' Answer: 'Sort of like around but it was, it was like he was trying to get in but he couldn't.' Question: 'So it was around but not inside; is that right?' Answer: 'Yes.' Question: 'So he didn't actually put his fingers all the way inside your vagina; is that right?' Answer: 'Yes.' Question: 'So it was on the outside, is that yes?' Answer: 'Yes'. Were those questions asked and did you give those answers at the committal hearing?* Yes.

[27] *R v A J S* [2005] VSCA 288, [41].

You have said today that you don't quite know how to express all the terms of your body; is that right? Yes.

Could I ask you, and it might be embarrassing, but could I ask you, at that time did you have pubic hair? Yes.

Did you have pubic hair around your vagina – the vaginal area on the outside near there between your legs? Yes.

Are you able to say when your grandfather touched you where his fingers were in relation to that pubic hair? (No answer.)

HER HONOUR: Kirsty, are you able to answer the question? --- Can you please repeat it.

[Prosecutor]: *All right. In relation to the pubic hair in the area of your vagina, can you say where in relation to the pubic hair in the area of your vagina your grandfather's finger went?* It was in between, like - - -

Just take your time, in between the what? In between the outside of the hair sort of thing. Oh - - -

HER HONOUR: Would you like to take a short break now, Kirsty? --- No.

[Prosecutor]: *When you say in between the outside, what do you mean by that ?* I mean there's pubic hair on each side and it wasn't on either side, it was in the middle.

Are you able to say what motion, if any, his fingers were making? Like a circle.

How were you able to say that they were like a circle, how do you know that? Because his finger were moving around.

Is that something you saw or how do you know that? I felt it.

This re-examination followed earlier questioning in examination-in-chief and cross-examination, the latter (like the re-examination) covering what she had said at the accused's committal.[28]

A 2010 Victorian case sets out parts of the police's interview of a complainant who was aged 11 at the time of the alleged offending:[29]

Okay. Now, whereabouts did his hand go? I can't exactly remember.

Okay. Is there an outside and an inside bit to a vagina? Yeah.

Tell me which part his hand - - - ? Ins-, - - -

Went on. Inside.

Okay. How – how far? Not very

Okay. Tell me how it felt. Not very nice.

…

Okay. And [the vagina is] made up of bits. You've got, like, an inside bit and outside bit, I think we talked about. Yeah.

Okay. And we spoke about Greg's hand went under your bather bottoms. Yeah.

And which part of your vagina did his hand touch? Inside

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[28] More recent procedural reforms reduce the need for alleged victims, especially children, to repeatedly testify; however, even the current laws still provide for further testimony if there is a need to clarify earlier evidence, as happened here. As it happens, the Court of Appeal in this case held that the re-examination was impermissible; alas, that ruling meant that the accused had to be retried

[29] *Anderson v The Queen* [2010] VSCA 108, [15].

> *And what part of his hand touched the inside?* I'm not sure. The fingers.
>
> *Yeah. Can you tell me a bit more about that?* I'm not sure.
>
> *Okay. And how long?* I'm not exactly sure. It wasn't too long, though, 'cos I moved away. I didn't like what he was doing.

She was 13 at the trial, where her cross-examination included the following:[30]

> *When you were asked questions by the policeman Mr Roberts in that tape about how Greg Anderson touched you, what I suggest to you is that you basically told Mr Roberts that you weren't really sure about how he touched you. Would you agree with that?* Yes.
>
> *You're not really sure where his hand went?* No....
>
> *I suggest to you that the first person you told that Mr Anderson had put his finger inside your vagina, was your mother?* I'm not sure....
>
> *What I suggest to you, [KB], is that even on the account that you've given to this court through the police tape and what you've told us when I've been asking you questions, you can't really be sure whether or not Mr Anderson put his finger in your vagina or not?* I don't understand the question....
>
> *You can't say, you can't be really sure whether or not Mr Anderson put his finger inside your vagina or not?* I'm sure that he touched me but I'm not sure of the exact words that you're saying.
>
> *You're saying that you're sure that he touched you, but what I'm suggesting to you is you're not sure whether or not his finger went inside your vagina?* I can't exactly remember..

On appeal, Weinberg JA, writing for the court, held:[31]

> KB was never asked to clarify precisely what she meant when she said that the applicant's finger had gone 'into' her vagina. She was not able to say for how long, or whether this involved a single slight penetration, or something more. Given the lack of clarity as to what exactly had taken place, the jury could not, in my view, be satisfied beyond reasonable doubt that actual penetration had occurred. In addition, KB was, as I have said, of tender years, and could hardly be expected to appreciate the significance that the law attaches to the distinction between an indecent act, and an act of sexual penetration.

Recent Victorian cases show that children continue to be asked these questions.

A mid-2020 Victorian judgment describes the cross-examination of a complainant who was 14 at the time of the alleged offending:[32]

> *You were clear that on that occasion with his penis there was no penetration of the vagina?* No penetration.
>
> *On that occasion, likewise on other occasions. Never an occasion where penis penetrated or went inside your vagina at all?* No, no, not at all.
>
> *And I think I've already covered the fact that at no stage do you allege that his finger or fingers went inside your vagina?* Yeah, there was no penetration of any form or any way.

These complainant's answers prompted the prosecutor into a more detailed re-examination, summarised in the judgment as follows:[33]

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[30] Ibid [69].
[31] Ibid [80].
[32] *Harrison (a pseudonym) v The Queen* [2020] VSCA 157, [6].
[33] Ibid [7]-[9].

> [W]hen the prosecutor asked her — in relation to charge 3 — which part of her vagina the applicant's penis had touched, she said:
>
> > Like, between — it's — it's called a labia, right, those two bits here? Between there. Like — like, straight kind of between there.
>
> Asked then what she had meant by her answer in cross-examination that the applicant's penis 'didn't go in', she answered:
>
> > Like, it didn't go into the, um, hole.
>
> The complainant made it clear what she meant by 'in between' when it was put to her that the applicant had only touched her 'on the outside':
>
> > On the outside, yeah. He didn't go inside. Like, in between but not inside.
>
> The prosecutor asked the complainant about the incident the subject of charge 1. She had referred earlier to being touched on the clitoris. When asked to state where that was in relation to her labia, she said:
>
> > Like, at the top in between, just like a little bit off the top.
>
> When asked specifically where she had been touched on the first occasion, she said:
>
> > The bikini line, the clitoris and then, like, in between the labia.

The Court of Appeal held:[34]

> the question for the jury was not whether the complainant herself would regard what she had described as amounting to 'penetration'. It would appear that she believed the term to be only properly applicable when there was 'full penetration' of the penis or finger inside the vagina. The only question for the jury was whether what the complainant described satisfied the legal definition of penetration of the vagina, as clearly and carefully explained to them by the judge.

The judges ruled that she 'described clearly… an act of penetration of the external genitalia', adding that, on their viewing of the complainant's police interview, her 'hand gestures which the complainant used while she was describing what had occurred… are consistent with the complaint's verbal descriptions as we have interpreted them'.[35] (The judgment doesn't identify the complainant's age at the time of either the police interview or the trial.)

A still more recent case sets out the police's interview of a 13-year-old about events when she was aged 9:[36]

> *O.K. And then you said that he played with your vagina with his fingers?* Yeah.
>
> *So tell me how he did that.* He just, like, rubbed his fingers, like, all around, I guess.
>
> *Yeah. And then you said that he licked your vagina.* Yeah.
>
> *Yeah. So tell me how he did that.* He, like – he bent over a bit and then he just, like, his - it's hard to explain - - -
>
> *It's all right. Just take your time.* He sort of also, like, just licked everywhere, yeah....
>
> *Yeah. And when you say, 'He licked everywhere,' everywhere of what?* Everywhere of, like, just around my vagina.

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[34] Ibid [12].
[35] Ibid [13].
[36] *Harmer (a pseudonym) v The Queen* [2020] VSCA 310, [13].

> *Yeah, O.K. Are you aware of the different parts of your vagina?* Not really.
>
> *O.K. It's all right. Would you agree that there's an area – the opening of your vagina, there's another area where urine comes out?* Yeah.
>
> *So when you say, 'He licked everywhere,' can you be more specific to where his tongue actually went?* It just went near – well, it went, like, over one of the holes. I don't really know what it's called but it's like the middle one. So not the pee hole. ...
>
> *O.K. So not where your urine comes out?* No.
>
> *The other hole. Which so we'll call the vagina hole.* Yeah.
>
> *Yep. So tell me what his tongue – just explain to me again, sorry, what happened in relation to that hole*. His tongue was, like, going up and down against the hole.
>
> *Yeah, O.K. Would you say that his tongue went inside that hole?* No.
>
> *But it went up and down - - -* Yeah.
>
> *- - - on the outside of that hole?* Yeah.

The dissent held that the evidence was not sufficient to prove that the accused had introduced his fingers into her external genitalia:[37]

> The complainant's description that the applicant 'rubbed his fingers ... all around' her vagina is far too vague and imprecise to support a finding to the criminal standard that there had been penetration. To my mind, that description cannot support a finding that there had been penetration of the external genitalia.

He contrasted the complainant's statements on this charge with others on different incidents, including the subsequent questions about the accused licking her vagina:[38]

> The complainant's description of the activity related to charge 2 may be contrasted with her description in the VARE of the activity founding charge 7, in which she said that the applicant touched her vagina with his fingers, 'and eventually they went in the vaginal hole'. She said that the applicant's fingers 'were going all around' her vagina — a similar description of the activity on charge 2 — before he put his fingers in her 'vaginal hole'.[10] Similarly, when describing the activity founding charge 13, RS said the applicant 'was trying to get it in [her] vaginal hole again', and did 'put his finger in [her] vagina hole'. Hence, for the purposes of charges 7 and 13, RS unequivocally and unmistakably described 'sexual penetration'.
>
> It is also instructive to contrast the complainant's version of digital-vaginal touching with her descriptions of lingual incest. Thus, in relation to charge 3, RS said that the applicant 'licked everywhere ... just around [her] vagina', 'over one of the holes' — not the 'pee hole' but the 'vagina hole' — and went 'up and down against the hole' and 'on the outside of the hole'.[12] And for the purposes of both charge 8 and charge 9, RS said that the applicant licked her 'vaginal hole'.[13] Quite clearly, for the applicant to have licked the 'vaginal hole', his tongue must have penetrated the external genitalia.

However, the majority held:[39]

> It is notable that the complainant used the same description to describe the conduct of the applicant relevant to charges 2 and 3, that is, she described the applicant using his fingers and his tongue 'around' her vagina. Asked to describe what she meant in the context of charge 3, she said that the applicant's tongue went 'over one of the holes' and 'up and down against the hole.'

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[37] Ibid [45].
[38] Ibid [46].
[39] Ibid [97]-[99].

> Of course, it was necessary for the jury to consider the evidence relevant to each charge separately and the fact that there was evidence to support a conviction on charge 3 could not make up for any inadequacy in the evidence pertaining to charge 2. However, the issue for the jury was to understand what the complainant meant when she said that the applicant had rubbed his fingers 'all around' her vagina. Had that evidence stood alone, then I would agree that it might not provide a sure enough basis for a finding of penetration. However, it did not stand alone. The fact that the complainant used the same expression and then went on to explain what she meant in answer to further questions provided evidence on which the jury could rely in assessing what had occurred in relation to charge 2.
>
> In my opinion, the jury was not obliged to assess the evidence in a linear fashion that compartmentalised the evidence in a rigid structure. The jury were entitled to conclude that in rubbing around the vagina the applicant's finger penetrated the external lips of the vagina in the same way as was described by the complainant in relation to charge 3.

While the majority's ruling is more forgiving about the lack of detail in the complainant's account of the first incident (perhaps to a fault), it nevertheless makes it clear that detailed questioning (in this case in relation to the next incident) is vital to establish findings of sexual penetration in cases like this.

These four cases demonstrate that alleged child victims of sexual offences in Victoria are, and sometimes must be, questioned in great detail about whether or not there was slight penetration of their bodies. No-one doubts that invasive questioning of children is often inevitable and necessary in sexual offence cases. The question posed by this submission is whether Victoria's current law makes otherwise unnecessary, and highly intrusive, discussions – specifically, questioning about slight differences in sexual acts, differences that are especially hard for children to appreciate, and that appear to have little connection to the gravity of the alleged offending or the harm the children allegedly endured – an undue legal necessity.

Possible reforms to sexual penetration offences

I do not know how common the problem of confusing, arbitrary and intrusive questioning on sexual penetration is in Victoria. This submission has only used examples from published cases, mainly on appeal. It is not even a representative sample of those cases, as there is no comprehensive way to search for them. Moreover, focusing on published cases may either understate the problem (by not showing discussions that are not discussed in published judgments, either because the charges do not proceed to trial, conviction or appeal, or because the appeals do not address questions of sexual penetration) or overstate it (because published cases may be disproportionately concerned with especially difficult cases.) Accordingly, the examples cited in this submission can only demonstrate that some such confusing, arbitrary and invasive discussions of sexual acts and anatomy do occur, and that more may be occurring, or (without reform) will occur in the future.

Nor do I say that all such discussions are due to the sexual penetration element of Victorian offences. To the contrary, such discussions may be required by other parts of the substantive law (e.g. if there is an issue about the specific sexual act the complainant consented to), or by evidence law (e.g. if the specific sexual act is adduced to support a tendency argument, or because the precise sexual act becomes important to credibility), or may occur because of improper questioning by counsel. While I wrote this submission, the reasons of Magistrate Wallington for acquitting Craig McLachlan of various indecent assault charges demonstrate how invasive discussions (e.g. of the size of a complainant's labia) arise for each of these reasons, none of which turns on the element of sexual

penetration.[40] While other reforms may be available to address such discussions, this submission is concerned only with discussions that arise solely because of the element of sexual penetration.

Eleven sexual penetration offences

For many Victorian offences, sexual penetration is one of several alternative conduct elements of an offence. For example, many Victorian sexual offences are defined to include either sexual penetration or some other sexual act, such as *sexual touching*. To establish those offences, the prosecution does not have to prove that anything was introduced *into* external genitalia, an anus or a mouth to prove the offence. Rather, proving that the accused touched (or was touched by) the complainant in a sexual way – notably, contact by or with genitals or anus – will typically suffice. The definitions of these defences do not require any detailed consideration of the difference between sexual penetration and sexual touching, although particular charging decisions may have that result.

By contrast, there are eleven offences – all in Victoria's *Crimes Act 1958* and including many key offences – where proof of sexual penetration is mandatory to prove the offence:

- Rape (s. 38)
- Rape by compelling sexual penetration (s. 39)
- Sexual penetration of a child under the age of 12 (s. 49A)
- Sexual penetration of a child under the age of 16 (s. 49B)
- Sexual penetration of a child aged 16 or 17 under care, supervision or authority (s. 49C)
- Sexual penetration of a child or lineal descendant (s. 50C)
- Sexual penetration of a step-child (s. 50D)
- Sexual penetration of a parent, lineal ancestor or step-parent (s. 50E)
- Sexual penetration of a sibling or half-sibling (s. 50F)
- Sexual penetration of a person with a cognitive impairment or mental illness (s. 52B)
- Bestiality (s. 54A)

For these offences, the prosecution must prove beyond reasonable doubt that something was introduced *into* someone's (often the alleged victim's) *external genitalia*, *anus* or *mouth*. However, the consequences for the prosecution not proving that vary from offence to offence.

For six of these offences, Victorian law sets out similar or identical companion offences for sexual touching that carry different maximum and standard sentences:

Sexual penetration offence	**Maximum sentence**	**Standard sentence**	**Sexual touching offence**	**Maximum sentence**	**Standard sentence**
Rape	25 years	10 years	Sexual assault	10 years	None
Rape by compelling sexual penetration	25 years	None	Sexual assault by compelling sexual touching	10 years	None
Sexual penetration of a child aged under 12	25 years	10 years	Sexual assault of a child aged under 16	10 years	4 years
Sexual penetration of a child aged under 16	15 years	6 years			
Sexual penetration of a child aged 16 or 17 under care, supervision or authority	10 years	None	Sexual penetration of a child aged 16 or 17 under care, supervision or authority	5 years	None
Sexual penetration of a person with a cognitive impairment or mental illness	10 years	None	Sexual assault of a person with a cognitive impairment or mental illness	5 years	None

[40] *DPP v McLachlan*, Magistrates Court of Victoria, 15 December 2020 (Wallington M.)

Five of these offences have equivalent offences for sexual touching, albeit ones with different names (e.g. 'sexual assault' instead of 'rape'), lower maximum sentences and lower or no standard sentences. However, a sixth offence ('sexual penetration of a child under the age of 12') lacks an equivalently defined offence for sexual touching (e.g. 'sexual assault of a child under the age of 12'.) If the prosecution in a trial relating to a child under 12 can't prove the introduction of anything *into* the external genitalia, an anus or a mouth but can prove sexual touching, then the accused will be guilty of the offence of 'sexual assault of a child under 16', perhaps increasing the significance of the distinction between sexual penetration and sexual touching in such cases.'[41]

In short, for these six offences, the prosecution's failure to prove the introduction of anything into the external genital, an anus or a mouth, in circumstances when the prosecution can prove other sexual touching, has the consequence that the accused will be convicted of a different (lesser) offence that carries a lesser maximum penalty. An example is a recent appeal case, where the accused was initially charged with rape, but eventually pled guilty to indecent assault (the pre-2016 equivalent to sexual assault. The Court of Appeal commented:[42]

> the sentencing judge was required to sentence the applicant on the footing that his offending conduct, which we describe below, had not involved any penetration of the victim's vagina.
>
> Self-evidently, serious as the offence of indecent assault frequently is, that offence is regarded by the legislature as significantly less grave than the offence of rape contrary to s 38 of the Crimes Act 1958, the maximum penalty for rape – 25 years' imprisonment – being two and a half times greater than the maximum penalty for indecent assault

The sentencing judge found that the accused 'slid' his hand 'down the front of' the victim's vagina and 'licked her vagina'. The judge said:[43]

> Charge 2, in particular, which involves the licking of the victim's vagina, is in circumstances of an oppressive and most intimate interference with 'X's' bodily integrity, accompanied by deep embarrassment and fear. The nature of the offending is objectively serious — well beyond acts of mere frottage, but clearly in the middle range of offending — and particularly Charge 2 lies in the high reaches of that range, in my view.

The accused was sentenced to 4.5 years in prison on that charge and appealed on a number of bases, including citing sentencing statistics that only one person (out of 111 in the surveyed period) had previously received such a sentence. The Court of Appeal, citing many aspects of the case, concluded:[44]

> notwithstanding all that could be said in support of the sentence on charge 2, having regard to the entire circumstances of the offending, the offender and the victim, we are persuaded that a sentence of 54 months' imprisonment on this charge was quite outside the range of sentences available in the sound exercise of the sentencing discretion.

The accused was resentenced to three years and three months on that charge.

The situation is quite different for other five sexual penetration offences. There is no companion offence for the four incest offences and the bestiality offence that criminalises incestuous or bestial

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[41] The rationale for this different treatment of sexual penetration and sexual touching a person under 12 is not clear. It appears to be an artefact of the origins of child sexual offences as aggravations or modifications of earlier offences of rape and indecent assault.

[42] *Traeger (a Pseudonym) v The Queen* [2019] VSCA 231, [1].

[43] Ibid [12].

[44] Ibid [31].

sexual touching. So, if the prosecution is unable to prove beyond reasonable doubt – or the defence is able to raise a reasonable doubt - that anything was introduced *into* a person's *external genitalia*, *anus* or *mouth*, then the accused will be acquitted of incest or bestiality. Somewhat surprisingly, merely sexually touching a family member or animal in a way that does not involve inserting anything *into* their *external genitalia*, *anus* or (in the case of a *penis*) *mouth* is not a crime in Victoria. The line between sexual penetration (including slight or fleeting penetration) and sexual touching, discussed throughout this submission, determines the limits of Victorian law on incest and bestiality. However, many instances of incestuous or bestial acts that fall short of sexual penetration will, depending on other circumstances, amount to a different sexual crime or to an assault or cruelty offence.

The upshot is that, for eleven Victorian sexual offences, proof beyond reasonable doubt of sexual penetration – and hence, in at least some cases, confusing, arbitrary and intrusive discussions of sexual acts and anatomy during the investigation, prosecution or trial – is necessary in order to ensure that the accused is convicted in a more serious offence category (with consequences for sentencing) or, in some instances, at all. The remainder of this submission examines whether appropriate changes to the sexual penetration element could be made to reduce the need for such discussions.

Four possible sexual penetration element reforms

The problem outlined in this submission arises from a difficult exercise in line-drawing – a line that drawn on the bodies of people, typically alleged crime victims – which requires some participants in some sexual offence matters to engage in confusing, arbitrary and invasive discussions of sexual acts and anatomy. The need for these particular discussions can be reduced or perhaps avoided by changing that line. However, the difficulty is that the change may cause problems of its own, or have significant incidental effects and those problems or effects need to be considered, and weighed against, any possible advantages from the change. None of the possible changes is straightforward or minor.

To conclude my submission, I outline four possible reforms to element of sexual penetration, and briefly assess their advantages and disadvantages.

Possible reform #1 – abolish the element of sexual penetration

The first option, taken in Canada decades ago, is to abolish the current two-tiered approach to Victoria's major sexual offences (i.e. rape and sexual penetration offences, and sexual assault/touching offences) and replace them with a single tier of sexual offences that only require proof of sexual touching. Specifically:

- the six sexual penetration offences with companion sexual assault offences could be abolished.
- the five sexual penetration offences without companion sexual assault offences could be replaced by offences defined in terms of sexual touching.

A notable incidental effect of the latter change is to newly criminalise non-penetrative sexual touching of family members and animals.

The main advantage of this approach would be to entirely remove the problem discussed in this submission: the boundary between sexual penetration and sexual touching prompting confusing, arbitrary and invasive discussions of sexual acts and anatomy in Victorian sexual offence investigations, prosecutions and trials. (As noted above, those discussions may still persist for other reasons, and will of course continue in relation to the outer boundaries of sexual touching.) An

arguably incidental advantage would be to signal societal disapproval (and allow for criminal punishment) of non-penetrative forms of incest or bestiality.

The main disadvantage of this approach is to entirely remove all of the advantages of the present two-tiered system of sexual offences. Advantages that may be lost include:

- any significance that lay people (including victims of crime) attach to labelling some sexual offences as more serious than others because of the sexual conduct involved.
- distinctions drawn in some Victorian laws between the different tiers of offending. [45]
- the advantages (if any) of confining the criminalisation of incest and bestiality to penetrative sexual acts.

As well, abolishing the tiered approach would necessitate a significant rethink of the current system of distinct maximum and (if any) standard sentences for the two tiers of offences. At the same time, as happened in Canada, the two tiers may re-emerge at sentencing, perhaps reducing the positive and negative impacts of this reform (although Victoria's instinctive sentencing approach may reduce this effect.)

In short, this would be a major reform indeed, and would have consequences well beyond the concern identified and discussed in this submission.

<u>Possible reform #2 – narrow the element of sexual penetration</u>

A second option, partly reflecting past (i.e. pre-1991 or pre-1980) Victorian law, is to reclassify some slight forms of sexual penetration as sexual touching. This could be done by replacing s. 35A's existing specification of introduction *(to any extent)* into parts of the body with a narrower specification, such as *(to a substantial extent)*. Alternatively, or additionally, the definition of vagina could be narrowed so as to refer specifically to vaginal canals, rather than all *external genitalia*.

The main advantage of this approach would be to remove the need for discussions of whether there was slight (as opposed to no) penetration, for example in relation to some forms of digital or oral sex, because mere slight penetration would not suffice to establish a narrowed element of sexual penetration. While discussions may as a result be needed about whether there was merely slight or more substantial penetration, or penetration of a person's vaginal canal (as opposed to penetration beyond their labia majora), those discussions may better accord with lay understandings of the term penetration, and may also involve less confusing discussions of anatomy.

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[45] For example, Victoria's:

- bail law, where only sexual penetration offences attract the exceptional circumstances test for bail: *Bail Act 1977*, Schedule 2.
- DNA sampling law, which treats only sexual penetration offences as DNA sample offences, which in turn determines if child suspects and offenders will be automatically sampled: *Crimes Act 1958*, schedule 9.
- double jeopardy law, which permits retrials on fresh evidence of acquittals only for non-consensual sexual penetration offences: *Criminal Procedure Act 2009*, s. 327M.
- presumptive sentencing law, which treats some sexual penetration offences as category 1 offences, requiring a presumptive sentence of imprisonment: *Sentencing Act 1991*, s. 3(1).
- sex offender registry law, which treats sexual penetration offences as class 1 offences, and sexual assault offences as class 2 offences; the distinction may affect the period of registration: *Sex Offenders Registration Act 2004*, schedule 1.

However, there are multiple disadvantages to this approach. First, the approach would exclude slight forms of penetration from the more serious tier of offences (and completely from incest and bestiality offences.) Second, narrower terminology focused on 'substantial' penetration or vaginal canal penetration may be ambiguous, both to lay participants in the criminal justice process and to courts directing on or applying those terms. Third, the narrower terminology may still necessitate difficult conversations about partial penetrative acts, including questions about positions, particular behaviour of the alleged offender and particular sensations of the alleged victim, and may increase the importance of medical evidence. Importantly, all of these disadvantages are likely to arise especially in relation to children.

An example is the High Court's main decision on unsafe verdicts, an incestuous abuse case involving a 13-year-old complainant, at a time when NSW law required proof of penetration of the alleged victim's vaginal canal, rather than her external genitalia. The complainant's cross-examination on one incident included the following questions:[46]

> *Then he - what did he do then?* He put his tongue inside my mouth - I mean inside my vagina.
>
> *And then what was - the next thing he put his penis in?* Yes.
>
> *Were your legs still over his shoulders?* Yes.
>
> *And he made a complete penetration?* Well it felt like that.
>
> *It felt like that?* Yes.
>
> *And that's when it hurt you?* Yes….
>
> *And you've told us that he put his finger in quite a number of times?* Yes.

The majority held that a doctor's evidence that the complainant's 'hymen' was 'intact' was 'inconsistent with the complainant's account of sexual intercourse'.[47] The minority judges disagreed:[48]

> whether what *felt* like complete penetration was in fact complete penetration must surely be a matter for speculation. Further, when these answers were given, the cross-examination had been proceeding for some time and the jury may have thought that K was giving an exaggerated response to questions which she found annoying because they required answers repetitive of evidence she had already given. (Brennan J)
>
> In all probability, the complainant did not use the word "vagina" in its strict anatomical sense but, instead, as referring to her genitalia. Her evidence with respect to the episode in which she alleged penile penetration did not go beyond an assertion that it felt as though there had been complete penetration. (Gaudron J.)
>
> although K said that it "felt like" complete penetration, the jury might reasonably have thought that what might have seemed like complete penetration to her was in fact only partial penetration. It was open to the jury to conclude that, because of her fear and inexperience, she thought that the attempts of M had achieved "complete penetration". In that respect, the jury might have thought M's statement to the police that "I would suggest as far as the allegations are concerned that our first priority would be to find out whether in fact K is still a virgin" indicated that he knew that she had not been completely penetrated. (McHugh J)

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[46] *M v R* (1994) 181 CLR 487, 526-527.
[47] Ibid 499.
[48] Ibid 506, 511, 528.

However, the minority judges divided on whether the complainant's evidence could support a charge requiring proof of penetration, with Gaurdon J ruling that, given the medical evidence, 'the jury should have entertained a doubt whether there was penetration as required by s.61A of the Crimes Act',[49] while the other judges held that it was open to find that there was at least slight penetration of the complainant's vaginal canal by the accused's tongue or finger.

In short, while likely avoiding some confusing, arbitrary and intrusive current discussions of sexual acts and anatomy, this reform option would both partly return sexual offence law to an earlier narrower scope and resurrect discarded interpretative and evidential concerns, including a focus on virginity, with particular negative effects on child victims and the prosecution of child sexual abuse.

Possible reform #3 – widen the element of sexual penetration

A third option, already adopted in the majority of Australian jurisdictions, is to add specified sexual conduct to the sexual penetration element, removing the need to prove that that particular conduct involved penetration. Notably, Western Australia has, since 1992 (and, except for *fellatio*, since 1985), defined *to sexually penetrate* to mean:[50]

> (a) to penetrate the vagina (which term includes the labia majora), the anus, or the urethra of any person with —
>
> (i) any part of the body of another person; or
>
> (ii) an object manipulated by another person,
>
> except where the penetration is carried out for proper medical purposes; or
>
> (b) to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the labia majora), the anus, or the urethra of the offender by part of the other person's body; or
>
> (c) to introduce any part of the penis of a person into the mouth of another person; or
>
> (d) to engage in cunnilingus or fellatio; or
>
> (e) to continue sexual penetration as defined in paragraph (a), (b), (c) or (d).

This this definition is simply Victoria's definition plus the conduct of *engag[ing] in cunnilingus or fellatio*. The Australian Capital Territory, Northern Territory and South Australia have similar definitions, but use the label *sexual intercourse*.[51] In these four jurisdictions, there is no need to prove penetration if the prosecution can instead prove *cunnilingus* or *fellatio*, whether penetrative or not, by either the alleged offender or the alleged victim.[52] As well, New South Wales's definition of *sexual intercourse* expressly includes *cunnilingus* (but not fellatio), [53] so it would be enough if the prosecution proves *cunnilingus*, whether or not the *cunnilingus* involves penetration; penis-mouth contact, though, would require proof of penetration. These reforms also have the incidental effect of slightly widening the more serious tier of sexual offending to include some non-penetrative oral sex.

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[49] Ibid 512.

[50] *Criminal Code* (WA), s. 2B. See *Acts Amendment (Sexual Assaults) Act 1985* and *Acts Amendment (Sexual Assaults) Act 1992*.

[51] *Crimes Act 1900* (ACT), s. 50(1); *Criminal Code* (NT), s. 1; *Criminal Law Consolidation Act 1935* (SA), s. 5(1). See also *Criminal Code* (Cth), s. 272.4(1).

[52] See *R v Randall* [1991] SASC 2877.

[53] *Crimes Act 1900* (NSW), s. 61HA.

The advantage of widening the element of sexual penetration in this way is that it would reduce, perhaps greatly, the need for discussions of penetration in cases of oral sex. In the case of *cunnilingus*, there will be little or no need to discuss whether or not a person's lips or tongue was introduced *into* another's external genitalia, even slightly, avoiding a potential clash between lay and legal understandings of penetration in such contexts, as well as detailed discussion of exactly where on someone's *external genitalia* another's tongue or lips went. In an early South Australian case where cunnilingus was defined non-penetrative contact with any part of the complainant's vulva, a judge observed that, in an earlier case:[54]

> the complainant was a young girl, and she was asked to mark with a cross on an anatomical drawing where the accused licked her, the prosecution case being that the accused's tongue actually penetrated the labia, and the drawing went backwards and forwards to the jury, and became a critical exhibit in the case. I refer to that case because it is worth observing that the interpretation that this Court is now propounding will avoid the unsatisfactory procedure that was followed therein.

In the case of *fellatio*, there may be less need to discuss whether or not a person's *penis* was introduced into another's *mouth*, as opposed to being in contact with that person's tongue or lips in some way. (The presence of these terms in similar jurisdiction's laws for decades means that further research may be able to ascertain whether these possible benefits have actually occurred.)

Disadvantages of this approach include a possible incongruity with the term *sexually penetrates* (something accommodated, perhaps, by decisions in some jurisdictions to relabel that term as *sexual intercourse*), and the introduction of new potentially ambiguous, and arguably also inapt, terms 0 *cunnilingus* and *fellatio* – into sexual offence law.[55] (The presence of these terms in similar jurisdiction's laws for decades means that further research may be able to ascertain whether these possible problems have actually arisen.)

However, the mere inclusion of *cunnilingus* and *fellatio* in the element may not go far enough, as the problems discussed in this submission will still arise with slight forms of digital and anal sex, which will still require proof that a finger was introduced *into* someone's genitals or anus, or that a tongue or lips were introduced *into* someone's anus. These concerns could perhaps be accommodated by extending the definition of *sexual penetration* further than other Australian jurisdictions have to include anal stimulation and masturbation, although those terms may in turn raise further ambiguities or inaptness. (The absence of these additional terms in similar jurisdiction's laws means that there is no direct way to test whether their introduction in Victoria would reduce or create practical problems in investigating or prosecuting sexual penetration offences.

In short, this reform option may significantly, albeit only partly, ameliorate the problems outlined this submission, but may also cause some new problems; however, both of these matters can be the subject of further research of the five jurisdictions that have made similar reforms. The reform could be made

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[54] *R v Randall* [1991] SASC 2877 (Matheson J, [4]), discussing

[55] For a discussion (and interpretation) *cunnilingus*, see *R v Randall* [1991] SASC 2877, where Cox J (with King CJ agreeing) states that *cunnilingus* 'denotes the licking or sucking of the vagina or vulva, including the labia majora, with the tongue or mouth. No distinction is to be drawn between the outer and inner aspects of the labia'; and that *fellatio* 'may extend to the… sucking or licking of another person's penis'. (Matheson J suggested a possibly different definition: 'the licking of the vagina, including the labia majora, with the tongue'.) For a discussion (and interpretation) of *fellatio*, see *Rien v R* (1995) 63 SASR 503, where Cox J held that *fellatio* included licking a penis.

more comprehensive than those jurisdictions, but the impact of those reforms would be harder to assess in advance.

Possible reform #4 – replace the element of sexual penetration

A final reform option is to completely replace the element of sexual penetration with a new element that does not involve penetration. This approach would retain two tiers of sexual offences, but draw a new line between the, one designed to avoid or reduce confusing, arbitrary and invasive discussions of sexual acts and anatomy. In contrast to the other three options, such an approach would not draw from past or comparative reforms; as far as I know, it would be a new approach.

A possible starting point for a new approach is a partial reform recently mooted in New South Wales, which proposes replacing that jurisdiction's existing definition of sexual intercourse with the following definition:[56]

> For the purposes of this Division, sexual intercourse means—
>
> (a) the penetration to any extent of the genitalia or anus of a person by—
>
> (i) any part of the body of another person, or
>
> (ii) any object manipulated by another person, except where the penetration is carried out for proper medical purposes, or
>
> (b) the touching of any part of the genitalia or anus of a person with the mouth or tongue of another person, or
>
> (c) the continuation of sexual intercourse as defined in paragraph (a) or (b)

It is para (b) that is new. Para (b) is concerned with oral sexual contact, but notably defines that by reference neither to *penetration* (as in current Victorian law) or to a particular type of sex, like *cunnilingus* or *fellatio* (as in five Australian jurisdictions, including current NSW law.) Rather, it simply describes a particular instance of *touching*, specifically between one person's *mouth or tongue* and another's *genitalia or anus*.

The stated purpose of the NSW proposal is to replace the existing NSW inclusion of *cunnilingus* with a broader term that it both gender neutral and inclusive of anuses. [57] That is a different concern to the problem discussed in this submission. However, I think that the NSW proposal incidentally addresses part of the problem described in this submission, by replacing the confusing, arbitrary and invasive concept of *penetration* of a vagina, anus or (with a penis) mouth with a clearer, sensible and minimal concept of *touching* of a person's *genitalia* or *anus*, albeit only where another person's mouth is involved. Importantly, proposed NSW para (b) could be straightforwardly broadened beyond oral sex in a way that removes the need for a continuing reference to penetration in para (a), by the term *mouth or tongue of another person* with *a part of a person's body or an object* (a term already used in Victoria's existing definition.) In short, Victoria's element of sexual penetration of a vagina, anus or (with a penis) mouth could be completely replaced with a new element of 'touching of any part of the genitalia or anus of a person with a part of a person's body or an object'.[58] This new element would

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[56] NSW Law Reform Commission, *Consent in relation to sexual offences: draft proposals*, October 2019, p. 30.

[57] Ibid, p. 31.

[58] As in existing s. 35A, this can be extended to continuing contact and equivalent contact with animals, and can include exceptions for medical or veterinary practices or the like. (The wording of the current proposal already covers self-contact, but that could also be expressly provided for.)

include all of the conduct currently within the more serious tier of offending in Victoria, but also include (or newly criminalise, in the case of incest or bestiality) non-penetrative touching of genitals or anuses.

The main advantage of this proposal is to remove the need for prosecutors to prove penetration, whether slight or not, in order to establish that a person has committed the more serious tier of sexual offending. Doing so may reduce or even avoid the problem outlined in this submission of necessitating confusing, arbitrary or invasive discussions of sexual acts or anatomy in cases of slight penetration, because all such cases will clearly involve touching someone's genitals or anus. This proposal may also bring the possible advantages listed in NSW:[59]

> touching of genitalia or an anus with a mouth or tongue involves an invasion of autonomy similar to the other forms of sexual intercourse, regardless of whether penetration occurs
>
> the definition of "sexual intercourse" should include the touching of the anus with the mouth or tongue,30 and
>
> the proposal would make the definition of "sexual intercourse" gender and sex neutral.

In the expanded form I've proposed, there may also be equivalent advantages for non-penetrative digital contact and contact with objects.

The main disadvantage of the proposal concerns the incidental expansion of the more serious tier of sexual offences, including the objections listed in the recent NSW consultation:[60]

> [S]ubmissions argue that the proposal would unjustifiably broaden the definition of "sexual intercourse" Currently, while cunnilingus can be prosecuted as sexual assault, other forms of non-penetrative oral sexual conduct can only be prosecuted as sexual touching. However, some forms of non-penetrative sexual conduct would be regarded as a form of sexual assault [the top tier in NSW] under our proposal. Some argue that the proposal would capture conduct that is not serious enough to constitute sexual intercourse, such as kissing the penis or wiping the penis across the face. Some express concern that our proposal would expose some accused persons to significantly higher maximum penalties than they would face currently. Sexual assault is a more serious offence, with a significantly higher maximum penalty (14 years' imprisonment) than sexual touching (five years' imprisonment).
>
> Other issues relating to our proposal include:
>
> - it could lead to more litigation, potentially involving lengthy arguments about interpretation and the relevant type of conduct (for instance, whether it involved the anus and what constitutes an "anus")[61]
> - it could increase the workload of the District Court, as some prosecutions that would currently take place in the Local Court would take place in the District Court if the conduct is charged as sexual assault, and
> - it would put NSW law "out of step" with the definitions of rape and sexual assault in other Australia states and territories, and the Model Criminal Code.

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[59] NSW Law Reform Commission, R*eport 148: Consent in relation to sexual offences*, September 2020, p. 189.
[60] Ibid, pp. 189-190.
[61] There would likely also be a need to define male genitals more precisely, to resolve whether (say) scrotums are included.

Under my expanded proposal, these same objections would also apply to the new inclusion of non-penetrative touching of genitals and anuses with other body parts (including penises and fingers) and objects.[62]

A further, non-trivial, problem of this reform option is terminology. My proposal would make *touching* (albeit only of genitals and anuses) the key element of the more serious tier of sexual offending; however, in 2016, Victoria replaced past terminology referring to indecent assault with a new term, *sexual touching,* used to define the less serious tier of sexual offences. The two elements are different – sexual touching includes touching of other parts of the body, such as buttocks and breasts, and also more peripheral conduct such as intimate kissing, and may possible exclude some non-sexual touching of genitals and anuses – but the concept of *touching* is common to both, and the term *sexual touching* would be apt for either. One or the other would need a different name, for example *genital or anal contact* for the new element?

The NSW consultation on the proposed revised para (b) correctly concluded:[63]

> This is clearly a complex issue. Submissions diverge over whether forms of nonpenetrative oral sexual conduct other than cunnilingus are serious enough to warrant inclusion in the definition of sexual intercourse. After further consideration, our view is that this issue requires further consultation and research. We recommend that further consideration be given to whether the definition of "sexual intercourse" should include the touching or stimulation with the mouth or tongue of a person to the anus or genitalia of another person.

The same applies to my expanded proposal, but even more so.

Conclusion

I argue that Victoria's current element of sexual penetration may prompt confusing, arbitrary and invasive discussions of sexual acts and anatomy, especially with alleged victims, in at least some Victorian sexual investigations, prosecutions and trials; however, I cannot say how prevalent this problem is. A variety of possible reform options are available to reduce this problem, in whole or in part, but all have advantages and disadvantages.

Yours Sincerely,

Jeremy Gans

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[62] A further issue to resolve is whether the new element should be limited to direct with genitals and anuses, rather than contact through clothing.

[63] NSW Law Reform Commission, R*eport 148: Consent in relation to sexual offences*, September 2020, p. 190.