**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

In the Matter of Article 4, 12 and 162
of the Constitution of the Republic of Singapore

Between

**KENNETH CHEE MUN-LEON**
(NRIC No. S7528719D)

… 1st Plaintiff

**LIM MENG SUANG**
(NRIC No. S6802321A )

… 2nd Plaintiff

And

**THE ATTORNEY GENERAL**

… Defendant

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**PLAINTIFFS' WRITTEN SUBMISSIONS**

**ORIGINATING SUMMONS 1135/2012**

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**PLAINTIFFS' WRITTEN SUBMISSIONS**

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    (1) Tangible Harm in the form of HIV/AIDS Outreach Limitation.

(2) The Offending Provision causes Psychological Damage.

(3) The Offending Provision makes it difficult for exploited gay/bisexual men to approach law enforcement for protection and leaves them particularly vulnerable to blackmail.

(4) The Offending Provision provides potential grounds for impugning otherwise regular commercial transactions involving homosexual men.

B. The Offending Provision fails the two-stage test of Constitutionality.

1. The Offending Provision fails Stage 1 as it discloses no intelligible differentia.

2. The Offending Provision fails Stage 2 as the differentia bears no rational relation to the object of the law in question:

(1) The Object of the Offending Provision.

(2) The Offending Provision bears no

## PLAINTIFFS' WRITTEN SUBMISSIONS

Reference to Plaintiffs' Bundle of Authorities ("PBOA")

*May it please the Court,*

The Plaintiff's submissions are divided into 5 parts as follows:

**PART I: INTRODUCTION**

**PART II: BACKGROUND OF THE OFFENDING PROVISION**

**PART III: THE OFFENDING PROVISION IS CONTRARY TO ARTICLE 12 OF THE CONSTITUTION**

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## PART I: INTRODUCTION

1. The present application concerns a challenge to the continued criminalisation of sexual acts between consenting male adults

under section 377A of the Penal Code (Cap. 224) ("the Offending Provision").

**A. FACTS**

2. This constitutional challenge is brought by Gary Lim Meng Suang ("the 1st Plaintiff") and Kenneth Chee Mun-Leon ("the 2nd Plaintiff"). The Plaintiffs have been in a romantic and sexual relationship for the past 15 years and, at all material times, were consenting adults.

3. Both the Plaintiffs have attested to the discrimination and stigma they have experienced and witnessed as a result of the Offending Provision. The Attorney-General of Singapore ("the Defendant") has not challenged the affidavits of the Plaintiffs filed in this action.

4. The Defendant has not challenged the *locus standi* of the Plaintiffs to take out the present application.

**B. BACKGROUND AND HISTORY OF THE OFFENDING PROVISION**

5. The Offending Provision reads as follows: PBOA at Tab 1

> *"Outrages on decency*

> *377A. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years."*

6. The Plaintiffs contend that the Offending Provision violates Article 12 (1) of the Constitution of the Republic of Singapore, which provides: PBOA at Tab 2

> *"All persons are equal before the law and entitled to the equal protection of the law."*

7. Accordingly, the Offending Provision, by virtue of its inconsistency with Article 12 (1), is void pursuant to Article 4 of the Constitution, which provides: PBOA at Tab 2

> *"Supremacy of Constitution*
>
> *This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the*

*inconsistency, be void."*

8. It is acknowledged that the Offending Provision was enacted prior to the enactment of the Constitution of the Republic of Singapore. However, this is not a barrier to using Article 4 as a way to void an unconstitutional law: *Tan Eng Hong v Attorney-General* [2012] SGCA 45 ("*Tan Eng Hong*") at [59]. PBOA at Tab 3

9. In the alternative, it is submitted that Article 162 also provides for a way to modify the Offending Provision in order to bring it in line with the Constitution. Article 162 reads as follows: PBOA at Tab 2

> *"Existing laws*
>
> *162. Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them*

*into conformity with this Constitution."*

10. The Offending Provision was introduced into the Singapore Penal Code by s 7 of the Penal Code (Amendment) Ordinance 1938 (No. 12 of 1938), and came into effect on 8 July 1938. The stated reason for its addition was to *"[make] punishable acts of gross indecency between male persons which do not amount to an unnatural offence within the meaning of s 377 of of the Code."* The Offending Provision was based on s 11 of the UK Criminal Law Amendment Act 1885 (48 & 49 Vict c 69). *Equal Protection and Sexual Orientation*, Jack Lee Tsen-Ta, [1995] 7 SingLRev 228 at 267. PBOA at Tab 52

11. The English section was introduced by Henry Labouchere in the House of Commons at the report stage of a *"Bill to make further provision for the protection of women and girls and the suppression of brothels and other purposes"*. It was passed without detailed consideration or discussion on its substance. PBOA at Tab 48

[United Kingdom, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) at 108 (Chair: Sir John Frederick Wolfenden) ("*Wolfenden Report*")]

12. The origins of what was known as the *"Labouchere amendment"* were part of a raft of "*many moral initiatives*" of the period and was "*strongly influenced by the "social purity" ideas of the late 19th century. The Labouchere amendment was said to give "voice to widely held concerns about the destructive power of male lust…Sex had to be contained within marriage*". PBOA at Tab 49

[Douglas E Sanders, "*377 and the Unnatural Afterlife of British Colonialism in Asia*" (2009) 4:1 Asian Journal of Comparative Law at 15 ("*Sanders*")]

13. There is some historical basis to suggest that the intention of the Labouchere amendment was to introduce an amendment so irrelevant and ridiculous into the Criminal Law Amendment Act of 1885 that the entire Bill would have to be reconsidered or fail.

14. The author Frank Harris suggests: PBOA at Tab 51

> "*Mr Labouchere, the Radical member, inflamed, it is said, with a desire to make the law ridiculous, gravely proposed that the section be extended so as to apply to people of the same sex who indulged in familiarities or indecencies. The Puritan faction had no logical objection to the*

*extension, and it became the law of the land*".

[F.B. Smith, "*Labouchere's Amendment to the Criminal Law Amendment Bill*" (1976) Historical Studies 17:67 165. citing F. Harris, Oscar Wilde, East Lansing 1959, p. 144.)]

15. There is less controversy over the reception of the Offending Provision into Singapore in 1938. The stated reason given for the introduction of the Offending Provision in the 1936 Penal Code was to strengthen the law to make *"gross indecency"* between male homosexuals an offence, even if committed in private. It was to "*strengthen the law and to bring it into line with the English Criminal Law*". PBOA at Tab 52

Speech of Mr C G Howell, Attorney-General, Second reading of the Penal Code (Amendment) Bill referenced at Jack Lee Tsen-Ta, *Equal Protection and Sexual Orientation*, (1995) 7 SingLRev 228 at 269.

16. The Offending Provision is the sister provision to the now repealed Section 377 ("S377") of the Penal Code (Cap 224, 1985 Rev Ed) ("the 1985 Penal Code"). S377 provided as follows: PBOA at Tab 5

"*Unnatural offences*

*377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman*

*or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years and shall also be liable to fine.*"

17. The Offending Provision traces its' roots to ecclesiastical Western, Judeo-Christian opposition to homosexuality.

18. Specifically, the prohibition against homosexual intercourse and characterisation of homosexuality as an abomination first finds its expression in the book of Leviticus at 18:22 and 20:13, which, respectively, read: PBOA at Tab 49

"*You shall not lie with a male as with a woman. It is an abomination.*

*If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them.*"

This religious abhorrence made its way into British criminal law in 1534, under legislation introduced in the reign of Henry VIII prohibiting "*the detestable and abominable Vice of Buggery committed with mankind or beast*".

[*Sanders* at page 2.]

19. This early version of the British "*buggery law*" was subsequently reformulated as "*unnatural intercourse*", in s 377 in Indian Penal Code of 1860. This was not a Code that was ever enacted in Britain, but used exclusively for the colonies. The Code was widely copied and adapted through British colonies such as Malaysia, Singapore and Brunei, along with the prohibition of unnatural intercourse. PBOA at Tab 49

[*Sanders* at page 2.]

20. S377 was repealed by the Penal Code (Amendment) Bill 2007 (Bill 38 of 2007). In repealing S377, then Senior Minister of State for Home Affairs Associate Professor Ho Peng Kee ("**Assoc Prof Ho**") explained the decision to repeal as follows: PBOA at Tab 6

> "*Next, Sir, we will be removing the use of the archaic term, "Carnal Intercourse Against the Order of Nature" from the [1985] Penal Code. By repealing section 377, any sexual act including oral and anal sex, between a consenting heterosexual couple, 16 years of age and above, will no longer be criminalised when done in private. As the [1985] Penal Code* PBOA at Tab 7

> *reflects social norms and values, deleting section 377 is the right thing to do as Singaporeans by and large do not find oral and anal sex between two consenting male and female [persons] in private offensive or unacceptable. This is clear from the public reaction to the case of Annis bin Abdullah v Public Prosecutor [2003] SGDC 290 and confirmed through the feedback received in the course of this Penal Code review consultation.*"

[*Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at cols 2175 – 2242).]

21. However, the legislature did not repeal the Offending Provision along with S377. While S377 was phrased in entirely gender-neutral terms, the Offending Provision is quite clearly targeted at men only.

**C. SUMMARY OF SUBMISSIONS**

22. It is submitted that the Offending Provision is void as it is contrary to Article 12(1) as it discriminates against gay/bisexual men on the basis of an immutable characteristic: sexual

orientation.

23. The Offending Provision is void as it is arbitrary, absurd and unreasonable.

24. The criminalisation of homosexual sex by sexually-active male homosexuals fails the two-step "*reasonable classification*" test for validity under Article 12 of the Constitution:

    (1) the Offending Provision discloses no intelligible differentia; and

    (2) the Offending Provision bears no rational nexus to the object of the legislation.

25. The Offending Provision is thus unconstitutional and should be declared void.

**D. HISTORICAL CONTEXT OF PRESENT CONSTITUTIONAL CHALLENGE**

26. In considering the present constitutional challenge to the Offending Provision, the Plaintiffs urge the Court to bear in mind the historical context of the present constitutional challenge.

27. While the present constitutional challenge will be the first of its

kind to be heard in the Singapore Courts, the issues the Court will need to adjudicate on have been decided in courts of competent jurisdictions, debated by eminent jurists, and has been the subject of numerous reports over the course of the last century.

28. As far back as September 1957, the relationship between the law and public opinion in relation to the criminalisation of homosexuality was considered by the *Wolfenden Report* in the United Kingdom. The report comprehensively considered the issue of whether or not homosexual behaviour between consenting adults in private should continue to be a criminal offence. The *Wolfenden Report* concluded that it should not.

29. Singapore is not just one step behind the country that birthed and bequeathed to her the Offending Provision. Singapore is now 66 years behind the *Wolfenden Report* and 56 years behind the United Kingdom's Sexual Offences Act (1967) which decriminalised homosexual acts in private between two men.

30. The Plaintiffs urge this Court to arrive at a similar conclusion as the *Wolfenden Report*, which the Plaintiffs humbly submit most accords with logic and the duty of the Courts to strike down

discriminatory legislation:

> "*Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.*"

31. The Plaintiffs submit that it is time for the Courts in Singapore to take the step forward to strike down the Offending Provision.

32. It is submitted that comports with the duty of the Court: to interpret that Constitution in a manner that accords all citizens "*meaningful protection of fundamental rights*" and to ensure "*effective safeguards against the abuse of majority power*". *Tan* PBOA at Tab 53

*Eng Hong* at [63], quoting the *Report of the Constitutional Commission* (27 August 1996) (Chairman: Wee Chong Jin CJ) ("the Wee Report").

## PART II: BACKGROUND OF THE OFFENDING PROVISION:

## INTERPRETATION OF LEGISLATIVE INTENT

33. It is submitted that in interpreting the legislative object of the Offending Provision, the Court can pay heed to both the original legislative purpose of the enactment in England as well as the statements of the government in deciding to retain the Offending Provision in 2007.

34. This is clear from Section 9A (3)(d) of the Interpretation Act which permits the Court to consider "*any relevant material in any official record of debates in Parliament*" in ascertaining the purpose or object of any written law. PBOA at Tab 8

35. In interpreting legislative intention in retention, the following statements by the government are indicative of the objective of the government in retaining the Offending Provision:

(1) Summary Of The Key Amendments To The Penal Code, Ministry of Home Affairs, 17 September PBOA at Tab 54

2007:

> *"Public feedback on this issue has been emotional, divided and strongly expressed with the majority calling for its retention. MHA recognizes that we are a generally conservative society and that we should let the situation evolve"*;

Ministry of Home Affairs, Press Release, "Summary of the Key Amendments to the Penal Code" (17 September 2007) online: MHA Press Releases <http://www.mha.gov.sg/news_details.aspx?nid=MTExNQ%3D%3D-iluBVeUNpZk%3D>

PBOA at Tab 7

(2) Speech of **Assoc Prof Ho** on the Second Reading of the Penal Code (Amendment) Bill:

> "*Next, Sir, section 377A which criminalises acts of gross indecency between two male adults will be retained. Public feedback on this issue has been emotional, divided and strongly expressed with the*

*majority calling for its retention. Sir, Singaporeans are still a largely conservative society. The majority find homosexual behaviour offensive and unacceptable. Neither side is going to persuade or convince the other of their position. We should live and let live, and let the situation evolve, in tandem with the values of our society. This approach is a pragmatic one that maintains Singapore's social cohesion. Police has not been proactively enforcing the provision and will continue to take this stance. But this does not mean that the section is purely symbolic and thus redundant. There have been convictions over the years involving cases where minors were exploited and abused or where male adults committed the offence in a public place such as a public toilet or back-lane. Sir, whilst*

*homosexuals have a place in society and, in recent years, more social space, repealing section 377A will be very contentious and may send a wrong signal that Government is encouraging and endorsing the homosexual lifestyle as part of our mainstream way of life."*

Parliamentary Debates Singapore: Official Report, vol 83 at column 2175 (22 October 2007) (Assoc. Prof. Ho Peng Kee)

(3) Speech of the **Prime Minister Mr Lee Hsien Loong** ("PM Lee") on the Second Reading of the Penal Code (Amendment) Bill, relevant sections set out in full:

"*Many Members have said this, but it is true and it is worth saying again. Singapore is basically a conservative society. The family is the basic building block of our society. It has been so and, by policy, we have reinforced this and we want to keep it so. And by*

PBOA Tab 7

*"family" in Singapore, we mean one man one woman, marrying, having children and bringing up children within that framework of a stable family unit.*

*But a heterosexual stable family is a social norm. It is what we teach in schools. It is also what parents want their children to see as their children grow up, to set their expectations and encourage them to develop in this direction. I think the vast majority of Singaporeans want to keep it this way. They want to keep our society like this, and so does the Government.*

*There is a range of views. There is also a range of degrees to which people are seized with this issue. Many people are not that seized with this issue. And speaking*

*candidly, I think the people who are very seized with this issue are a minority. For the majority of Singaporeans - this is something that they are aware of but it is not the top of their consciousness - including, I would say, amongst them a significant number of gays themselves. But, also, I would say, amongst the Chinese speaking community in Singapore. The Chinese-speaking Singaporeans are not strongly engaged, either for removing section 377A or against removing section 377A. Their attitude is: live and let live.*

*Asian societies do not have such laws, not in Japan, China and Taiwan. But it is part of our landscape. We have retained it over the years. So, the question is: what do we want to do about it now? Do*

*we want to do anything about it now? If we retain it, we are not enforcing it proactively. Nobody has argued for it to be enforced very vigorously in this House. If we abolish it, we may be sending the wrong signal that our stance has changed, and the rules have shifted.*

*So, this is not an issue where we can reach happy consensus and abolishing section 377A, were we to do this, is not going to end the argument in Singapore. Among the conservative Singaporeans, the deep concerns over the moral values of society will remain and, among the gay rights' activists, abolition is not going to give them what they want because what they want is not just to be freed from section 377A, but more space and full acceptance by other Singaporeans. And they have*

*said so. So, supposing we move on 377A, I think the gay activists would push for more, following the example of other avant garde countries in Europe and America, to change what is taught in the schools, to advocate same-sex marriages and parenting, to ask for, to quote from their letter, "...exactly the same rights as a straight man or woman." This is quoting from the open letter which the petitioners wrote to me. And when it comes to these issues, the majority of Singaporeans will strenuously oppose these follow-up moves by the gay campaigners and many who are not anti-gay will be against this agenda, and I think for good reason.*

*Therefore, we have decided to keep the status quo on section 377A. It is better to accept the legal untidiness*

*and the ambiguity. It works, do not disturb it. Mr Stewart Koe, who is one of the petitioners, was interviewed yesterday and he said he wanted the Government to remove the ambiguity and clarify matters. He said the current situation is like, I quote him, "Having a gun put to your head and not pulling the trigger. Either put the gun down or pull the trigger." First of all, I do not think it is like that, and secondly, I do not think it is wise to try to force the issue. If you try and force the issue and settle the matter definitively, one way or the other, we are never going to reach an agreement within Singapore society. People on both sides hold strong views. People who are presently willing to live and let live will get polarised and no views will change, because many of the*

> *people who oppose it do so on very deeply held religious convictions, particularly the Christians and the Muslims and those who propose it on the other side, they also want this as a matter of deeply felt fundamental principles. So, discussion and debate is not going to bring them closer together. And instead of forging a consensus, we will divide and polarise our society."*
>
> [Singapore Parliamentary Debates: Official Report, vol 83 at column 2354 (23 October 2007) (PM Lee)]

36. From the original enactment of the Offending Provision and the Parliamentary Debates in 2007, the main intent and purpose of the Offending Provision is clear: it is to prevent homosexual acts by criminalizing them. There are two other discernible objectives of the Offending Provision: **the first** is to not cause offence and polarisation in society ("**Objective 1**"), **the second** is to reflect societal conservatism and preserve family values ("**Objective** PBOA at Tab 7

**2**").

37. Notably, PM Lee stated in his speech that society as a whole is generally agnostic about whether or not to retain the Offending Provision: PBOA at Tab 7

> "*I think the people who are seized with this issue are a minority. For the majority of Singaporeans – this is something that they are aware of but it is not the top of their consciousness – including, I would say, amongst them a significant number of gays themselves. But also, I would say, amongst the Chinese speaking community in Singapore. The Chinese-speaking Singaporeans are not strongly engaged, either for removing section 377A or against removing section 377A. Their attitude is: live and let live*."

## PART III: S 377A IS CONTRARY TO ARTICLE 12(1) OF THE CONSTITUTION

### The "Equal Protection" entitlement in Article 12 (1) extends to prevent discrimination on the basis of sexual orientation

38. As a threshold issue, it is submitted that Article 12 of the Constitution, and, in particular, Article12 (1), is capable of

protecting against discrimination on the basis of sexual orientation.

39. Article 12 of the Constitution is set out below for ease of reference: PBOA at Tab 2

> *"Equal protection*
>
> *12.—(1) All persons are equal before the law and entitled to the equal protection of the law.*
>
> *(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.*
>
> *(3) This Article does not invalidate or prohibit —*
>
> *(a) any provision regulating personal law; or*
>
> *(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group*

*professing any religion, to persons professing that religion."*

40. Article 12(1) of the Constitution is a general limb expressing non-discrimination. Article 12(2) does not in any way limit the scope of Article 12(1), but merely expresses some explicit categories of non-discrimination. On a plain reading, Article 12(1) is not limited to prohibiting certain kinds of discrimination.

41. Article 12(1) is capable of covering discrimination on the basis of other factors.

42. Cases implicating Article 12(1) have been considered by the Court despite not falling into the categories of non-discrimination in Article 12 (2). *Ong Ah Chuan v PP* [1980-1981] SLR 48 ("*Ong Ah Chuan*"), *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 ("*Nguyen*") and *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 ("*Yong Vui Kong [2010]*") considered an Article 12 (1) challenge to provisions of the *Misuse of Drugs Act*. *Public Prosecutor v Taw Cheng Kong* [1998] 1 SLR(R) 78 ("*Taw Cheng Kong HC*"); [1998] 2 SLR(R) 489 ("*Taw Cheng Kong CA*"), considered an Article 12 (1) challenge to provisions of the *Prevention of Corruption Act* that

PBOA at Tab 9: *Ong Ah Chuan v PP*

PBOA at Tab 10: *Nguyen Tuong Van v Public Prosecutor*

PBOA at Tab 11: *Yong Vui Kong v Public Prosecutor [2010]*

PBOA at Tab 12: *Public Prosecutor v Taw Cheng Kong [1998] HC*

differentiated between citizens and non-citizens. In none of these cases did the Court pronounce that Article 12(1) was limited by Article 12(2).

PBOA at Tab 13: *Public Prosecutor v Taw Cheng Kong [1998] CA*

43. The government itself has admitted in international fora that Article 12 (1) of the Constitution is broad enough to encompass equal protection with respect to sexual orientation.

44. The Report of the Government to the CEDAW Committee at [31] states:

PBOA at Tab 55

> *"31. Please comment on reports with regard to prevalent and systematic discrimination against women based on sexual orientation and gender identity in the social, cultural, political and economic spheres in the State party. What measures are being undertaken to address these problems, especially with a view to destigmatizing and promoting tolerance to that end.*
>
> *31.1 The principle of equality of all persons before the law is enshrined in the Constitution of the Republic of Singapore, regardless of* ***gender, sexual orientation and gender identity****. All persons*

> *in Singapore are entitled to the equal protection of the law, and have equal access to basic resources such as education, housing and healthcare. Like heterosexuals, homosexuals are free to lead their lives and pursue their social activities. Gay groups have held public discussions and published websites, and there are films and plays on gay themes and gay bars and clubs in Singapore."*
> [Emphasis added]
>
> [*Responses to the list of issues and questions with regard to the consideration of the fourth periodic report*, UNCEDAWOR, 49th Sess, (2011)]

45. As seen above, since it is clear from jurisprudence and the construction of the provision that Article 12(1) is wide enough to cover discrimination on other grounds, and since the government has said that this covers sexual orientation, it is submitted that the Article 12(1) is capable of prohibiting discrimination on the basis of sexual orientation.

## PART IV: THE OFFENDING PROVISION FAILS THE TEST OF LEGALITY UNDER ARTICLE 12 (1) OF THE CONSTITUTION

### A. The Offending Provision is so absurd, arbitrary and unreasonable that it cannot be considered good law

46. The Plaintiffs contend that there is sufficient material to show that the Offending Provision fails even before applying the two stage test of Constitutionality of the Offending Provision under Article 12 (1) is considered.

47. A law which is so absurd or arbitrary that it could not have been contemplated by our constitutional framers as being "*law*" when they crafted the constitutional provisions protecting fundamental liberties cannot be good law: *Yong Vui Kong*, interpreting *Ong Ah Chuan* at [24]. PBOA at Tab 11 PBOA at Tab 9

48. The validity of a piece of legislation can be attacked if material tendered before the Court shows that the enactment or the exercise of the power under it is arbitrary and unsupportable. *Taw Cheng Kong CA* at [60]. Legislation or executive action that perpetuates "*inequalities […] on a substantial scale*" or which PBOA at Tab 13 PBOA at Tab 14 PBOA at Tab 15

exhibit "*deliberate and arbitrary discrimination*" will fall foul of the Equal Protection clause. See the Privy Council decisions in *Howe Yoon Chong v Chief Assessor and Comptroller of Property Tax* [1981]1 MLJ 51 and *Howe Yoon Chong v Chief Assessor and Comptroller of Property Tax* [1990] 1 MLJ 321. Despite the presumption of constitutionality to be applied to statutes, a law can be impugned if it is plainly arbitrary on its face and evidence is led to show it has operated arbitrarily. *Taw Cheng Kong CA* at [80]

PBOA at Tab 13

49. The position in Singapore is supported and consistent with clear authority in comparative jurisdictions that clearly state that an arbitrary legal provision will fall foul of the equality clause. *Shri Sitaram Sugar Co Ltd v Union of India & Ors* [1990] 3 SCC 223 at [251], cited in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 at [49]. See also *Naz Foundation v Government of NCT of Delhi*, WP(C) No. 7455/2001, High Court of Delhi at New Delhi, 2 July 2009 ("*Naz Foundation*") at [89]: "*equality is antithetic to arbitrariness*".

PBOA at Tab 16

PBOA at Tab 17

50. Additionally, per Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [46], quoting American

PBOA at Tab 18

judge Jackson J in *Railway Express Agency Inc. v New York* 336 US 106 (1949), 112-113:

> *"I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."*

51. The Plaintiffs contend that the Offending Provision is absurd, arbitrary and unreasonable for the following reasons:

(1) it criminalises identity, which is innate and immutable;

(2) it is overly broad and fails to identify what actions it is meant to proscribe;

(3) it is arbitrarily enforced in operation;

(4) it attempts to legislate morality in an arbitrary and selective manner; and

(5) it causes a plethora of tangible harm to a "not insignificant portion or our community".

**1. The Offending Provision is absurd, arbitrary and unreasonable as it criminalises identity, which is practically immutable**

52. Sexual orientation refers to a person's sexual identity in relation to the gender to which they are attracted. Sexual orientation is often expressed in the terms of being heterosexual, homosexual, or bisexual.

53. Those who identify as other than heterosexual, are generally referred to as lesbian, gay or bisexual ("**LGB**"). Sexual orientation is not merely based on conduct; it is based on an

innate and immutable characteristic of certain segments of the population. While there is no scientific consensus on what causes same-sex attractions, it is almost universally acknowledged by a respectable body of scientific opinion that sexual orientation is an immutable characteristic.

54. The immutability of sexual orientation has been accepted by senior members of government in Singapore.

55. In the 2007 Penal Code (Amendment) Bill debate, **PM Lee** stated: PBOA at Tab 7

> *"So, I think, the social environment has something to do with it (homosexuality). But there is growing scientific evidence that sexual orientation is something which is substantially inborn. I know that some will strongly disagree with this, but the evidence is accumulating. We can read the arguments and the debates on the Internet. Just to take one provocative fact, homosexual behaviour is not observed only amongst human beings but also amongst many species of mammals.*
>
> *So, too, in Singapore, there is a small percentage of people, both male and female, who have*

*homosexual orientations*."

[Emphasis Added]

Singapore Parliamentary Debates: Official Report, vol 83 at column 2354 (23 October 2007) (PM Lee)

56. Former Prime Minister and current **Minister Mentor Lee Kuan Yew** has stated unequivocally that homosexuality is inborn and genetic:

"*No, it's not a lifestyle. You can read the books you want, all the articles. There's a genetic difference, so it's not a matter of choice. They are born that way and that's that. So if two men or two women are that way, just leave them alone…There's enough evidence that some people are that way and just leave them be….*

*That's life. They're born with that genetic code, that's that. Dick Cheney didn't like gays but his daughter was born like that. He says, "I still love her, full-stop…*

*Life's like that. People are born like that. It's not new; it goes back to ancient times. So I think there's something in the genetic code*".

PBOA at Tab 56

[Han F. K., Ibrahim Z. et al., *Lee Kuan Yew: Hard Truths*

*to Keep Singapore Going* (Singapore: Singapore Press Holdings Ltd., 2011]

57. Then Minister of State for Health, the late **Dr Balaji Sadasivan**, a trained neurosurgeon, explained the observable differences in the brains of homosexuals and heterosexuals:

PBOA at Tab 57

> *"'Research has also shown that the brain of homosexuals is structurally different from heterosexuals. It is likely therefore that the homosexual tendency is imprinted in the brain in utero and homosexuals must live with the tendencies that they inherit as a result of the structural changes in their brain. Within the moral and cultural constraints of our society, we should be tolerant of those who may be different from most of us."*

[Speech by Minister of State for Health, the late Dr Balaji Sadasivan, The Sunday Times]

58. The position taken by senior members of the Singapore government as stated above is consistent with and reflects the majority of scientific studies on the issue of whether or not

homosexuality is innate.

59. The nature of sexual orientation and its basis in biology has been the subject of considerable research over the last 25 years. For example, in 1991 the neurobiologist Simon LeVay published a study suggesting that the hypothalamus was smaller for gay men, than heterosexual men. Simon LeVay, , "*A difference in hypothalamic structure between heterosexual and homosexual men*" (2001) 253 Science 1034 and in 1993 Dean Hamer concluded that there was a link between male homosexuality and markers on the X chromosome [DeanH. Hamer et al., "*A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*", (1993) 261 Science 5119].

PBOA at Tab 58

PBOA at Tab 59

60. For researchers, the preponderance of this type of evidence is sufficient to draw the conclusion that '*biological mechanisms are the ones operating in the etiology of a homosexual orientation.*' [A.Lee Beckstead., "*Can We Change Sexual Orientation*?"(2012) 41 Arch Sex Behav].

PBOA at Tab 60

PBOA at Tab 61

A recent and comprehensive summary of the available research was published by Simon LeVay (LeVay, S., *Gay, Straight, and the Reason Why The Science of Sexual Orientation* (New York:

Oxford University Press, 2011) ) ("*Gay Straight and the Reason Why*"). Concluding that it is possible to identify a biological basis for homosexual orientation, LeVay acknowledges that this involves a complex interaction between genes, sex hormones, and the cells of the developing body and brain.

61. Indeed, since the publication of *Gay Straight and the Reason Why*, further research has been published suggesting new connections between biology and sexual orientation (see, for example, William R. Rice, Urban Friberg and Sergey Gavrilets, "*Homosexuality as a Consequence of Epigenetically Canalized Sexual Development*" (2012) 87 The Quarterly Review of Biology 4 ). PBOA at Tab 61 PBOA at Tab 62

62. While no local cases have considered the question of sexuality and immutability, cases from other Commonwealth jurisdictions and the United States have generally accepted that homosexuality is innate, or immutable to the extent that sexual orientation is only changeable at great personal cost.

63. The High Court of Delhi in *Naz Foundation* accepted that '*homosexuality is not a disease or mental illness that needs to be, or can be, "cured" or "altered,"'* by reference to medical PBOA at Tab 17 PBOA at Tab 19

opinion and the amicus brief of the APA in *Lawrence v Texas* (160 (2009) DLT 277 para.s 67-68) ("*Lawrence v Texas*").

64. In *Sunil Babu Pant and Others v Nepal Government and Others* [2008] 2 NJA LJ. 261 ("*Sunil Babu*") at [274], the Court concluded that "the traditional norms and values in regards to the sex, sexuality, sexual orientation and gender identity are changing gradually. It is also seen that the concept specifying that the gender identity should be determined according to the physical condition and psychological feelings of a person is being established gradually. The concept that homosexuals and third gender people are not mentally ill but leading normal lifestyles, is in the process of entrenchment. The Court considered international approaches to this question, including the approach of the US Supreme Court in *Lawrence v Texas* and a Government Interdepartmental Working Group in the UK that emphasised that psychiatry could not cure homosexuality. PBOA at Tab 20

65. The Supreme Court of Canada has chosen an approach that does not require the Court to pronounce definitively on whether homosexuality is innate: PBOA at Tab 21

> '*whether or not sexual orientation is based upon biological or physiological factors, which may*

> *be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal cost.*'
>
> [*Egan v Canada* [1995] 2 RCS at [5]]

66. This is a practical approach that the Singapore Courts can choose to adopt if it declines to wade into the scientific controversy in this field.

67. In the United States, the nature of homosexuality has been considered in a number of cases. For example, the Northern District of California received significant expert testimony on the nature of homosexuality in *Perry v Schwarzenegger* (704 F.Supp.2d 921) (the latest update on this case is *Perry v Brown* [2012] 671F.3d 1052). Judge Walker concluded that '*[i]ndividuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation*'. PBOA at Tab 22 PBOA at Tab 23

68. Scientific data on the subject of immutability suggest that there is a sound basis for concluding that sexual orientation is immutable

or at least practically immutable to the point where attempts to change a person's sexual orientation would come at great personal cost. It would be as much a trait such as gender, ethnicity, eye colour, skin colour and so on.

69. In any case, senior members of Singapore's government have accepted the body of scientific literature in this regard.

70. It is therefore absurd, arbitrary and unreasonable for the government to continue criminalising what is, for all extents and purposes, a practically immutable characteristic.

71. It brings the force of the criminal law to bear against individuals for something they cannot change. This can only be absurd.

**2. The Offending Provision is so overly broad as to be absurd, arbitrary and unreasonable**

72. What constitutes an act of gross indecency is indeterminate and not even capable of specific definition. In *Ng Huat v Public Prosecutor* [1995] 2 SLR 783 ("*Ng Huat*") at [27], then Chief Justice Yong Pung How held that there was no actual definition of "*gross indecency*" and that the *actus reus* for this offence would essentially evolve with the times:

PBOA at Tab 24

> *"What amounts to a grossly indecent act must depend on whether in the circumstances, and the customs and morals of our times, it would be considered grossly indecent by any right-thinking member of the public."*

73. The Offending Provision is interpreted so broadly in Singapore that consent is not even necessary to trigger the offence. *Ng Huat* was a case that applied the Offending Provision to an accused male nurse who had touched the penis of patient without his consent. It was held that the preposition "*with*" in the Offending Provision is interpreted by the Singapore Courts to be read broadly to mean "*directed towards*" or "*against*": *Ng Huat* at [11]. PBOA at Tab 24

74. The Singapore Courts have stated that under this definition of "*with*" [which represents the state of the law in England prior to 1967: *Ng Huat* at [23]], even "*innocent "victims*"" of a grossly indecent act could find themselves charged under the Offending Provision unless prosecutorial discretion is duly exercised. PBOA at Tab 24

75. Under the law as it stands in *Ng Huat*, the only distinction between an "*innocent victim*" who is charged and one who is not PBOA at Tab 24

in a situation where an indecent act has been directed towards the innocent victim is if "*No aspersions are being cast on their sexual proclivities*": "*If they did have any homosexual tendencies, they would almost invariably have been charged with the offence as well*": *Ng Huat* at [24].

76. Basically, the only distinction is whether or not the "*innocent victim*" should be prosecuted under the Offending Provision in the above scenario is if the victim is gay. This is a remarkable proposition: homosexual victims of sexual assaults can be considered offenders purely by virtue of their sexuality.

77. This further illustrates the fact (highlighted above) that the Offending Provision essentially criminalises identity.

78. It was further held in *Ng Huat*, *obiter*, that physical contact is not even necessary for the Offending Provision to be triggered. CJ Yong cited the English case of *R v Preece* [1977] QB 370; [1976] 2 All ER 690 ("*R v Preece*") as guidance on how the Singapore Courts would interpret "*gross indecency*". In *R v Preece*, two men were charged with gross indecency for looking at each other masturbate in a public lavatory through a hole in the partition of their respective cubicles. PBOA at Tab 25

79. The over-breadth of the Offending Provision is all the more repugnant as it has been further broadened by executive fiat to criminalise sodomy, despite that not being its original intent. This was done subsequent to the repeal of its sister provision, S377. S377 was originally meant to deal with buggery (i.e. sodomy) [as well as, anal and oral copulation with members of the opposite sex]. The natural understanding of the provision for a prohibition of sodomy under S377 was that it would not be covered under the Offending Provision.

80. Subsequent to the repeal of S377, it was suggested that it would be impermissible to reinterpret the Offending Provision to include what was not originally there, as this would violate the principle of *nullum crimen sine lege*.

PBOA at Tab 63

Kumaralingam Amirthalingam, "*Criminal Law and Private Spaces, Regulating Homosexual Acts in Singapore*" in Bernadette McSherry, Alan Norrie &Simon Bronitt, eds, *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Oxford: Hart Publishing, 2009) at 190..

81. The Ministry of Home Affairs attempted to rectify this lacuna through a public statement in the press. In a letter titled "*Section 377A covers anal sex between males*", Mr Toh Yong Chuan, the Deputy Director of International and Corporate Relations Division wrote: PBOA at Tab 64

> *"I REFER to Associate Professor Kumaralingam Amirthalingam's Review article, 'Balancing evidence and rhetoric in law reform' (ST, Dec 5).*
>
> *Prof Kumaralingam argued that based on existing jurisprudence, gross indecency under Section 377A (Outrages on decency) of the Penal Code does not include anal sex between males. He is of the view that since Section 377 (Unnatural offences) which criminalises consensual anal sex between males will be repealed and Section 377A does not include anal sex, there is a lacuna in the law. There is no lacuna in the law. The debate in Parliament made it abundantly clear that the Government's intention is to decriminalise oral and anal sex between a consenting adult heterosexual couple in private by repealing Section 377 but to retain the status quo whereby homosexual acts under Section 377A*

> *remain criminalised. In this regard, the Attorney-General's Chambers had earlier advised that Section 377A covers the act of anal sex between male persons."*
>
> [Toh Yong Chuan "*Section 377A covers anal sex between men*", *The Straits Times* (13 December 2007)]

82. The end state of affairs is that the obsolescence of S377 insofar as it relates to homosexuals has been interpreted by executive fiat into the Offending Provision, which is in itself over-broad and archaic. This is clearly arbitrary and absurd.

83. It is also important to note that the interpretation by the Ministry of Home Affairs above cannot be taken as an expression of Parliamentary intent. Reading a prohibition on sodomy into a provision that was never intended to encompass sodomy, and which does not specifically prohibit sodomy, contravenes principles of interpretation adopted by the Singapore Courts. In *PP v Low Kok Heng* [2007] SGHC 123 ("*Low Kok Heng*"), V K Rajah JA , cited the Canadian case of *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 with approval:

PBOA at Tab 26

> *"The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."* [emphasis added]

84. The above dicta is clearly on all fours with the situation insofar as it relates to the Offending Provision.

**3. The Offending Provision is absurd, arbitrary and unreasonable as even the government acknowledges it has been arbitrarily and selectively enforced**

85. There is absolutely no clarity as to the circumstances in which the Offending Provision will be enforced. The government acknowledges and admits this.

86. The complete lack of consistency in the application of the Offending Provision was pointed out by **MP Hri Kumar** S.C. in the 2007 Penal Code Amendment Debate: PBOA at Tab 7

> *"Sir, first, it is unclear what the current legal position is. In a statement on 7th of November 2006, the Ministry of Home Affairs said that, with respect to section 377A, it will not be proactive in enforcing the section against adult males engaging in consensual sex with each other in private. Does it mean that the Police will not act on complaints or that suspects may be investigated but ultimately not arrested or prosecuted? Or is it the case that the Attorney-General, who has prosecutorial discretion, may prosecute some but not all offenders? That puts the Attorney-General in a difficult position because selective prosecution will give rise to more issues"*
>
> …
>
> *"Thirdly, Sir, the law has no real substance. Through a 15 year period, i.e.1988 to 2003, there were only eight convictions under section 377A involving seven incidents. Two convictions were*

> *for the same incident. Moreover, it has not been invoked in respect of consensual sex since 1993. So this law is rarely applied or, if applied, it applies to minors or acts in public. Does that mean that private consensual homosexual acts do not happen in Singapore? To believe that would be naïve. The truth is that it is virtually impossible to enforce this law."*

[Parliamentary Debates Singapore: Official Report, vol 83 at column 2175 (22 October 2007) (MP Hri Kumar SC)]

87. **PM Lee** acknowledged the ambiguity and lack of clarity in the law: PBOA at Tab 7

> *"It is not legally neat and tidy. Mr Hri Kumar gave a professional explanation of how untidy it is, but it is a practical arrangement that has evolved out of our historical circumstance".*
>
> …
>
> *"It is better to accept the legal untidiness and the ambiguity*"

[Singapore Parliamentary Debates: Official Report, vol 83 at

column 2354 (23 October 2007) (PM Lee)]

88. In *Tan Eng Hong*, the Attorney-General has accepted, and the Court of Appeal has found as a fact, that there have been cases of arrests resulting in stern warnings under the Offending Provision for consensual sexual acts conducted in private. *Tan Eng Hong* at [173], [174] and [183]. This contradicts the assurances of the government that the Offending Provision would not be enforced, and is indicative of enforcement that is arbitrary. PBOA at Tab 3

89. The consequence of the above state of affairs is a complete lack of clarity on when the Offending Provision will be enforced.

90. This further compounds the fact that it is completely unclear *what* the provision is meant to be enforced (see section III(A)(iii) above).

**4. The Offending Provision is absurd, arbitrary and unreasonable as it attempts to legislates *morality* in an arbitrary and discriminatory manner**

91. The Offending Provision is absurd, arbitrary and unreasonable as it criminalises private sexual relations between consenting adults absent any evidence of serious harm. *Naz Foundation* at [92]. PBOA at Tab 17

92. Maintaining the need to distinguish between private disapproval of ***immoral*** behaviour and actually legislating that disapproval was a key argument against sodomy laws considered by the *Wolfenden Report* at [61]: PBOA at Tab 48

> "*Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private* ***morality*** *and* ***immorality*** *which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private* ***immorality****. On the contrary, to emphasise the personal and private nature of* ***moral or immoral*** *conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law*".

93. The situation in Singapore is worse as it selectively legislates **morality** against homosexuals (as opposed to the introduction of moralistic legislation which does not specifically discriminate

against a class of persons). Numerous Members of Parliament pointed out the glaring and selective legislation of morality in relation to the Offending Provision during the 2007 Penal Code Amendment debate.

94. Nominated Member of Parliament **Mr Siew Kum Hong** ("NMP Siew") pointed out that the government's selective legislation of ***morality*** in relation to the Offending Provision was not internally consistent with the government's rationale for repealing other archaic provisions and refusing to criminalize other forms of behaviour considered ***immoral*** by society: PBOA at Tab 7

> "*Even if we accept the "signposting" argument, the Amendment Bill seems to reflect* ***public morality*** *in a selective and discriminatory manner. It is surely undisputed that society views extramarital sex as* ***immoral****. And, surely, most Singaporeans disapprove of prostitution and all types of discrimination, such as age, racial and gender discrimination. But we have not criminalised any of these.*
>
> *Indeed, the Amendment Bill even repeals section 498, which makes it an offence for a man to*

*entice, take away or detain a married woman with the intent of having illicit intercourse with her. The reason given is that it is an archaic offence which is no longer relevant in today's context.*

*But **public morality** in today's society remains firmly opposed to extramarital sex. So why do we selectively reflect **public morality** with respect to private, consensual acts between adult men, but not **public morality** on adultery? Why are we not "signposting" society's disapproval of adultery by retaining section 498, without proactively enforcing it? The Senior Minister of State has argued that repealing section 498 is not an endorsement of adultery or pre-marital sex. In the same way, repealing 377A is also not an endorsement of homosexuality. The inconsistency is discriminatory.*

*And taking the signposting argument to its logical conclusion, if we repeal section 498, are we then telling the world that seducing a married woman, hence leading to adultery, is acceptable? By*

> *lifting marital immunity in limited circumstances, are we endorsing marital rape in the other circumstances?*
>
> *Signposting is all or nothing. We cannot signpost selectively, with some provisions reflecting* ***public morality*** *and others not. It does not work that way. It is a fundamentally flawed argument that does not stand up to logic or reason or the principles of a democratic society, and so we should shy away from it.*"

[Parliamentary Debates Singapore: Official Report, vol 83 at column 2175 (22 October 2007) (NMP Siew)]

95. **MP Hri Kumar** S.C. exposed the absurdity of the argument that the Offending Provision should be retained as a societal signpost of Asian Values: PBOA at Tab 7

> *"Second is the notion that section 377A reflects our Asian values. But section 377A is not even Asian in origin. Section 377 was originally based on an English criminal law which sought to prohibit sodomy, and was incorporated into the*

> *Indian Penal Code in late 1862. It was also adapted for the Straits Settlements Penal Code in 1871. Section 377A was later added under the sub-title "Unnatural offences" in 1938. Both sections were absorbed unchanged into the Singapore Penal Code when the latter was passed by Singapore's Legislative Council on 28th January 1955. In short, we inherited this from the British. There is nothing distinctly Asian about it."*

[Parliamentary Debates Singapore: Official Report, vol 83 at column 2175 (22 October 2007) (MP Hri Kumar S.C.)]

96. **MP Charles Chong** similarly highlighted the fact that the Offending Provision is an absurd and arbitrary expression of societal values selectively inflicted on homosexual men by ironically noting: PBOA at Tab 7

> *"Sir, if we have intended the retention of section 377A in the Penal Code as an expression of our conservative values, rather than to be proactively enforced, as some have suggested, then I think we have come out short even in this respect. The*

> *section criminalises act of gross indecency in public and in private only if it is engaged between men. Surely, the Minister must acknowledge that women are as capable as men of committing such acts. Is section 377A therefore, as it stands, a correct statement of our values and principles? Or are there no lesbians in Singapore?"*

[Singapore Parliamentary Debates: Official Report, vol 83 at column 2354 (23 October 2007) (MP Charles Chong)]

97. The principle underlying the critiques of the Offending Provision in Parliament and the propositions that the Plaintiff urges upon this Court is, at heart, that it is not the business of the law to legislate ***religious morality*** or ***popular morality***: retaining a penal sanction that stigmatises and causes real harm to a section of the population cannot be justified on the grounds that it is required as a symbolic marker of "*family values*", ***public morality***, or ***moral disapproval***.

98. Despite the differing tests for constitutional validity under equality provisions and differences in the actual legislation considered by courts around the world, the basic principle that

neither ***sectarian nor religious morality*** should not form the basis of discriminatory legislation resonates clearly across comparative jurisdictions.

99. In *Lawrence v Texas,* Justice Kennedy at [571] acknowledged that the "*condemnation of homosexual conduct as immoral"* had been "*shaped by religious beliefs, conceptions of right and acceptable behaviour, and respect for the traditional family*". Nevertheless, he wrote, such considerations did not answer the question: "*The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own* ***moral code***." PBOA at Tab 19

100. The *Wolfenden Report* at [54] is evident that the argument for legislating morality to the detriment of the minority is invalid: PBOA at Tab 48

> "*In so far as the basis of this argument can be precisely formulated, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Many people feel this revulsion, for one or more of these reasons. But* ***moral conviction*** *or instinctive feeling, however strong, is not a valid basis for*

*overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind*".

101. The *Wolfenden Report* at [55] goes on to note that the singling out of homosexual behaviour for criminalisation on the basis that it is detrimental to family values is arbitrary and without basis: PBOA at Tab 48

*"We have had no reasons shown to us which would lead us to believe that homosexual behaviour between males inflicts any greater damage on family life than adultery, fornication or lesbian behaviour. These practices are all reprehensible from the point of view of harm to the family, but it is difficult to see why on this ground male homosexual behaviour alone among them should be a criminal offence. This argument is not to be taken as saying that society should condone or approve male homosexual behaviour. But where adultery, fornication and lesbian behaviour are not criminal offences there seems to us to be no valid ground, on the basis of damage to the family, for so regarding homosexual behaviour between men. Moreover, it*

*has to be recognised that the mere existence of the condition of homosexuality in one of the partners can result in an unsatisfactory marriage, so that for a homosexual to marry simply for the sake of conformity with the accepted structure of society or in the hope of curing his condition may result in disaster."*

102. In *Naz Foundation*, the Court clarified that '*while it could be "a compelling state interest" to regulate by law the area for the protection of children and others incapable of giving a valid consent or the area of non-consensual sex, enforcement* ***of public morality*** *does not amount to a "compelling state interest" to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others.*' (at [75]) PBOA at Tab 17

103. The Court in *Naz Foundation* also rejected the '*floodgates of delinquent behaviour'* (at [86]) argument of the Attorney-General, noting that it was not founded upon any substantive material, even from those jurisdictions where sodomy laws have been abolished. The Court concluded:

"*Public animus and disgust towards a particular*

> *social group or vulnerable minority is not a valid ground for classification under Article 14 [equality before the law and equal protection of the law]. Section 377 targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people*." *Naz Foundation* at [91]

104. Other Asian courts have been similarly inclined. The Hong Kong High Court found that when fundamental human rights are at issue, such rights '*are not easily set aside because the majority wishes it*.' PBOA at Tab 27

[*Leung v Secretary for Justice*, HCAL 160/2004, para. 123]

105. In the Philippines, the Supreme Court found that the Commission of Elections had made an impermissible distinction on the basis of sexual orientation when it refused to register the organisation Ang Ladlad as a political party. The Supreme Court did not recognise homosexuals as a class requiring special protection. Instead, it found that the classification imposed by the Commission on Elections was irrational, and in violation of the equal protection clause of the Constitution. The electoral commission had argued that since '*the majority of the Philippine* PBOA at Tab 28

*population considers homosexual conduct as immoral and unacceptable*,' this was sufficient reason to disqualify the political party. The Court strongly rejected this idea:

> '*Indeed, even if we were to assume that public opinion is as the COMELEC describes it, the asserted state interest here – that is,* ***moral disapproval*** *of an unpopular minority – is not a legitimate state interest that is sufficient to satisfy rational basis review under the equal protection clause. The COMELEC's differentiation … furthers no legitimate state interest other than disapproval of or dislike for a disfavored group.*'

*Ang Ladlad v Commission on Elections, Supreme Court of the Philippines*, 8 April 2010, paras. 13-14.

106. Another Asia-Pacific jurisdiction with a conservative culture reached a similar conclusion. The High Court of Fiji, in considering a constitutional challenge to the criminalisation of homosexual conduct, recognised that there was a '*genuine and sincere conviction shared by a large number of responsible members of the Fijian community that any change in the law to decriminalize homosexual conduct would seriously damage the* PBOA at Tab 29

***moral fabric of society**... However, while members of the public who regard homosexuality as amoral may be shocked, offended or disturbed by private homosexual acts, this cannot on its own validate unconstitutional law.'*

*Nadan & McCoskar v State*, High Court of Fiji at Suva, 26 August 2005 ("*McCoskar v State*")

107. Accepting that there is a realm of ***private morality*** that should not be legislated into discriminatory legislation does not invalidate the views of members of the public, nor is it an obstacle to the existence of overall societal conceptions of right and wrong.

108. As the South African Constitutional Court stated in *National Coalition for Gay and Lesbian Equality v The Minister of Justice* [Case CCT 11/98] ("*National Coalition*") at [136]: PBOA at Tab 30

> "*A state that recognizes difference does not mean a state without **morality** or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil..... The Constitution certainly does not debar the state from enforcing **morality**. Indeed, the Bill*

*of Rights is nothing if not a document founded on deep political* ***morality****. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.*"

**5. The Offending Provision is absurd, arbitrary and unreasonable as it causes tangible harm to a segment of the population**

109. It is absurd and unreasonable to retain an archaic legal provision that causes actual harm to a segment of society for the purpose of upholding "*family values*".

***(1) Tangible Harm in The Form Of HIV/AIDS Outreach Limitation***

110. There is significant data worldwide to suggest that the continued criminalisation of homosexual acts exacerbates the problem of HIV/AIDS.

111. The findings set out in the report of the Global Commission on PBOA at Tab 65

HIV and the Law, *Risks, Rights & Health*, July 2012 ("*the Report*") at PBOA at Tab 33 are apposite.

112. The Global Commission on HIV and the Law ("*the Commission*") is an independent body established under the auspices of the United Nations Development Programme (UNDP) at the request of the Programme Coordinating Board of the Joint United Nations Programme on HIV/AIDS. The Commission consists of 14 distinguished individuals who are advocates and specialists on issues of HIV, ***public health***, law and development and was chaired by a former President of Brazil.

113. The Commission was tasked to assess the state of global HIV prevention and to recommend strategies for further reducing the spread of HIV.

114. Among the key findings and recommendations of the Commission that are relevant to this application:

(1) *"In many countries, the law (either on the books or on the streets) dehumanises many of those at highest risk for HIV: sex workers, transgender people, men who have sex with men (MSM),*

*people who use drugs, prisoners and migrants. Rather than providing protection, the law renders these "key populations" all the more vulnerable to HIV…Fear of arrest drives key populations underground, away from HIV and harm reduction programmes"* [The Report at p 8];

*(2)* *The Commission recommends decriminalizing "private and consensual adult sexual behaviours, including same-sex sexual acts and voluntary sex work"* [The Report at p. 10];

*(3)* *"But the law can also do grave harm to the bodies and spirits of people living with HIV. It can perpetrate discrimination and isolate the people most vulnerable to HIV from the programmes that would help them to avoid or cope with the virus. By dividing people into criminals and victims or sinful and innocent, the legal environment can destroy the social, political, and economic solidarity that is necessary to overcome this global epidemic"* [The Report at p. 12 ];

(4) *Marginalisation, together with aspects of physiology, circumstance and sexual behaviour, puts MSM at significantly heightened risk of HIV. MSM are nineteen times more likely to be infected than other adult men. For instance, MSM are among the most hidden and stigmatised of all HIV risk groups in the Middle East and North Africa. In nearly every country that reliably collects HIV surveillance data, the figures are stark. Criminalisation both causes and boosts those numbers. For example, UNAIDS reports that in the Caribbean countries where homosexuality is criminalised, almost 1 in 4 men who have sex with men ("MSM") is infected with HIV. In the absence of such criminal law the prevalence is only 1 in 15 among MSM* [The Report at p 45, referring to a chart at page 46]; and

*(5) The Commission recommends repealing all laws that criminalise consensual sex between adults of the same sex and/or laws that punish homosexual identity* [The Report at p 50].

[Global Commission on HIV and the Law, *Risks, Rights & Health*, (2012)]

115. Closer to the Singapore context, a similar set of recommendations was proposed by the Commonwealth Eminent Persons Group ("*the EPG*") – a group of 10 leading figures from around the Commonwealth chaired by Tun Abdullah Badawi, former Prime Minister of Malaysia. The *EPG* was commissioned in 2009 by Commonwealth Heads of Government to examine key areas for reform of the Commonwealth.

116. After extensive study and consultations, the *EPG* unanimously recommended in its 2011 Report that, among others, steps be initiated to procure the repeal of laws criminalising homosexuality as a critical step in the fight against HIV. This was noted as particularly important given that Commonwealth countries comprise of over 60% of people living with HIV globally, despite representing about 30% of the world's population. [Commonwealth Secretariat, Report of the Eminent Persons Group to Commonwealth Heads of Government, *A Commonwealth of the People: Time for Urgent Reform*, (2011) ("*The EPG Report*")]. PBOA at Tab 66

117. The *EPG Report* states: PBOA at Tab 66

> *"We have … received submissions concerning criminal laws in many Commonwealth countries that penalise adult consensual private sexual conduct including between people of the same sex. These laws are a particular historical feature of British colonial rule. They have remained unchanged in many developing countries of the Commonwealth despite evidence that other Commonwealth countries have been successful in reducing cases of HIV infection by including repeal of such laws in their measures to combat the disease. Repeal of such laws facilitates the outreach to individuals and groups at heightened risk of infection. The importance of addressing this matter has received global attention through the United Nations. It is one of concern to the Commonwealth not only because of the particular legal context but also because it can call into question the commitment of member states to the Commonwealth's fundamental values and principles including fundamental human rights and non-discrimination."*

(The *EPG Report* at pp. 98-102)

118. A report published in *The Lancet* in 2012 illustrates how men who have sex with men ("**MSM**") bear a disproportionate burden of HIV and yet continue to be excluded, sometimes systematically, from HIV services because of stigma, discrimination, and criminalisation. Among others, the report recounts the strong correlations that have been found between criminalisation of same-sex behaviour and lack of financing and implementation of HIV programmes for MSM.

PBOA at Tab 67

[The Lancet, "A call to action for comprehensive HIV services for men who have sex with men", online: The Lancet < http://www.thelancet.com/series/hiv-in-men-who-have-sex-with-men>]

119. Decriminalisation of same-sex behaviour, on the other hand, has been seen as a key structural intervention to legitimise HIV services for gay and other MSM.

120. Locally, the Plaintiffs rely on the expert evidence of Professor Dr Roy Chan ("**Professor Dr Chan**"), founder of the Non-Governmental Organization and charity Action for AIDS ("**AfA**") and the Director of the National Skin Centre, as

Affidavit of Professor Dr Roy Chan

evidence that the existence of the Offending Provision negatively impacts HIV/AIDS awareness outreach to MSM.

121. The material observations by **Professor Dr Chan** are as follows: Affidavit of Professor Dr Roy Chan

(1) *"Stigma and discrimination are the main barriers to early HIV testing and diagnosis. It is my opinion that the main structural obstacle that perpetuates stigma and discrimination of MSM, as well all other persons living with HV/AIDS in Singapore, is Section 377A of the Penal Code";*

(2) *"As a result of the stigma attached to being homosexual due to the continued criminalization of homosexual sex, there is insufficient research into same-sex identity and behavior in the general population and MSM subcultures"; and*

(3) *"As a result of this stigma and the shame attached to being homosexual, it has been exceedingly difficult to reach out to young MSM who are contemplating, experimenting or already having gay sex. School-based programmes do not provide information and materials which discuss homosexuality in a sensitive and unbiased manner, these programmes do not include*

> *accurate and practical information on gay relationships and safer sex practices relevant to MSM".*

***(2) The Offending Provision Causes Psychological Damage to Homosexual Men***

122. The Offending Provision criminalises identity, and not just conduct. Psychological damage arises from the stigma attached to the criminalising of identity of homosexual men.

123. International jurisprudence has acknowledged that even though a provision might only refer to a certain act, the phrasing of the provision was likely to affect people of a certain class or community, which, in this case, is based on sexual orientation[(see *National Coalition* at [23]-[27]; *David Norris v The Attorney General* [No. 5793p of 1977]; Naz *Foundation*, at [49]-[52]].

PBOA at Tab 30

PBOA at Tab 31
PBOA at Tab 17

124. *McCoskar v State* states explicitly (at page 18):

PBOA at Tab 29

> "… *while technically the provisions of Section 175 are not anti-homosexual nonetheless they proscribe criminal conduct essential to the sexual*

*expression of the homosexual relationship and are perceived as such.*"

125. Since it is the identity, and not just the visible conduct of the homosexual relationship which is being criminalised, the focus of the law shifts to the people bearing the identity, even when they are not engaging in said conduct. It criminalises an entire community and makes targets out of them. Gay/bisexual men, who are more obviously gay/bisexual in terms of appearance or conduct, are especially affected/targeted if they appear or behave in an effeminate manner. Hence, the entire community, particularly those who are more visible with regard to their sexual orientation and gender identity, are targets for the law.

126. The psychological damage arising from the criminalising of conduct is well documented and has been accepted in courts around the world. Regardless of jurisdiction or legal framework, the findings of fact relating to psychological damage are consistent.

127. In *Naz Foundation* at [22], it was said that: PBOA at Tab 17

"*…the continuance of Section 377 IPC on the statute book operates to brutalise a vulnerable,*

*minority segment of the citizenry for no fault on its part. The respondent No.8 contends that a section of society has been thus criminalised and stigmatized to a point where individuals are forced to deny the core of their identity and vital dimensions of their personality*."

128. Ackermann J in *National Coalition*, states: PBOA at Tab 30

*"The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest,*

> *prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society*."

129. In *Norris v Ireland* (1991) 13 EHRR 186, (at [21]), the ECHR approved of the finding of the lower court, that, "*Mr Justice McWilliam, in his judgment of 10 October 1980, found, among other facts, that:* PBOA at Tab 32

> *"One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow…"*

130. In *Vriend v Alberta* [1998] 1 S.C.R. 493, it was said, PBOA at Tab 33

> "*Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates [sic] the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.*"
>
> [Vriend v Alberta [1998] 1 S.C.R. 493]

131. In the context of Singapore, the affidavit of Bryan Choong, a counsellor at an LGBT friendly counselling agency, clearly demonstrates the negative psychological effect of the stigma Affidavit of Bryan Choong

engendered by and reinforced by the Offending Provision. Mr Choong states, in material part:

> *Young MSM generally realise the difference in their sexuality from heterosexual men as early as 15 years old. In this early stage of identity formation, they have to deal with additional stress compared to the heterosexual population. In a hetero-normative society where male and female relationship is promoted in school and families, celebrated and supported by the society, and legally endorsed by the state, young MSM have to struggle with confusion caused by this "new" identity and how this new identity shaped their relationship with their families, friends, society and the country;*
>
> *At this critical stage in their lives, they are also likely to be in the educational system where sexuality education is introduced and written for the heterosexual population. As Ministry of Education has been very stringent with the content in sexuality education programs and strict on the content delivery by its vendors,*

*young MSM students will not be able to receive any form of relevant and culturally sensitive material about homosexuality or bisexuality. Instead, they are reminded that the male to male sexual behaviour is punishable under Section 377A. This realisation could be detrimental to the healthy identity formation for young MSM students when they realise that something so fundamental to their identity and being will make them a criminal in Singapore*

*This state-endorsed discrimination towards MSM in turn creates other issues within the educational setting. Firstly, it hampers any possible form of open support from the educators, staff and school counsellors when young MSM students seek assistance from these adults, whom they will look up as role models for guidance. Authority figures typically do not want to appear supportive of the students' struggles that could jeopardise their own careers and getting themselves into trouble with the Ministry of Education or the families. They do not want to be seen to be affirming or*

> *encouraging deviant lifestyles. It also creates an unhealthy precedent in educational settings where non MSM students could discriminate and bully the young MSM students, as well as those who do not fall into the hetero-normative appearances or behaviours.*

132. It is clear that the Offending Provision has serious consequences on the psychological health and access to psychological health services for homosexual men in Singapore.

### *(3) The Offending Provision makes it difficult for exploited gay/bisexual men to approach law enforcement for protection and leaves them particularly vulnerable to blackmail*

133. The law makes gay men vulnerable to abuse and exploitation by others, as they might have difficulty approaching law enforcement. It potentially makes "*criminals out of victims*". (*Tan Eng Hong* at [184]). PBOA at Tab 3

134. For example, a man who was robbed after having sex with another man, reported the theft to the police. Instead of being sympathetic to the fact that he was robbed, the police warned PBOA at Tab 68

him with respect to the Offending Provision instead. PBOA at Tab 3

[The New Paper, News Release, "*This teacher was caught having sex in public, police tells school*"(21 February 2005).]

Even though he was never prosecuted, the consequences of this warning were equally destructive. The police chose to send a letter to his place of employment about the warning he received, which resulted in him losing his job. This specific fact was acknowledged in *Tan Eng Hong* at [184].

135. The Offending Provision makes vulnerable people who deserve the protection of the law, especially if they are being blackmailed, abused or harassed. For example, if a gay man was experiencing domestic violence from his partner, he would not be able to report this to the police without worrying that he would be exposing himself to prosecution by revealing the nature of their relationship. PBOA at Tab 3

(*Tan Eng Hong*, at [184])

136. There are already worrying signs that the Offending Provision could dissuade gay men from reporting violence. In 2008, 6 men were charged, and 3 were convicted for assaulting and killing a PBOA at Tab 50

man who had solicited 2 of the attackers for sex. If a similar situation happens today, and the victim is alive to make a report, he might be fearful of doing so due to fear of prosecution under the Offending Provision. [Today, News Release "*Murder Charge Reduced for Those in Orchard Towers Brawl*", (7 October 2008).]

137. The Offending Provision also silences victims of sexual assault. The lack of consent provisions in the Offending Provision means that a victim could potentially be construed as the criminal instead. It could potentially deter homosexual victims of sexual assault from coming forward to the police.

(*Tan Eng Hong* at [184]) PBOA at Tab 3

138. Even when "*passively enforced*", this is a dangerous situation, as it empowers any member of the public to make complaints. It can empower the disgruntled neighbour to lodge a complaint against the gay couple living peacefully next door, a scenario acknowledged as a possibility by the Court of Appeal in *Tan Eng Hong* at [180]. Also conceivable is a situation where a jealous colleague or subordinate can report a gay colleague, in order to remove competition. It could even be used in politics as a strategy, in order to damage an opponent. PBOA at Tab 3

139. The Offending Provision also makes gay men particularly vulnerable to blackmail (see *Dudgeon v United Kingdom* (1981) EHRR 40, at [31], quoting an Advisor Commission Report; *Naz Foundation*, at [50]). PBOA at Tab 34

140. The Offending Provision, in its incarnation as the Labouchere Amendment, was colloquially known as the "*Blackmailer's Charter*" in England. The *Wolfenden Report* at [109]. The *Wolfenden Report* further goes on to note at [110] – [111] that: PBOA at Tab 51

> "*There is no doubt also that a good many instances occur where from fear of exposure men lay themselves open to repeated small demands for money or other benefit, which their previous conduct makes it difficult for them to resist; these often do not amount to blackmail in the strict sense, but they arise out of the same situation as gives rise to blackmail itself. Most victims of the blackmailer are naturally hesitant about reporting their misfortunes to the police, so that figures relating to prosecutions do not afford a reliable measure of the amount of blackmail that actually goes on. However, of 71 cases of*

*blackmail reported to the police in England and Wales in the years 1950 to 1953 inclusive, 32 were connected with homosexual activities…*

*We have found it hard to decide whether the blackmailer's primary weapon is the threat of disclosure to the police, with the attendant legal consequences, or the threat of disclosure to the victim's relatives, employer or friends, with the attendant social consequences. It may well be that the latter is the more effective weapon; but it may yet be true that it would lose much of its edge if the social consequences were not associated with (or, indeed, dependent upon) the present legal position. At the least, it is clear that even if this is no more among other fields of blackmailing activity, the present law does afford to the blackmailer opportunities which the law might well be expected to diminish*". [Emphasis added]

***(4) The Offending Provision provides potential grounds for***

***impugning otherwise regular commercial transactions involving homosexual men***

141. The Offending Provision has the potential to cast a pall of illegality over otherwise perfectly innocent transactions and dealings.

142. There is a real danger that regular transactions entered into on a day to day basis, if conducted between people who are engaging in sexual relations in violation of the Offending Provision, might be tainted with illegality.

143. The case of *Guillaume Levy-Lambert v Goh See Yuen Pierre* [2010] SGDC 482 ("*Guillaume*") illustrates that something as simple as joint bank account and the trust created thereupon could be called into question due to the existence of the Offending Provision. In *Guillaume*, the Defendant attempted to strike out the Plaintiff's Statement of Claim for trust monies on the basis that it was void for illegality as the "*parties had agreed to cohabit in a homosexual relationship which would involve unnatural sex"*. (*Guillaume* at [8]). PBOA at Tab 35

**B. The Offending Provision fails the two stage test of**

**Constitutionality**

144. A differentiation between the punitive treatment of one class of individuals compared to another class in relation to which there is some difference in the circumstances of the offence that has been committed is only permissible if it meets two requirements (*Taw Cheng Kong v PP*) :

PBOA at Tab 12, 13

(1) the classification is founded on an intelligible differentia ("**Stage 1**") ;and

(2) the differentia bears a rational relation to the object sought to be achieved by the law in question ("**Stage 2**").

145. To reiterate the objectives of the Offending Provisions that the two stage test should be applied to are as follows: the main intent and purpose of the Offending Provision is to prevent homosexual acts by criminalizing them. There are two other discernible objectives of the Offending Provision: **the first** is to not cause offence and polarisation in society ("**Objective 1**"), **the second** is to reflect societal conservatism and preserve family values ("**Objective 2**").

**i. The Offending Provision fails Stage 1 as it discloses no**

**intelligible differentia**

146. The Offending Provision discloses no **intelligible differentia** and thus fails **Stage 1** of the test of constitutionality under Article 12. It is both grossly over-inclusive as well as woefully under-inclusive to achieve the legislative objectives it purports to further.

147. The doctrine of reasonable classification does not demand a perfect classification, *i.e.*, a complete coincidence of the class defined by the purpose of the law. The controlling test of the "***intelligible differentia*** *allows that the courts may sustain or reject an imperfect classification, depending on the degree of inequality involved. The measure of reasonableness of a classification depends on the degree of its success in treating similarly those similarly placed, and the closer the correspondence between the legislative classification and that implied by the purpose of the law, the easier it is to sustain the classification as reasonable.*" [Emphasis added]

S M Huang-Thio in her article "*Equal Protection and Rational Classification*" [1963] Pub L 412 at 429-440 ("*Equal Protection and Rational Classification"*), at 431 – 432.

(a) The actus reus of the Offending Provision is so ill defined that it discloses no **intelligible differentia** and is grossly over-inclusive

148. The Offending Provision discloses no **intelligible differentia** as it is completely unclear as to what the definition of "*gross indecency*" is.

149. The exact parameters of committing "*any act of gross indecency with another male person*" are so broad as to be incapable of being defined as "***intelligible differentia***".

150. In this regard, the Plaintiffs adopt and repeat the submissions made on the over-breadth of the Offending Provision at Section IV (A) (2) of these submissions above.

151. The Offending Provision is thus over-inclusive as it captures a whole range of actions that is so ill-defined and amorphous that it could, conceivably, even include the holding of hands in public.

(b) The Offending provision is under-inclusive as it only criminalizes male homosexual acts and not female

152. In *Equal Protection and Rational Classification*, Huang-Thio considers under-inclusive classifications at 433-435. At 433, she suggested that the test for determining whether an under-inclusive classification should be upheld was this:

> "*What the courts do is to consider whether any justification exists to warrant the non-extension of a law to persons within the scope of the objectives, or, as Holmes J. put it, whether 'fair reason' exists for this deviation from the strict requirement of equal treatment for all equally situated". She then criticized courts deferring to the "wisdom of the legislature... when faced with imperfect classifications*", noting that "*if it is used indiscriminately, it will result in whittling down the guarantee of the equal protection of the laws as its formulation is so wide as to cover any under-inclusive classification*" (at 434).

153. As stated in paragraph 38, Objective 1 of the stated objectives of retaining the Offending Provision is to maintain the social norm of a heterosexual stable family: PBOA at Tab 7

> "*But a heterosexual stable family is a social norm. It is what we teach in schools. It is also*

*what parents want their children to see as their children grow up, to set their expectations and encourage them to develop in this direction. I think the vast majority of Singaporeans want to keep it this way. They want to keep our society like this, and so does the Government*."

154. It is submitted that there is no "*fair reason*" for the government, in attempting to achieve its objective of promoting heterosexual stable families, to not extend the ambit of the Offending Provision to criminalise female homosexuals and heterosexuals who engage in behaviour that undermines the stable family unit. Indeed, part of the Penal Code amendments was to decriminalise the act of enticing a married woman away from her husband, an action that would surely undermine the stable family as a social norm. PBOA at Tab 6

**2. The Offending Provision fails Stage 2 as the differentia bears no rational relation to the object of the law in question**

155. Assuming that the Offending Provision discloses an intelligible differentia (which the Applicants deny), the differentia bears no **rational relation** to the object of the law in question.

(1) The Offending Provision bears no **rational nexus** to **Objective 1**

156. Continued retention of the Offending Provision does not achieve the legislative object of reducing offence and polarisation.

157. In fact, the decision to retain the Offending Provision while repealing its gender-neutral sister provision s 377 was the touch point of the heated debate and "*polarisation*". If the Offending Provision was repealed like its sister provision, the entire 2007 debate on its retention would not have occurred. While there might have been some outrage from religious groups at the repeal, there would be nothing akin to the present state of "*polarisation*" engendered by the retention of the Offending Provision as there would be no need to agitate for the repeal of the provision.

158. Far from reducing the level of societal disagreement over the Offending Provision, the continued retention of the Offending Provision has escalated the level of opposition as well as support for repeal and retention.

159. On 15 January 2013, Pastor Lawrence Khong of Faith Community Baptist Church took the opportunity of a visit by PBOA at Tab 69

Emeritus Senior Minister Goh Chok Tong to lobby the government against the repeal of the Offending Provision. In his address to the church welcoming Mr Goh, Pastor Khong said,

> "*We see a looming threat to this basic building block by homosexual activists seeking to repeal Section 377A of the Penal Code.*
>
> *Examples from around the world have shown that the repeal of similar laws have led to negative social changes, especially the breakdown of the family as a basic building block and foundation of the society. It takes away from the rights of parents over what their children are taught in schools, especially sex education. It attacks religious freedom and eventually denies free speech to those who, because of their moral convictions, uphold a different view from that championed by increasingly aggressive homosexual activists.*"
>
> [Pastor Lawrence Khong, Comments made in a speech at Faith Community Baptist Church, (2013)]

160. On 19 January 2013, Pastor Yang Tuck Yoong from Cornerstone Church put out a public statement that threatened social division should the Offending Provision be repealed: PBOA at Tab 70

> "*We must sound the trumpet because the church must get herself into battle footing, and be battle-ready. The first salvo was fired by the Senior Pastor of FCBC this week on the LGBT issue and the churches are beginning to mobilise themselves not just for this battle, but for the many battles ahead of us. The LGBT bloc will of course be outraged, but that is to be expected. We must make a stand for righteousness in this nation. This war is winnable and the church will arise victorious. We are more than conquerors in Christ Jesus who loved us. <u>Be ready for a sharp polarising of our society over the gay and lesbian issue</u> and when it happens, you better make sure you know which side you are on. Grace to all of you*".
>
> (Emphasis added)
>
> [Pastor Yang Tuck Yoong, Posting of a note at Cornerstone Church, (2013)]

161. On 24 January 2013, a police report was filed against Pastor Yang for "*an incitement to violence*" by a homosexual individual who felt threatened by his statement. [Tessa Wong, "*Police report filed against Pastor*", *The Straits Times* (25 January 2013)]. PBOA at Tab 71

162. Clearly, the retention of the Offending Provision has led to the exact opposite effect intended by the legislature in relation to reducing polarisation in society.

2. The Offending Provision bears no rational nexus to **Objective 2**

163. There is no evidence to suggest that criminalising homosexuality will strengthen or preserve stable family values, or conversely that de-criminalisation will have a negative impact on family values or encourage homosexuality. In fact, logic and the facts suggest precisely the opposite result from continued criminalisation and stigmatisation arising from the Offending Provision.

164. The *Wolfenden Report* notes that repressing homosexual behaviour and subjecting homosexuals to stigma which leads PBOA at Tab 48

them to force themselves into conformity with a heterosexual social norm can have the opposite effect of undermining the stability of the family:

> "*Moreover, it has to be recognised that the mere existence of the condition of homosexuality in one of the partners can result in an unsatisfactory marriage, so that for a homosexual to marry simply for the sake of conformity with the accepted structure of society or in the hope of curing his condition may result in disaster*." (*Wolfenden Report* at [55])

165. The goal of the stability of the family also has to be considered with reference to the psychological well-being of homosexual men, who are brothers, sons and uncles to other members of society. The psychological stigma, confusion, societal opprobrium and isolation visited upon homosexual men cannot in any way be said to be a positive development for family values. The psychological damage to homosexual men has been extensively recounted in paragraphs 127 - 137 above.

166. There is nothing to suggest that removing the Offending Provision will send a signal that homosexuality is encouraged in PBOA at Tab 48

society. Adultery is not criminalised but it is undoubtedly still not socially acceptable. As early as the *Wolfenden Report*, there was no evidence to suggest that the repeal of discriminatory legislation against homosexuals led to any increase in the incidence of homosexual behaviour. (*Wolfenden Report* at [24]).

**(4) The Offending Provision bears no rational nexus to the aims of maintaining public decency and protecting the young**

167. To the extent that the government relies on the Offending Provision to achieve the aims of maintaining public decency and protecting the young (which is not evident from the legislative debates relating to the Offending Provision), it is redundant and unnecessary.

168. Section 7 of the Children and Young Person's Act (Cap. 38) ("S7") criminalises sexual exploitation of children or young persons: PBOA at Tab 36

> "*Any person who, in public or private commits or abets the commission of or procures or attempts to procure the commission by any person of any obscene or indecent act with any child or young person; or procures or attempts to procure the*

*commission of any obscene or indecent act by any child or young person, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 5 years or to both and, in the case of a second or subsequent conviction, to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 7 years or to both."*

169. The above provision is gender neutral. Furthermore, "*child*" is defined as someone below 14 years old, and "*a young person*" is defined as someone who is between 14 and 16 years of age. Hence, unlike the Offending Provision, the relevant age is clearly specified in this provision, such that it is clear that all children below 16 years are protected by this provision.

170. The punishment for this provision is much higher than what is specified in the Offending Provision, as S7 specifies a maximum of 7 years and the Offending Provision is only 2 years. There can be no question that the usage of S7 of the CYPA would be more effective in terms of punishment and deterrence.

171. If that was not enough, currently, S 376A of the Penal Code also PBOA at Tab 37

protects minors:

> *"376A.—(1) Any person (A) who —*
>
> *(a) penetrates, with A's penis, the vagina, anus or mouth, as the case may be, of a person under 16 years of age (B);*
>
> *(b) sexually penetrates, with a part of A's body (other than A's penis) or anything else, the vagina or anus, as the case may be, of a person under 16 years of age (B);*
>
> *(c) causes a man under 16 years of age (B) to penetrate, with B's penis, the vagina, anus or mouth, as the case may be, of another person including A; or*
>
> *(d) causes a person under 16 years of age (B) to sexually penetrate, with a part of B's body (other than B's penis) or anything else, the vagina or anus, as the case may be, of any person including A or B,*
>
> *with or without B's consent, shall be guilty of an offence. [51/2007]*
>
> *(2) Subject to subsection (3), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which*

*may extend to 10 years, or with fine, or with both. [51/2007]*

*(3) Whoever commits an offence under this section against a person (B) who is under 14 years of age shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning."*

172. S376A is also gender neutral.

173. It is clear that between S 7 of the CYPA and S376A of the Penal Code, all possible acts of sexual assault or exploitation of minors are adequately covered, and heavily punished. There is no possible need for the Offending Provision to exist in order to protect minors.

174. In fact, prosecutions have actually been brought against persons accused of homosexual acts perpetrated on young persons. For example, see *Public Prosecutor v Ng Geng Whye* [2009] SGDC 397 and Public Prosecutor v ZQ [2009] SGDC 4. PBOA at Tab 38 PBOA at Tab 39

175. The Offending Provision is also unnecessary to protect public decency by criminalising homosexual acts committed in public

places.

176. Section 294 of the Penal Code criminalizes obscene acts committed in public places and has been used to prosecute homosexual acts in public places. For example, see *Public Prosecutor v Saravanan s/o Velasamy* [2003] SGMC 2. PBOA at Tab 40

177. Of special note is the case of *Tan Eng Hong*, in which the Attorney-General's Chambers withdrew the charge brought under the Offending Provision and substituted it with Section 294 (a) of the Penal Code instead.

## PART V: INTERNATIONAL JURISPRUDENCE ON COMPARATIVE EQUALITY PROVISIONS

178. It is submitted that the Court should, in considering the arguments advanced on behalf of the Plaintiffs, additionally consider the growing trend around the world towards non-discrimination upon the basis of sexual orientation. While not binding on the Court, the Plaintiffs submit that the Court should not turn a blind eye to the international movement against continued criminalisation of homosexuality.

179. It is clear that sexual orientation is a breach of equality norms based on international and comparative jurisprudence from around the world, which interpret rights to equality before the law, equal protection of the law and non-discrimination as enunciated in core international and regional human rights instruments and national constitutions.

180. While the specific language varies amongst different instruments, equality related provisions worldwide share a common purpose and spirit. They seek to ensure that human beings do not suffer prejudice or discrimination in law or in practice, simply by virtue of who they are, and that majority groups can never arbitrarily marginalise less powerful or popular groups.

***1. General Principle of Non-Discrimination***

181. The Universal Declaration of Human Rights provides that: PBOA at Tab 41

> *"All human beings are born free and equal in dignity and rights" and "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in*

*violation of this Declaration and against any incitement to such discrimination.*"

[*Universal Declaration of Human Rights*, GA RES 217 (III), UNGAOR, 3d Sess, Supp No 13, UN DOC A/810, (1948)].

182. The 2012 ASEAN Declaration of Human Rights, (Association of Southeast Asian Nations, ASEAN Declaration of Human Rights, 18 November 2012) to which Singapore is a signatory, contains the following provisions, which are representative of the letter and spirit of equality provisions worldwide: PBOA at Tab 42

"*1. All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity.*

*2. Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.*

*3. Every person has the right of recognition everywhere as a person before the law. Every*

*person is equal before the law. Every person is entitled without discrimination to equal protection of the law.*

*4. The rights of … vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.*

…

*9. In the realisation of the human rights and freedoms contained in this Declaration, the principles of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation, should always be upheld. …"*

183. In *Secretary of Justice v Yau Yuk Lung Zigo*, the Hong Kong Court of Final Appeal summarised the link between equality and non-discrimination in this way: PBOA at Tab 43

'*Equality before the law is a fundamental human right ("the right to equality"). Equality is the antithesis of discrimination. The constitutional right to equality is in essence the right not to be discriminated against. It guarantees protection*

> *from discrimination. The right to equality is enshrined in numerous international human rights instruments and is widely embodied in the constitutions of jurisdictions around the world. It is constitutionally protected in Hong Kong*' (emphasis in original).
>
> (*Secretary of Justice v Yau Yuk Lung Zigo*, Hong Kong Court of Final Appeal, 17 July 2007, [2007] 10 HKCFAR 335, para. 1.)

### *2. International Law and Inclusion of Sexual Orientation as a Ground of Non-discrimination*

184. As part of the international community, Singapore should be aware of and take into account the wide range of high level statements from international bodies condemning criminalisation of private, adult, consensual same-sex sexual relations. While non-binding, these statements complement and punctuate the jurisprudential trends around the world. These statements indicate a growing consensus around the world that criminalisation is wholly inappropriate even if it reflects a moral disapproval of homosexuality from some sectors of the population.

**(1) UNITED NATIONS (UN)**

185. The UN General Assembly Joint Statement on Sexual Orientation and Gender Identity delivered on 18 December 2008 and co-sponsored by 66 states stated in part: "*We urge States to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention*." PBOA at Tab 72

[UN General Assembly, Joint Statement on Sexual Orientation and Gender Identity, 18 December 2008].

186. A Joint Statement by 85 countries at the United Nations Human Rights Council in March 2011 called for states to end criminal sanctions based on sexual orientation.(United Nations Human Rights Council, *'Joint Statement on Ending Acts of Violence and Related Human rights Violations Based on Sexual orientation and Gender Identity*', 22 March 2011) In June 2011, a UN Human Rights Council resolution expressed "*grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity*". PBOA at Tab 73 PBOA at Tab 74

[United Nations Human Rights Council resolution 17/19 "*Human rights, sexual orientation and gender identity,*" A/HRC/RES/17/19 (2011)]

187. The first comprehensive UN study documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity was published in November 2011. (Report of the United Nations High Commissioner for Human Rights, *'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity'* (17 November 2011), A/HRC/19/41) That study confirmed that the "*criminalization of private consensual homosexual acts violates an individual's rights to privacy and to non-discrimination and constitutes a breach of international human rights law.*" PBOA at Tab 75

188. UN Secretary General Ban Ki-moon, speaking at a December 2012 event co-organized by the Office of the UN High Commissioner for Human Rights and a range of permanent missions to the world body, stated that: PBOA at Tab 76

> "*Laws rooted in 19th century prejudices are fuelling 21st century hate. In other cases new discriminatory laws are being introduced. These*

*laws must go. We must replace them with laws that provide adequate protection against discrimination, including on the basis of sexual orientation and gender identity. This is not optional. It is a State obligation, based on the principle of non-discrimination – a fundamental tenet of international human rights law.…. It is an outrage that in our modern world, so many countries continue to criminalize people simply for loving another human being of the same sex. In most cases, these laws are not home-grown. They were inherited from former colonial powers…these laws must go."*

(Secretary-General's remarks to special event on "Leadership in the Fight against Homophobia", 11 December 2012)

189. Similarly, the UN High Commissioner for Human Rights has repeatedly stated that the fight against discrimination in all its forms is at the root of human rights and that this fight includes ending laws that criminalise people on the basis of their sexual orientation. (See for example: Statement by the UN High

PBOA at Tab 77

Commissioner for Human Rights Navenethem Pillay, '*Gays, lesbians must be treated as equal members of human family*', New York, 18 December 2008, Address at the 63rd session of the UN General Assembly)

**(b) TREATY BODIES**

190. In their General Comments and Concluding Observations, which authoritatively interpret provisions of legally binding international human rights treaties, UN treaty bodies have frequently reiterated that protection against discrimination includes the right not to be discriminated against on the basis of sexual orientation.

191. The treaty monitoring bodies for the UN Convention on the Rights of the Child (CRC) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), both of which Singapore ratified on 5 October 1995, are illustrative.

192. The CRC Committee issued a General Comment in 2003 explaining that '*sexual orientation*' is included within the treaty's prohibitions on discrimination. (Committee on the Rights

PBOA at Tab 99

of the Child, General Comment 4, UN Doc. CRC/GC/2003/4, 1 July 2003), at para. 6.

193. The Committee has also expressed concern about discriminatory policies and practices of individual states. See, for example, its Concluding observations on the United Kingdom of Great Britain and Northern Ireland-Isle of Man, U.N. Doc. CRC/C/15/Add.134, 16 October 2000, para. 22: '*…concern is expressed at the insufficient efforts made to provide against discrimination based on sexual orientation. While the Committee notes the Isle of Man's intention to reduce the legal age for consent to homosexual relations from 21 to 18 years, it remains concerned about the disparity that continues to exist between the ages for consent to heterosexual (16 years) and homosexual relations*'.

PBOA at Tab 78

194. The CEDAW Committee, in its concluding observations on the periodic reports of individual states, has also condemned discrimination on the basis of sexual orientation and has called for the repeal of laws that classify homosexuality as an offense. [Concluding Observations on Kyrgyzstan, UN Doc. A/54/38, 20 August 1999, at para. 128; Concluding Observations on Uganda, UN Doc. CEDAW/C/UGA/CO/7, 22 October 2010, at paras. 43-

PBOA at Tab 79

PBOA at Tab 80

PBOA at Tab 81

PBOA at Tab 82

44. The Committee has also commended states for enacting laws protecting against discrimination on the basis of sexual orientation. See Concluding Observations on Sweden, UN Doc. A/56/38, 31 July 2001, at para. 334; Concluding Observations on Ecuador, UN Doc. CEDAW/C/ECU/CO/7, 2 November 2008, at para. 28.]

195. The monitoring bodies for other international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights and the Convention Against Torture have likewise made clear that discrimination on grounds of sexual orientation is prohibited, notwithstanding the absence of the words 'sexual orientation' in their respective texts.

PBOA at Tab 83
PBOA at Tab 84
PBOA at Tab 85
PBOA at Tab 86

[Committee Against Torture, General Comment 2, UN Doc. CAT/C/GC/2, 24 January 2008, at para. 21; Committee on Economic, Social and Cultural Rights, General Comment 20, UN Doc. E/C.12/GC/20, 10 June 2009, at para. 32, General Comment No. 14, UN Doc. E/C.12/2000/4, 11 August 2000, at para. 18; and General Comment No. 15, UN Doc. E/C.12/2002/11, 20 January 2003, at para. 13.]

196. Similarly, the UN Working Group on Arbitrary Detention has characterised deprivations of liberty on the basis of laws that

PBOA at Tab 87

criminalise same-sex sexual conduct as arbitrary, because the laws in themselves are discriminatory.

[Report of the Working Group on Arbitrary Detention, Civil Political Rights, (15 December 2003), paragraph 73.]

197. The Human Rights Committee has repeatedly called on individual states to refrain from discriminating against individuals on the basis of their sexual orientation. See, inter alia, Concluding observations of the Human Rights Committee: Namibia, U.N. Doc. CCPR/CO/81/NAM, 30 July 2004, para. 22:

PBOA at Tab 88

PBOA at Tab 89

> *'The Committee notes the absence of anti-discrimination measures for sexual minorities, such as homosexuals…The State party should consider, in enacting anti-discrimination legislation, introducing the prohibition of discrimination on the ground of sexual Orientation'; El Salvador, U.N. Doc. CCPR/CO/78/SLV, 22 August 2003, para. 16: 'The Committee expresses concern at…the current provisions…used to discriminate against people on account of their sexual orientation (art. 26). The State Party should provide effective protection against violence and discrimination*

PBOA at Tab 90

*based on sexual orientation'*;

Poland, U.N. Doc. CCPR/C/79/Add.110, 29 July 1999, para. 23: '*The Committee regrets that the reference to sexual orientation which had originally been contained in the nondiscrimination clause of the draft Constitution has been deleted from the text, which could lead to violations of articles 17 and 26.*')

**(3) REGIONAL BODIES**

198. Regional and other bodies such as the Organisation of American States (OAS), the Council of Europe (COE) and the Commonwealth have taken a similar stance. In a series of resolutions, the OAS has condemned human rights violations based on sexual orientation and gender identity and invited states to adopt measures to eliminate them. (See for example: Organisation of American States, '*Human Rights, Sexual Orientation and Gender Identity*', AG/RES. 2435 (3 June 2008); Organisation of American States, '*Human Rights, Sexual Orientation and Gender Identity'*, AG/RES. 2504 (4 June 2009) ;Organisation of American States, '*Human Rights, Sexual Orientation and Gender Identity'*, AG/RES. 2600 (8 June 2010)

PBOA at Tab 91

PBOA at Tab 92

PBOA at Tab 93

199. The Committee of Ministers of the Council of Europe stated in 2010 that: PBOA at Tab 94

> "*Member states should ensure that any discriminatory legislation criminalising same-sex sexual acts between consenting adults, including any differences with respect to the age of consent for same-sex sexual acts and heterosexual acts, are repealed; they should also take appropriate measures to ensure that criminal law provisions which, because of their wording, may lead to a discriminatory application are either repealed, amended or applied in a manner which is compatible with the principle of non-discrimination.*"
>
> [Council of Europe, Committee of Ministers, Recommendation (2010) 5 on measures to combat discrimination based on sexual orientation and gender identity (CM/Rec(2010)5, 31 March 2010), para. 18.]

200. The Council of Europe's Commissioner for Human Rights PBOA at Tab 95

likewise stated that

> *"…significant, albeit uneven, progress has been made over the past decades concerning the attitudes and practices towards LGBT people. The pathologisation and criminalisation of homosexuality clearly belong to the past…"*
>
> [Council of Europe Commissioner for Human Rights, Thomas Hammarberg, in a speech given at the launch of the Council of Europe report entitled *'Discrimination on grounds of sexual orientation and gender identity in Europe'* (Strasbourg, 23 June 2011)]

201. The Commonwealth Eminent Persons Group ("the *EPG*") – a group of 10 leading figures from around the Commonwealth chaired by Tun Abdullah Badawi, former Prime Minister of Malaysia – was commissioned in 2009 by Commonwealth Heads of Government to examine key areas for reform of the Commonwealth. After extensive study and consultations, the *EPG* unanimously recommended in its 2011 Report that, among others, steps be initiated to procure the repeal of laws criminalising homosexuality. The Report states: PBOA at Tab 66

"*We have … received submissions concerning criminal laws in many Commonwealth countries that penalise adult consensual private sexual conduct including between people of the same sex. These laws are a particular historical feature of British colonial rule. They have remained unchanged in many developing countries of the Commonwealth despite evidence that other Commonwealth countries have been successful in reducing cases of HIV infection by including repeal of such laws in their measures to combat the disease. Repeal of such laws facilitates the outreach to individuals and groups at heightened risk of infection. The importance of addressing this matter has received global attention through the United Nations. It is one of concern to the Commonwealth not only because of the particular legal context but also because it can call into question the commitment of member states to the Commonwealth's fundamental values and principles including fundamental human rights and non-discrimination*."

(Commonwealth Secretariat, (2011), A

> Commonwealth of the People: Time for Urgent Reform, Report of the Eminent Persons Group to Commonwealth Heads of Government, London, 2011, p. 100.)

202. The *EPG* unanimously recommended that steps be initiated to procure repeal of such laws.

203. Commonwealth Secretary General Kamalesh Sharma agreed. In his keynote address at the opening ceremony of the 2011 Commonwealth People's Forum, he stated that: PBOA at Tab 96

> "*… criminalisation on grounds of sexual orientation is at odds with [Commonwealth] values and I have had occasion to refer to this in the context of our law-related conferences.*"
>
> [Commonwealth Secretary General Kamalesh Sharma's Commonwealth People's Forum Opening Speech, 25 October 2011.]

**(4) *Yogyakarta Principles***

204. The Yogyakarta Principles, which may be regarded as one of the most authoritative sources on the application of international

human rights law in relation to issues of sexual orientation and gender identity, include the following:

> *Principle 2:*
>
> *"Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination."*

205. The Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including

PBOA at Tab 97

gender, race, age, religion, disability, health and economic status.' (International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007.)

206. Similarly, the 2008 Declaration on Principles on Equality, adopted under the auspices of the Equal Rights Trust, make it clear that sexual orientation is a protected ground and that discrimination on the basis of sexual orientation must be prohibited: PBOA at Tab 98

> '*Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds*.' (emphasis added)

(Equal Rights Trust, Declaration on Principles of Equality, 21 October 2008, p. 6.)

207. While non-binding, the Yogyakarta Principles and the Declaration on Principles of Equality reflect a professional consensus amongst human rights and equality experts, and their content is based on jurisprudence developed across multiple international, regional and national jurisdictions.

**CONCLUSION**

208. Equality and non-discrimination, including in regard to minority groups within society which may be regarded with animus by the majority, are not only legally mandatory principles, they are '*essential to democracy.*'(*Ghaidan v Godin-Mendoza* [2004] 2 AC 557, p. 605 per Baroness Hale of the UK Supreme Court): PBOA at Tab 46

> '*Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but automatically violates his or her dignity as a human being. Second, such treatment is damaging to society as a whole. Wrongly to assume that*

*some people have talent and others do not is a huge waste of human resources. It also damages social cohesion, creating not only an under-class, but an under-class with a rational grievance. Third, it is the reverse of the rational behavior we now expect of government and the State. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly on a group basis, it is an important discipline to look for a rational basis for those distinctions. Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.*'

[*Ghaidan v Godin-Mendoza* [2004] 2 AC 557, p. 605 per Baroness Hale of the UK Supreme Court.]

209. It is thus clear that "*[t]here is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if* PBOA at Tab 47

*they think that the public interest so requires.*"

[*R. (Alconbury Ltd.) v. Environment Secretary* [2001] 2 WLR 1389 at 1411.]

210. Courts around the world have rejected arguments that criminalisation of homosexual conduct is simply a matter for Parliament as the elected representative body of the people.

211. The role of the Court is to uphold the Constitution, and where matters of "*high constitutional importance such as constitutionally entrenched human rights are under consideration, the courts are obliged in discharging their own sovereign jurisdiction to give considerably less deference to the legislature than would otherwise be the case*." PBOA at Tab 17

[*Naz Foundation*, Note 5, para 118.]

212. It is the Plaintiffs' humble submission that the Court does its Constitutional duty and strike down the Offending Provision.

Dated this 7th day of February 2013

Respectfully submitted,

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