"ABOA": Appellant's Bundle of Authorities
"CB": Core Bundle
"ROA": Record of Appeal"
"RBOA": Respondent's Bundle of Authorities
“SBOA”: Supplementary Bundle of Authorities

I. INTRODUCTION

1. This Note is submitted in response to the Respondent's Case dated 26 July 2010. It is intended to be read alongside the Appellant's Case dated 26 June 2010.

A. Summary

2. The decision of the learned judge at the High Court is wrong in law in concluding there was no real controversy, and the application by the Appellant should not have been struck out.

3. The principles of striking out are well covered in our written submissions to the Court. It is emphasised that the power of striking out an application is only to be used in cases where it is exceptionally clear that the Plaintiff's action has no arguable or triable merit whatsoever. It is our submission that there is a fairly arguable case for the Plaintiff in this matter, and hence striking out the Application would be an injustice to the Plaintiff. For this reason, we pray for the Court to reverse the decision of the learned Judge below, with respect to the striking out.

4. We would like to emphasise, further, that the learned Judge found in our favour with respect to standing, and the application of **s56A of the Subordinate Courts**. She found against us on the issue of real controversy. The Respondent has not lodged a counter-appeal to the decision of the Judge. As such, technically, the only issue at stake here is whether there is a real controversy.

5. Having said that, in our submissions, we have put before the court our complete

arguments with respect to all the issues arising in this matter. In this submissions, we will cover our reply to the Respondent’s submissions.

II. S 377A IS VOIDABLE UNDER THE CONSTITUTION

6. Not only is **s 377A of the *Penal Code*** voidable under the art 9 and 12 of *Constitution of the Republic of Singapore* (1999 Rev. Ed.) ["*Constitution*"], it is voidable by virtue of **art 162 of the *Constitution***.

7. The Respondent contends thus:

8. The Appellant cannot pray for s 377A to be voided based on **Art 4 of the *Constitution***, as Art 4 only applies to laws enacted after the commencement of the Constitution.

9. Since s 377A was enacted in 1938, before the Independence Day, the Appellant argues that Art 4 is not applicable to the action.

10. Respondent further argues that only art 162 is applicable to s 377A, and furthermore, that one cannot void s 377A using art 162.

11. It is conceded that Art 162 is applicable. In answer, the Appellant's case rests on 4 core submissions:

    a. The language of art 162 impliedly allows for the complete voiding of laws

    b. Possibility of pre-Independence laws being void by virtue of art 162 has not been ruled out

    c. If pre-Independence laws cannot be modified to nullification, it

would create absurd results

d. It is possible to modify s 377A, even if it cannot be voided

12. The Appellant concedes that art 162 is applicable rather than Art 4, insofar as the consequences of invalidity. Art 4 still applies, in that it stresses constitutional supremacy over all laws of Singapore. The second part of Art 4 specifies the consequence of enacting a law which is contrary to the constitution, which is that such a law is void *ab initio*.

13. Art 162, then deals with pre-Independence laws. Pre-independence laws are obviously not enacted with the *Constitution* in mind, hence, they cannot be held to be void *ab initio*. However, art 162 allows one to construe all existing law, in accordance with the first clause of Art 4, which stresses constitutional supremacy.

14. In ***DPP of Jamaica v Mollison*** **[2003] 2 AC 411** ["*Mollison*"], their equivalent of art 162 was considered. In that case, the respondent had been convicted of murder committed at the age of 16 years, and had been sentenced to be detained during the Governor General's pleasure in accordance with s 29 of the Juveniles Act 1951 (Jamaica). Among other things, the appellant contended that s 29 was immune from constitutional challenge as it was a law in force immediately before Jamaica's independence, using art 4 of the Jamaica (Constitution) Order in Council 1962, which can be read in pari materia with art 162 of our Constitution [*Mollison*, at 421]:

"*All laws which are in force in Jamaica immediately before the appointed*

day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, *but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order.*

[emphasis ours]"

15. In response to the DPP's arguments, the Court held [***Mollison*, at 425**] that section 4 does not make laws immune to constitutional challenges.

"More significantly, the effect of section 4 of the 1962 Order is not to preserve the validity of existing laws. As already pointed out in paragraph 10 above, its effect is to continue existing laws in force, for reasons there given. Far from protecting existing laws against constitutional challenge, section 4 recognises that existing laws may be susceptible to constitutional challenge and accordingly confers power on the courts and the Governor General (among others) to modify and adapt existing laws "so as to bring them into conformity with the provisions of this Order". It was not suggested that "this Order" did not include the Constitution scheduled to it. Further, the Board cannot accept as accurate the statement "No law in force immediately before 6 August 1962 can be held to be inconsistent

with the Constitution". Nowhere in the Order or the Constitution is there to be found so comprehensive a saving provision, which would indeed undermine the effect of section 2 of the Constitution.

16. Hence, it is only logical that s 377A is subject to the Constitution as well, even if it was enacted prior to the commencement date. As such, this does not change the complexion of the arguments, or the pleadings.

17. Alternatively, even if the pleadings were amended to read art 162 instead of art 4, the complexion of arguments still would not change.

A. ***Language of art 162 impliedly allows for the complete voiding of laws***

18. Art 162 of the Constitution is quoted in full below:

> "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."

19. The Respondent makes a technical argument that the phrase "be construed" cannot be stretched to allow a law to be void. However, this is clearly wrong, with reference to the rest of the phrase. The construing is to be done "with such modifications, adaptations, qualifications and exceptions" that are "necessary to

bring them into conformity with this Constitution". All three parts of this clause have to be read together.

20. The second part of the clause, "modification, adaptations, qualifications and exceptions" all indicate a certain alteration of the existing law, from its current understanding. The word "void" or "repeal" is not included in these words.

21. However, the third part of the clause, "necessary to bring them into conformity", impresses upon the reader that the superior guiding power in this situation is the Constitution. Modification, adaptation, qualifications and exceptions must include the power to completely nullify any part of the law, if it is necessary to bring it into conformity with the Constitution. The supremacy of the Constitution must take precedence over the literal meaning of the words. This is simply common sense, and a logical conclusion.

22. Furthermore, this is supported by authority, in ***Roodal v The State*** **(unreported) 17 July 2002 (Cr App No 64 of 99)** ["*Roodal*"], where the court held that "construing" must be interpreted generously enough to give the power to repeal or void:

> "The first thing we can say about that section is that though it speaks of existing laws being "construed", the type of 'construing' which is involved is not the examination of the language of existing laws for the purpose of abstracting from it their true meaning and intent, nor is it attributing to existing laws a meaning which, though not their primary or natural meaning, is one that they are capable of bearing. In fact, the function which the court is mandated to carry out in relation to existing

laws under this section, goes far beyond what is normally meant by 'construing'. *It may involve the substantial amendment of laws, either by deleting parts of them or making additions to them or substituting new provisions for old.* It may extend even to the repeal of some provision in a statute or a rule of common law. Mr. Daly's submission that the section should be regarded as conferring very limited powers is, I am afraid, a brave but unavailing attempt to turn the clock back.

[emphasis ours]"

23. In ***Roodal***, the savings provision in question reads in pari materia with art 162 as well [**at 9**]:

> "Subject to the provisions of this section, the operation of the existing law on and after the appointed day shall not be affected by the revocation of the Order in Council of 1962 but the *existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act*
>
> [emphasis ours]"

24. ***Roodal*** is one of the authorities cited by ***Mollison***, in coming to this conclusion about the extent of the power to modify a provision in accordance with the Constitution (***Mollison*****, at 426**). ***Mollison*** concluded that the power to modify must include the power to repeal, especially with respect to human rights:

> "The terms of section 4, read in isolation, would leave room for an argument that the section is directed to the correction of descriptions and

> nomenclature and not to more far-reaching adaptations and modifications. But such an argument would encounter two difficulties. First, it is now well established that constitutional provisions relating to human rights should be given a generous and purposive interpretation, bearing in mind that a constitution is not trapped in a time-warp but must evolve organically over time to reßect the developing needs of society: see Reyes v The Queen [2002] 2 AC 235, 245-246, paras 25-26 and the authorities there cited. Secondly, it is plain from authority that provisions similar to section 4(1) have not in practice been applied in a narrow and restricted way."

25. As such, it is entirely clear that art 162 can be read to give the power to void or nullify a law.

B. ***Possibility of pre-Independence laws being void by virtue of art 162 has not been ruled out in local jurisprudence***

26. In the cases where art 162 has been discussed in the context of holding pre-Independence laws valid, the courts have consistently held that art 162 can be used to bring laws into conformity with the constitution if necessary. In ***Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal*** **([2009] SGCA 46; [2010] 1 SLR 52,** at [250]**)**, the Appellant's request to hold the Defamation Act void was denied, not because it was not possible to void the law by art 162, but because the passing of laws that abridged the freedom of speech was something that was permitted by art 14 of the *Constitution*. The same result was arrived at in ***Jeyaretnam Joshua Benjamin v Lee Kuan Yew*** **[1992] 1**

SLR(R) 791, at [57].

C. If pre-Independence laws cannot be modified to nullification, it would create absurd results

27. If the Respondent is right, then that means majority of our laws cannot ever be voided by the courts. Singapore is a former colonial country, with a significant majority of our common law and legislation being inherited from our colonial masters, pre-Independence. By virtue of the Second Charter of Justice, we have a rich history of colonial law. Most of this law has not been modified since Independence, and continue to apply like any other law enacted post-Independence. Not only that, there was a period between between self-governance in 1959 and 1965, where there was an elected Singapore parliament making and passing laws including the historic ***Women's Charter*** **(Cap. 353, 1997 Rev. Ed. Sing.)** ["*Women's Charter*"] in 1961, prior to the Independence. The laws they made would be completely immune from being voided, according to the Respondent.

28. The Respondent's contention seems to imply that the laws enacted by the Independent Parliament of Singapore are in an inferior position to the laws made by our colonial masters and a pre-Independence government, for they can be voided, but the pre-Independence laws cannot. They would be evergreen laws that can never die out completely unless legislated out of existence by the current Parliament.

29. This is patently an absurd position. Clearly, this is not the intention of art 4 and

art 162 being read together. A sensible interpretation of Art 162 would indicate to anyone reading them, that the power of modification should include the complete voiding, as suggested above.

30. Not to mention, if these pre-Independence laws were truly evergreen, this would be unjust to those who seek justice in the courts. The Legislature may never address their minds to that particular problem, for whatever reason, but the need for justice for the litigant would be real. Evergreening the laws would tie the hands of the courts, who might be the only ones in the position to dispense justice.

31. The Supreme Court is the final arbiter of the law of Singapore, and this includes the power to pronounce laws that conflict with the Constitution, as being invalid. It is plain that the Courts must have this power with respect to how art 162 is constructed.

32. The other possibility that must be considered is that law can be construed to be broader than a specific provision. A "law" can be contained within the shortest sub-clause within a provision, or it can be interpreted to mean entire statutes.

33. Depending on the provision concerned and its construction, even the shortest sub-clause within a long provision can constitute a "law" by itself, which can be severed from the provision conceptually and operationally. Hence, if the Respondent insists that only modification of a law is possible, which implies that some of original law is left behind, then that would create absurd results as well. It would never be possible to modify laws as need be, as there would always be a need to leave something behind, lest it be considered a repeal.

34. As such, we submit that "law" should be construed widely to allow it to mean entire statutes. If this is the case, it is possible to modify the Penal Code to remove s 377A.

D. It is possible to modify s 377A, even if it cannot be voided

35. Even if the Respondent is right in that pre-Independence laws are immune from being voided by the courts, it does not preclude a modification. This was admitted by the Respondent, and it was said that the Appellant must be very clear about the modification he is seeking.

36. In fact, such a modification was asked for in the Affidavit supporting the **Originating Summons**, at para 4. For reference, it shall be quoted:

> "The Plaintiff prays that section 377A be declared as constitutionally invalid in so far as it affects sexual acts between consenting male adults or in the alternative to read down section 377A to exclude consenting same-sex sexual acts between adults."

37. As such, the Respondent cannot claim that the modification was not asked for, in the original pleadings.

III. APPELLANT HAS STANDING AND THERE IS A REAL CONTROVERSY

38. There is a significant conceptual overlap between real controversy and standing. This is a point of law the Appellant and Respondent are in agreement on.

39. As such, the submissions under this heading are to be read as for being for both of these limbs.

40. The Respondent submits the following arguments in support of his contention that the Appellant has no standing or that there is no real controversy.

41. A reading of ***Eng Foong Ho*** and ***Colin Chan*** does not indicate that a different standard from ***Karaha Bodas*** was not being applied.

    a. Appellant's actual rights and interests are not affected.

    b. Appellant has not been prosecuted, hence has not suffered an injury

    c. Appellant suffers no credible threat of prosecution

    d. Appellant's interest in areas of sexual conduct outside s 377A will not be protected

42. In reply, the Appellant's submissions rest on 2 core submissions:

    a. ***Eng Foong Ho*** and ***Colin Chan*** clearly indicate that questions of constitutional law adopt a different standard, and this ground has been adequately explored in the Appellant's Submissions.

b. Appellant's rights are gravely affected by reason of the existence of s 377A, for it affects his life even when unenforced

i. Full prosecution is not necessary for enforcement

ii. There is credible threat of prosecution for the Appellant

iii. Passive enforcement encourages abuse and exploitation of gay men

iv. s 377A affect Appellant's ability to access essential services

v. Government has said that the Constitution could potentially include sexual orientation

vi. Appellant does not have interest in other areas of sexual conduct

A. <u>An Alternative standard is clear and grounded in both local and overseas jurisprudence</u>

43. It is submitted that ***Colin Chan*** and ***Eng Foong Ho*** indeed support an alternative standard. This has been sufficiently elaborated on in our Appellate submissions, that a person need to be prosecuted in order to challenge the constitutionality (see ***Colin Chan***, at 614, ***Eng Foong Ho***, at [18]). We reiterate that for matters of Constitutional rights, the Courts have to take a more lenient approach.

i. <u>Standing under the Eng Foong Ho standard will not lead to floodgates</u>

44. The Respondent also raises the possibility that allowing the Appellant standing

will open floodgates for litigation. He also mentions that losers in Parliament would be able to take their fight to court. This fear is unfounded, not to mention misplaced. There are many other factors that inhibit litigation besides standing: cost, time, even ability to find legal counsel willing to take on constitutional challenges (of which, there are not many). Also, after William Leung, Hong Kong has not experienced a surge in litigation.

45. Firstly, the Appellant is not asking for a new standard to be applied, but an existing standard that has already been articulated in prior precedents by this court.

46. Secondly, even if this is not accepted, this new standard might be necessary for the sake of public interest. If a person was required to be prosecuted before he can challenge an unfair law, that would be even more unfair to him. It would also encourage active criminality in order to be able to access justice.

47. Furthermore, it must be pointed out that the Respondent seems to take the view that a law must act "actively" before it can be considered to be affecting a person's rights. This is wrong in principle. A law can act in a passive manner, blocking a person's rights before any damage can be said to have been incurred. This is apparent in ***Virginia v American Booksellers Association Inc*** **(484 U.S. 383, 108 S.Ct. 636)** ["*Virginia*"], where it was said (at 643):

> "We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume other- wise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced

against them. Further, the alleged danger of this statute is, in large measure, *one of self-censorship; a harm that can be realized even without an actual prosecution*.

[emphasis ours]"

48. The italicised words are key: *Virginia* recognised that self-censorship due to the law, even when not enforced, can cause damage. S 377A causes the equivalent of self-censorship with respect to being able to live an open gay life. This shall be elaborated on later.

49. Thirdly, the fear with respect to "losers in parliament" is specious, at best. Members of Parliament, unless personally affected by a law in question, would not be inclined to make such an effort. The rules of standing, under the ***Colin Chan*** and ***Eng Foong Ho*** are not wide enough to just let anyone raise a question, but upon proving they have sufficient interest that might not amount to the "real interest" test under ***Karaha Bodas***. While Members of Parliament might not meet this criteria, their constituents might. In such a case, it would be up to the court to make a determination, on the facts of the case, whether he has standing to bring a challenge.

50. Furthermore, while it is true that we live in a democracy, which goes by majority rule, this is not without due regard to the rights of the minorities. The courts are required to act as guardians against the tyranny of the majority, in reference to the Constitution. This also relates to the second point. As such, the "loser in parliament" situation would only apply when Constitutional rights are at stake. It would not apply to most run-of-the-mill pieces of legislation. There is little need

to worry about a floodgates situation.

ii. Standard for "exceptional cases" in William Leung is not vague

51. The Respondent submits that the standard of "exceptional cases" for standing for obtaining declarations in ***William Leung*** is vague, but we have already submitted in the Appellant's Main Submissions as to why it is not vague.

52. Furthermore, once this locus standi is determined, there is a further threshold that hypothetical cases have to meet. This case meets the criteria for hypothetical cases, as set out in ***R (Rusbridger) v Attorney General*** **[2004] 1 AC 357**, at 367-368, which was also referred to in Leung.

    a. "whether there is a genuine Dispute about the matter"

    b. "Whether the case is fact sensitive or not…. But it has always been recognised that a question of pure law may more readily be made the subject matter of a declaration"

    c. "whether there is a cogent public or individual interest which could be advanced by the grant of a declaration"

53. For the first head in Rusbridger, while a prosecution under s 377A has not happened, the judge in Rusbridger said this is the least important head.

> "But that cannot by itself conclude the matter or be a weighty criterion if there are otherwise good reasons to allow the claim for a declaration to go forward. It is not a significant factor militating against placing the present case in an exceptional category."

54. Hence, it is not fatal to a claim if there is no prosecution. This case can still be placed in the exceptional category as espoused by ***William Leung***.

55. For the second head, it is quite clear that the judge accepted that "a question of pure law may more readily be made the subject matter of a declaration: see *Munnich v Godstone Rural District Council* [1966] 1 WLR 427, cited with approval by Lord Lane (with whom Lord Edmund-Davies and Lord Scarman agreed) in *Imperial Tobacco Ltd v Attorney General* [1981] AC 718, 751-752.". In the present case, we are asking for a question of law to be considered: whether s 377A is unconstitutional. Hence, this head is satisfied as well.

56. Under the third head, there is clearly a cogent public interest. It is of public interest whether gay people are allowed to live their lives without obstruction from the law. This is an important socio-political issue, as evidenced by the amount of controversy that has been stirred in the past few years over it.

57. Hence, as can be seen, the criteria of exceptional cases is not vague, and there can be jurisprudential controls over it. The ***William Leung*** standard is something that could be potentially adopted, even if it is found that the case is based on hypothetical facts.

iii. <u>Written law is just as susceptible to challenge as acts of the executive</u>

58. The Respondent contends that ***Pharmaceutical Society of Great Britain [1970] AC 403*** **("Dickson")** can be distinguished on the basis that it was an executive act, and claimed that ***Eng Foong Ho*** and ***Colin Chan*** are along the same lines as Dickson, being products of executive acts.

59. As we have already submitted in the Appellant's Submissions, this is a fundamental misapprehension of public and administrative law, as well as the nature of law.

60. All written laws and administrative acts are subject to the Constitution. If a law purports to deny housing to those with red hair, that might fall foul of the equality provision. If a government official discriminates on the basis that the applicant has red hair, his action is subject to similar scrutiny.

61. As any first-year law student learns, written law is obtained from statutes, caselaw and statutory regulations. All these laws are not equal in weight, but they are written law regardless. Ministerial Orders, or Executive Orders are made subject to the powers granted by the statute, and fall under the purview of statutory regulations. The executive has law-making capacity as well, pursuant to their powers under the statute. Not all acts and directives by the Executive have legal force, for example, circulars put out by statutory boards. However, in both ***Colin Chan*** **(at [2])** and ***Eng Foong Ho*** **(at [7])**, there were executive orders made, which have the binding force of law.

62. Hence, in ***Colin Chan***, ***Eng Foong Ho*** and ***Dickson****,* all of them involve executive orders, which are considered part of written law. Hence, they cannot be distinguished from the present set of facts on that basis.

B. <u>Appellant's rights are gravely affected by s 377A even when passively enforced</u>

63. The Respondent submits that without prosecution, the Appellant has suffered no violation of his rights capable of being complained about. As far as s 377A is

concerned, we submit that the policy of passive or non-enforcement is a mirage, as far as protecting the rights of the Appellant. The Respondent has standing, as his rights are affected.

64. Firstly, full prosecution is not necessary for standing. Secondly, there is a credible threat of prosecution, which affects the Appellant's ability to live as any other person. Thirdly, passive enforcement encourages abuse and discrimination against gay men. Fourthly, the Government has admitted that the Constitutioal guarantee of equality can cover LGBT people. Fifthly, s 377A affects his ability to access essential services due to s 377A casting the shadow of illegality. The precise ways in which he is affected will be elaborated on.

i. Full prosecution not necessary for standing

a) Enforcement does not have to include prosecution

65. The Respondent contends that prosecution is necessary for there to be standing. This is a fundamental misapprehension of the nature of criminal litigation. We must distinguish between prosecution and enforcement. Prosecution is necessarily a sub-set of enforcement, but enforcement is not equated with prosecution. There are many instances in which a law is enforced, but a full prosecution might not necessarily have taken place.

66. For example, a person can be warned for violating a law, instead of being charged straightaway. Alternatively, the Prosecutor has the discretion to withdraw remaining charges after an accused has been convicted with more than two of the offences, under s 147 of the ***Criminal Procedure Code 2010*** (No. 15 of 2010, Sing.). In such a case, the accused has not actually been prosecuted

under the withdrawn charge, but it has definitely been enforced against him, by way of charging him with it.

67. Furthermore, as is said by the Respondent, the AG has the full discretion to *prosecute*. However, the AGC does not have control over the police and their enforcement activities. Enforcement can also include efforts to catch the perpetrators, such as raids. After enforcement activities such as raids have taken place, the AGC might well decide that on the facts, there is no need for the accused to be charged. Or they could agree to testify against others in exchange for much smaller charges to be dropped.

68. In the European Court of Human Rights judgment in ***Dudgeon v United Kingdom* 7525/76, ECHR (1981) Series A No. 45**, especially, the fact that enforcement did not need to include prosecution was taken into account:

> "Moreover, the police investigation in January 1976 was, in relation to the legislation in question, a specific measure of implementation - albeit short of actual prosecution - which directly affected the applicant in the enjoyment of his right to respect for his private life (see paragraph 33 above). As such, it showed that the threat hanging over him was real."

69. As such, the Respondent's contention that a prosecution is necessary for enforcement to be proved is necessarily wrong.

70. Hence, in this case, the provision has been enforced against the Appellant, as he has been charged with it, though not prosecuted under it. Hence, he must have standing.

b) Real and credible threat of prosecution can be achieved with a threat to prosecute

71. Appellant submits that real and credible threat of prosecution is needed, and he cites ***Bruce Babbitt, Governor Of The State Of Ari- Zona, et al., Appellants, v. United Farm Workers National Union*** **(442 U.S. 289, 99 S.Ct. 2301) [“*Babbit*”]** for this proposition.

72. The Respondent cites ***Babbit*** to show that a real and credible threat of prosecution is needed. However, **Babbit** does say that this can be achieved if the Plaintiff can claim he has ever been threatened with prosecution (***Babbit***, at 299):

> “When plaintiffs “do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,” they do not allege a dispute susceptible to resolution by a federal court. Younger v. Harris, supra, at 42, 91 S.Ct., at 749.”

73. In the present case, the Appellant has indeed been threatened with prosecution. The charge was actually filed, before withdrawn and substituted. ***Babbit*** is hence poor authority for the proposition that a real and credible threat can only be achieved with a full prosecution. Even if he was never threatened, the threshold in Babbit allows for the Plaintiff to show that a “prosecution is remotely possible”. We have already made our case with respect to the fact that prosecution is entirely possible, as said above.

c) Criminal behaviour should not be encouraged

74. The Respondent also cites ***Berg v State of Utah*** **100 P.3d 261** [“*Berg*”] in support of the proposition that since the Attorney General promised not to enforce the sodomy statutes, there was no controversy, and hence he had no

standing. *Berg* is extremely poor authority, as its holding is repugnant to our values.

75. *Berg*'s ratio is highly repugnant to public policy. The court held that:

> "Rather, the cases demonstrate that the State will occasionally use the statutes against two classes of people: (1) individuals charged with rape or forcible sodomy, and (2) individuals who engage in consensual sodomy with minors. Berg does not fit into either of these classes. Thus, Berg fails to demonstrate a palpable injury and cannot qualify for standing under the first rule…
>
> … As indicated above, persons charged with rape and persons who engage in consensual sodomy with minors are much better suited to challenge the sodomy and fornication statutes because they are more likely to be prosecuted. Hence, these individuals "have 'a more direct interest in the issues' and [are] able to 'more adequately litigate the issues.' " 5 State v. Ansari, 2004 UT App 326,¶ 40 (quoting State v. Mace, 921 P.2d 1372, 1379 (Utah 1996)). We cannot grant Berg standing when other individuals face greater risk under the statutes and thus have a greater stake in the resolution of this issue."

76. It is truly horrifying to consider that a person must rape, or have sex with minors, just in order to be able to challenge an already unjust law. Furthermore, if the Respondent's logic is to be followed, since s 377A is currently only used for sex with minors and acts of public sex, then for s 377A to ever be challenged by someone, he has to commit either one of these acts and be charged under s 377A.

This is an especially repugnant stand, especially with respect to sex with minors.

77. No justice system in the world should ever encourage criminal behaviour. It is one matter to insist that an Appellant has to show actual prosecution for having sex with another adult in private, consensually, in order to gain standing. It is entirely another to say that he must have sex with a minor in order to gain standing, which seems to be the naturally conclusion of applying *Berg*. Such a conclusion is illogical, and an affront to our morals.

78. Furthermore, it is perversely illogical to ask the public to continue committing crimes, and take it on faith that it will not be enforced. As Justice Douglas said aptly in his judgment in ***Poe v. Ullman*, 367 U.S. 497 (1961)** ["*Poe*"], **(at 513)**:

> "What are these people - doctor and patients - to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision we leave them no other alternatives. It is not the choice they need have under the regime of the declaratory judgment and our constitutional system. It is not the choice worthy of a civilized society. A sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete, orderly answer to the critical problem confronting them. We should not turn them away and make them flout the law and get arrested to have their constitutional rights determined."

79. As was said in ***Poe***, continuing to commit a crime, hoping that one would never get caught, "is not a choice worthy of a civilised society". It is also beneath the dignity of the court, to direct gay men in Singapore to continue to make this choice, by denying the Plaintiff standing in this matter.

ii. <u>There is credible threat of prosecution</u>

a) Meaning of pro-active enforcement

80. The Respondent states that there is no pro-active enforcement for private consensual sex between adults. Pro-active enforcement might mean that the police do not actively seek out violators, or entrap potential violators. It must be, once again, noted that in the past, there was plenty of pro-active enforcement by the police and the AGC with respect to s 377A.

81. Policemen would often pose as gay men and hang about in areas frequented by gay men, in order to entrap them (***PP v Tan Boon Hock*** **[1994] 2 SLR(R) 32 at [8**]; **"12 men nabbed in anti-gay operation at Tanjong Rhu" The Straits Times, 23 November 1993**; **"Nine held in police raid to curb homosexual activities", The Straits Times, 9 April 1990**). They would often deny licences to events that might involve Lesbian, Gay, Bisexual and Transgender ("LGBT") people (**Tanya Fong, "It's no go for planned Christmas 'gay party'", The Straits Times, 9 December 2004**).

82. As of today, these enforcement activities have mostly come to a stop, thus saving on all the tax dollars that might otherwise be wasted on it. The executive and legislature, as a matter of policy, have decided that as a society, it is no longer important to actively police bedroom behaviour of gay men. This was clear in the tenor of the parliamentary debates by the Prime Minister Lee Hsien Loong

(**Sing.*, Parliamentary Debates*, Vol. 83, COL. 2354 at 2469 (23 October 2007) (Prime Minister Lee Hsien Loong)**) ["PM Lee PD"]. The "live and let live" approach he espoused embeds this idea, especially when says:

> "[LGBT people], too, must have a place in this society, and they, too, are entitled to their private lives. We should not make it harder than it already is for them to grow up and to live in a society where they are different from most Singaporeans. And we also do not want them to leave Singapore to go to more congenial places to 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."

83. The tax dollars are clearly better spent on other matters, like drug trafficking or organised crime. Not to mention, it is difficult for enforcement to take place when most of the activity takes place in private.

b) Discretionary prosecution is a credible threat of prosecution

84. Having said that, tax dollars are now channelled towards passive enforcement, subject to complaint. "Inherently unlikely" is not the same as "never would happen", in terms of probability. What the Appellant is looking for, is the assurance that it will never be used against him, not that it is unlikely to be enforced against him.

85. Passive enforcement is not the creation of a safety zone for gay men, but a danger zone. The inability to know one's legal status for certain, creates opportunities for confusion and abuse. Passive enforcement creates a dangerous climate where the threat of enforcement overrides the actual potential for enforcement. This is especially so because there is no formal declaration, order, or guideline stopping it from being enforced. The Respondent itself admits that the Ministerial statements neither disavow enforcement entirely, nor bind the AGC in any way. The existence of the provision also encourages the potential for abuse by the police. They could easily threaten prosecution under s 377A to get something else they want, out of a gay person or couple. Even if it is not going to be prosecuted, the police are perfectly entitled to harass the person in question through investigation and interrogation. This would be perfectly legal, especially if a complaint has been made.

86. In fact, any promises or representations that the AGC makes are not binding on itself. In ***Public Prosecutor v Knight Glenn Jeyasingam*** **[1999] 1 SLR(R) 1165** ["*Jeyasingam*"], the PP made a representation to the accused, promising immunity. The Prosecution decided to go ahead with this prosecution regardless. The court observed thus (***Jeyasingam*****, at [70]**):

> "As a branch of government, the judiciary has the decision making power to affect whatever concerns the administration of justice. This is circumscribed only to the extent that Art 35(8) vests prosecutorial discretion in the AGC. In fact, the revision below which questioned the exercise of the AGC's discretion in prosecuting the accused despite a

purported letter promising immunity from future prosecution, confirmed the almost inviolable discretion of the AGC to prosecute."

87. The Respondent further suggests that the Executive is in the best place to address enforcement, citing ***Virginia*****,** and ***Babbit***. However, with respect to the rights of the Appellant which are affected, a verbal promise without legal enforceability is simply not good enough, in the light of ***Jeyasingam***.

88. The Respondent is basically stating that the discretion of any given individual prosecutor is good enough to make the gay community feel safe from prosecution. Whatever "discretion" an individual prosecutor may hold when a complaint is made is simply that: discretion. DPPs are people too, and they hold their own subjective views. There is no guarantee that a complaint will not end up on the desk of a DPP who feels enforcement is necessary, for whatever reason. His reasons could very well include his personal feelings about the matter. It would be well within his discretion as a prosecutor to bring a perfectly legal prosecution on the basis of s 377A, in the absence of an enforceable declaration or policy otherwise. Such a DPP would only be doing what his job requires him to do: enforce the laws of the land. And he would be doing his job well. He is not bound to obey the dictions of the Legislature, except insofar as those which are gazetted as the laws of Singapore.

89. Furthermore, as we have stated in the Appellant's Submissions, this policy of passive enforcement can be changed at the drop of a hat, if a different Minister, Police Commissioner, or Attorney-General is elected. Furthermore, there is nothing stopping them from changing their mind tomorrow, and start prosecuting

if they are so inclined.

90. Due to this, there is no certainty upon which one can base one's decisions and actions. A tacit agreement is simply not good enough.

91. The tacit agreement in ***Poe*** (at [512]) was that there seemed to be an "understanding" that the crime would not be prosecuted, as said in the majority judgment:

> "If the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here. C. I. O. 508*508 v. McAdory, 325 U. S. 472, 475. Eighty years of Connecticut history demonstrate a similar, albeit tacit agreement."

92. The dissenting judgment by Justice Douglas in ***Poe*** is worth quoting, on the reliability of tacit agreement:

> "No lawyer, I think, would advise his clients to rely on that "tacit agreement." No police official, I think, would feel himself bound by that "tacit agreement."

93. The Respondent sought to distinguish ***Norris v Ireland*** **(1988) 13 EHRR 186** ["*Norris v Ireland*"] for a similar challenge on the basis that there was no stated policy not to enforce it. It is submitted that this contention is wrong, for ***Norris v Ireland*** was not decided on the basis that there was no executive promise.

94. The court held thus, in **Norris v Ireland**:

“32. In the Court’s view, Mr Norris is in substantially the same position as the applicant in the Dudgeon case, which concerned identical legislation then in force in Northern Ireland. As was held in that case, "either [he] respects the law and refrains from engaging - even in private and with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution" (Series A no. 45, p. 18, para. 41).

33. Admittedly, it appears that there have been no prosecutions under the Irish legislation in question during the relevant period except where minors were involved or the acts were committed in public or without consent. It may be inferred from this that, at the present time, the risk of prosecution in the applicant’s case is minimal. However, there is no stated policy on the part of the prosecuting authorities not to enforce the law in this respect (see paragraph 20 above). A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question. This conclusion is further supported by the High Court’s judgment of 10 October 1980, in which Mr Justice McWilliam, on the witnesses’ evidence, found, inter alia, that "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 from that unfortunate disease" (see paragraph 21 above)."

95. The decision was based on the fact the law can be said to affect the person as long as it remains on the books, and the fact that policy could change anytime, and the law could be enforced again.

96. Alternatively, if it is contended that the decision was based on the text of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which Singapore is not party to, the Supreme Court decision in ***David Norris v. The Attorney General*** **[1983] IESC 3; [1984] IR 36** has to be looked at. This is the decision that led to ***Norris v Ireland***, as the case was brought before the ECHR. The Supreme Court decided that, based on laws of standing in Ireland (which had nothing to do with the above Convention), the Plaintiff did have standing, even though the laws were not enforced:

> "However, I do not agree with the defendant's submission that the plaintiff lacks standing to complain merely because he has not been prosecuted nor has had his way of life disturbed as a result of the legislation which he challenges. In my view, as long as the legislation stands and continues to proclaim as criminal the conduct which the plaintiff asserts he has a right to engage in, such right, if it exists, is threatened and the plaintiff has standing to seek the protection of the Court."

97. As can be seen, the court takes substantially the same view, and holds that as

long as the legislation stands, it continues to affect the people who wish to engage in the conduct prohibited by the law.

98. As such, ***Norris v Ireland*** cannot be distinguished on the basis that there was a promise, especially as it specifically contemplates the possibility that the policy can change.

99. Even prior to Norris, in The European Commission on Human Rights in ***Dudgeon v United Kingdom*** **(1981) 3 E.H.R.R. 40** ("*Dudgeon (EComm)*") also explored the possibility of having a policy that stated there would be no prosecution, and noted that such a policy rested on shaky legal ground:

> "The Director of Public Prosecutions announced in February 1977 that his decision not to prosecute in cases then before him 'was not to be interpreted as representing a policy never again to prosecute in this sphere of the law'. The Commission also notes that that decision was taken at a time when law reform was under discussion, whereas the relevant Government proposals have, for the time being at least, now been dropped. It further notes that according to the applicant a policy not to enforce the law would be of doubtful legality and open to challenge in the courts."

100. Hence, the promise of passive enforcement is simply not reliable enough for the client.

c) If s 377A is truly unenforced, then declaration should not be opposed

101. The respondent contends that since s 377A is mostly unenforced for private

consensual conduct between adults, this should be enough for the Appellant.

102. If there was a truly an intention to never use s 377A again for this conduct, then the Respondent should not object to the Appellant seeking a formal legal declaration that s 377A does not apply to private consensual conduct between adults.

103. This declaration was asked for in the OS. This is not a declaration based on the Constitution, but simply an enforceable crystallisation of what has already been said in Parliament, and declared by the AGC to be its policy.

104. Furthermore, the Respondent submits that the powers of the Court are secondary to the enforcement patterns of the executive. If this is accepted as true, then a declaration of this nature would not offend the powers of the Executive. This is because they already do not possess the intention to prosecute for private consensual conduct between adults. This would be in line with the statements from the Legislature as well (**PM Lee PD**).

105. Furthermore, the Respondent would not be losing an avenue by which they can prosecute offenders. As was already pointed out by the Respondents, **s 376A**, and **s294(a)** also exist in the Penal Code, and can cover same-sex acts for sex with minors and public sex respectively. Furthermore, the punishments under s376A are much harsher than that of s 377A. The punishment provisions are quoted below:

> "376A (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.

(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."

106. The maximum punishment under **s 294(a)** is 3 months which is admittedly, is not as harsh as the maximum for s 377A, which is 2 years. However, it must be questioned why homosexual obscene acts need to be punished more harshly than a heterosexual obscene act under s 294(a).

107. Hence, if there was truly no intention to prosecute, there should be no objection from the Respondent on this matter. However, as can be seen, the Respondent seeks to maintain use of s 377A for the future.

d) Future sexual conduct

108. The Respondent submits that the future sexual conduct of the Appellant is unlikely to come to attention. In our view, this is short-sighted. The Appellant's name is on record, and has been reported in the media. In our view, he is in heightened danger than the average gay man due to this. Members of the public are likely to recognise him, and if they are so inclined, try to find evidence that he is engaging in gay sex, so that they can report him. This danger is heightened with members of the public who are strongly homophobic, and might wish to "punish" the Appellant for daring to challenge s 377A.

109. While this might seem like a far-fetched scenario, those who are blinded by hate

are capable of much, including violence, as is prevalent in many parts of the world.

iii. Passive enforcement encourages discrimination and abuse against gay men

110. The Respondent claims that it will not enforce unless there is a complaint. The Appellant submits that the idea that the policy of non-enforcement creates a safety zone for gay men, rests on extremely thin ice. Prosecution is not the only way a criminal law makes itself felt.

a) Deterrence

111. Firstly, the Respondent's erroneous submission rests on the idea that prosecution is the only way a criminal law can make its presence felt. This is to completely ignore the fact that criminal law rests on the principles of not just retribution, but deterrence. The purpose of s 377A, when enacted, was not in the hopes that the jails will be filled with gay men, but that it would scare one into choosing not to engage in acts of sexual intimacy with other men. In this situation, whether the law is actually enforced or not does not matter.

112. As ***Dudgeon* (EComm)** said:

> "When he [the applicant] complains of the existence of penal legislation, the question whether he runs any risk of prosecution will be relevant in assessing the existence, extent and nature of any actual effects on him. On the other hand the mere fact that a penal law has not been enforced by means of criminal proceedings, or is unlikely to be so enforced, does not of itself negate the possibility that it has effects amounting to interference

with private life. *A primary purpose of any such law is to prevent the conduct it proscribes, by persuasion or deterrence. It also stigmatises the conduct as unlawful and undesirable. These aspects must also be taken into consideration***.**

[emphasis ours] "

b) Symbolic effect of s 377A

113. In addition to the concrete effects of the law, there exists the purely symbolic and oppressive effect of s 377A. It is not possible to have a law that criminalises the very essence of one's identity, and not have it affect one's ability to live openly.

114. To give a hypothetical example, the Legislature in the future could decide to enact rules against a certain ethnic (or religious) minority. They could then declare that it will not be enforced, it is impossible to imagine that the law will not cause members of the community to feel a general sense of oppression and fear. It will cause them to feel like outcasts, and prompt others to discriminate against them.

115. The fact that s 377A is symbolic even when unenforced is borne out by the entire debate with respect the provision, both in the Parliament and in the media. Even Prime Minister Lee, admitted thus (**PM Lee PD, at 2496**):

"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. But because of the Penal Code amendments, section 377A

has become a symbolic issue, a point for both opponents and proponents to tussle around. The gayactivists want it removed. Those who are against gay values and lifestyle argue strongly to retain it. "

116. Even the proponents of the provisions in the Legislature are interested in enforcing it. They simply want to maintain it as a symbol of disapproval on the gay community. It is difficult to think that their intentions have not been achieved, since the provision has remained in the Penal Code even after the debate.

117. In such a case, the least any court can do is hear the case by the minority group in question, to see if the law is truly discriminatory, not simply dismiss the law as being "hypothetical" even if a prosecution has never been effected.

c) International law acknowledges discrimination against LGBT

118. The international community acknowledges that discrimination against LGBT individuals is unacceptable, as submitted in Appellant's Submissions.

119. However, between the filing of our appellate submissions and today's hearing, an important development has taken place with respect to international law in Singapore. Singapore has been a signatory to ***Convention on the Elimination of All Forms of Discrimination against Women*** ["CEDAW"]. Recently, at the 49th Session of the CEDAW Committee, the Committee asked the State delegation many questions as to the status and laws with respect to the LGBT Community. As a concluding observation, they said thus (**Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women - Singapore*, CEDAW, 49th**

Sess., CEDAW/C/SGP/CO/4 (2011). at 4)

> "22. The Committee calls upon the State party to:
>
> (a) Put in place, without delay, a comprehensive strategy to modify or eliminate patriarchal attitudes and stereotypes that discriminate women, including those based on sexual orientation and gender identity, in conformity with the provisions of the Convention. Such measures should include efforts, in collaboration with civil society, to educate and raise awareness of this subject, targeting women and men at all levels of the society;"

120. While this paragraph (and CEDAW itself) refers to women, it is clear it would violate the principle of equality to simply have these measures for LGBT women and not men, to the extent that they are in the same situation.

121. The CEDAW committee has highlighted portion of this discrimination, as an issue that has to be dealt with, by the Singapore government. This is to clearly acknowledge that discrimination exists, and that it is the duty of the State to deal with it.

122. As we have submitted, s 377A is the provision that loops around the layers and facets of discrimination against LGBT people. S 377A reinforces the idea that they are criminals and not worthy of protection in any way. Since s 377A is a criminal provision, being labelled as a criminal, prosecuted or not, would definitely add to the "stereotypes" as mentioned by the CEDAW committee.

123. As such, there is a real triable issue here, and the case cannot be just dismissed

out of hand as being hypothetical.

d) s 377A makes gay men vulnerable to abuse, even if never enforced

124. Furthermore, the law makes gay men vulnerable to abuse and exploitation by others.

(1) S 377A impedes access to legal justice

125. S 377A makes it difficult for gay men to seek access to legal justice, as they can never be sure that it will not be used against them.

126. We would like to draw attention to a reported event in 2005. 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 him with respect to s 377A instead. **("This teacher was caught having sex in public, police tells school", *The New Paper*, 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 s 377A warning he received, which resulted in him losing his job. This would never have happened if s 377A did not exist.

127. S 377A leads to the abandonment of 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. And of course, not being married, he cannot even apply for a Protection Order under s

65(1) of the ***Women's Charter*** as he is not a "family member", under s 64 of the ***Women's Charter***.

128. Most worrying, this law completely silences victims of sexual assault. The lack of consent provisions in s 377A means that a victim could potentially be construed as the criminal instead. Adult male sexual assault victims are frequently not taken seriously, whether their perpetrator was a man or woman. The police are not likely to be sympathetic to someone who reports that he has been raped by another man, especially due to s 377A. This is especially the case with respect to men who identify as LGBT, or are visibly LGBT. Law enforcement agencies would assume that they are willing participants due to the fact that they are normally receptive to same-sex acts. As such, s 377A leaves plenty of room for such victims to have the law used against them instead.

129. There are already worrying signs that s 377A could encourage violence against gay men. In 2008, 6 men were charged, and 3 were convicted for assaulting and killing a man who had solicited 2 of the attackers for sex ["**Birthday bash ends in tragedy ; Six plead guilty to voluntarily causing grievous hurt", *Today*, 8 October 2008**]. There was no indication that the victim had used any kind of force or coercion in soliciting for sex, yet the 6 men chose to beat him to death for it, far beyond what self-defence would justify.

130. If a similar situation happens today, and the victim is alive to make a report, he would likely not do so, due to s 377A. This would further encourage assailants, for they are confident in the powerlessness of the victim. If in the same situation, if a man was soliciting women for sex, but without any coercion, force or

intimidation, self-defence would not extend to the woman gathering up her friends and beating the man to death. The victim would be able to press charges for assault without fear of prosecution for a jail term that extends to 2 years. At the most, he might be charged for being a nuisance, under s 13A, s 13B or s 13C of the ***Miscellaneous Offences (Public Order And Nuisance) Act*** **(Cap. 184, 1997 Rev. Ed., Sing.)** which merely warrants a fine.

131. Furthermore, sometimes the victim need not even make any sexual overtures for violence to be instigated. Some men are naturally homophobic, and quick to misinterpret casual glances. Some men are quick to want to "punish" men who are effeminate, or assume that the effeminate man is interested in them, and react disproportionately.

132. It must also be noted that male-to-female transgenders/transvestite people are extremely vulnerable to abuse. This is especially so as they are more visible, hence likely to elicit homophobic reactions. Effeminate, transgender and tranvestite men would be more likely to worry that should they report any assault or abuse, the other can choose to make a complaint under s 377A, even if they are not guilty. As they belong to a category where their sexuality is visible, such charges would be more likely to be believed by enforcement agencies where it is one person's word against the other.

133. Passive enforcement as envisioned by the Respondent is a dangerous creature, 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 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. The Respondent claims that these situations would never come to the attention of the complainant, but this does not take into account the situations where the complainant is looking for a proxy to get at the potential s 377A offender.

(2) Poor and the youth, are even more vulnerable to s 377A

134. While many suggest the purpose of s 377A protects young people, in fact, it does the opposite. Due to the lack of age provisions in the section, even a minor could potentially be prosecuted. This makes curious and exploring LGBT youth them vulnerable to exploitation by others, who might take advantage of their youth and inexperience. They would then be unable to approach any authorities to seek help, without worrying the tables would be turned on them. This is regardless of whether they will be charged with s 377A, for the damage is done not in the charging, but the real and credible fears that they experience. Precisely because of their age and potential naivety, the youth are made vulnerable by this law.

135. Furthermore, all these scenarios are especially exacerbated with the poorer and less educated members of the gay community, who might not be able to understand what it means when Parliament or AGC says they do not enforce "pro-actively". They might not even be aware that such a stance has been taken. The stance of passive enforcement is not even particularly clear to trained lawyers, for that matter, for such a thing has never been done.

(3) It is irrelevant whether the complaint is acted on

136. Whether the AGC chooses to act on a complaint, however, is irrelevant, for the damage is already done. For every complaint they receive, there are many others who have chosen to suffer in silence rather than risk prosecution.

137. In all these situations, s 377A sits on top of the existing social and legal biases, engendering systemic social and legal discrimination against gay men, and leaves them vulnerable and powerless to seek redress.

iv. Government has said that LGBT people are covered under the constitution

138. It would be unfair to deny the Appellant standing, especially when the Government itself admits that the Constitution could encompass equal protection with respect to sexual orientation, even though it is not explicitly written in.

139. The Report of the Government to the CEDAW Committee, titled "Responses to the list of issues and questions with regard to the consideration of the fourth periodic report" says thus **(*Committee on the Elimination of Discrimination against Women: Pre-session working group*, Responses to the list of issues and questions with regard to the consideration of the fourth periodic report, 12 May 2011, Forty-ninth session, 11 – 29 July 2011**, **at [31]**):

> "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 ours]"

140. If the principle of equality applies to LGBT people, then surely, the Appellant, being a member of the LGBT community, must have the rights to be treated equally.

141. As such, the constitutionality of s 377A is in doubt. The Appellant must have standing to challenge it, since his rights are at stake.

v. <u>s 377A Affects the ability of the Appellant to access essential services</u>

142. s 377A casts a shadow on every aspect of one's life as a gay man. Sometimes it even casts a shadow on LGBT women. Everything that relates to same-sex love, intimacy, and relationships have to be handled with caution, due to the legal grey area. This shadow can reach out in multiple ways, including housing, education, health, employee protection, access to justice, freedom of speech and more.

143. This shadow is especially egregious, as the government has explicitly declared in

the CEDAW Report that:

> "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*.
>
> [emphasis ours]"

144. If there is a constitutional guarantee that all people, including LGBT people, have the same access to healthcare, education, housing and healthcare, then any legal provision that affects this access must be examined closely.

145. For the purposes of this submission, Appellant shall concentrate on two examples which are easily understood: health services, and access to justice. There are several other ways the existence of the law affects the Appellant, but which are too voluminous to be properly elaborated hereupon.

a) Outreach to gay men with respect to HIV/AIDS is limited

146. The Appellant's right of access to health services are being gravely affected by reason of s 377A.

147. Outreach to gay men with respect to HIV/AIDS is limited due to s 377A, as we have submitted in Appellant's Submissions. Anyone who aims to reach out and educate gay men about HIV/AIDS, or provide medical services, could potentially be charged with abetment. It puts a perpetual shadow over their altruistic activities. For example, they could be charged with abetment if they hand out condoms to gay men as part of their outreach programmes, knowing that the condoms will be used for same-sex acts. Such programmes are already

undertaken by organisations such as Action for AIDS.

148. To speak about how the criminal law can affect HIV/AIDS outreach, it is useful to refer to ***Poe***. In ***Poe***, the challenge was against a law which prohibited the use and sale of contraceptive devices, and the giving of advice of the same to married couples. This directly touches on the provision of health services.

149. There has been very forceful dissent from the 4 dissenting judges in this decision, which also has to be considered, especially in the light of the facts in the dissent. Justice Douglas said thus (***Poe***, at 511):

> "This couple have been unable to get medical advice concerning the "best and safest" means to avoid pregnancy from their physician, plaintiff in No. 61, because if he gave it he would commit a crime. The use of contraceptive devices would also constitute a crime…
>
> … A public clinic dispensing birth-control information has indeed been closed by the State. Doctors and a nurse working in that clinic were arrested by the police and charged with advising married women on the use of contraceptives. That litigation produced State v. Nelson, 126 Conn. 412, 11 A. 2d 856, which upheld these statutes…
>
> … The Court refers to the Nelson prosecution as a "test case" and implies that it had little impact. Yet its impact was described differently by a contemporary observer who concluded his comment with this sentence: "This serious setback to the birth control movement [the Nelson case] led to the closing of all the clinics in the state, just as they had been previously closed in the state of Massachusetts." At oral argument,

counsel for appellants confirmed that the clinics are still closed. In response to a question from the bench, he affirmed that "no public or private clinic" has dared give birth-control advice since the decision in the Nelson case."

150. The facts of the ***Poe*** are instructive to the current case, while not exactly analogous. S 377A is a Damocle's Sword that can be used anytime against the gay community. There have been random prosecutions and entrapments in the past, which puts those concerned on alert. The law can be used not just to directly prosecute infringing individuals, but harass businesses and services which are related to the provision of services to the gay community.

151. Naturally, this will put on notice any organisation or service that aims to work with the gay community to combat HIV/AIDS. While Action for AIDS has been doing admirable work for the past 21 years in this sector, including outreach to other at-risk populations, it has not been without its share of controversies, and having to step around shadows.

152. Even though the law is not "enforced" per se, the legal ambiguity that surrounds their actions makes service providers ripe for abuse, simply by threatening enforcement for abetment. It must be noted that the AGC is not the only one who can make such threats, but anyone, by threatening to make a complaint, as said above. Furthermore, when it comes to non-profits, the section prejudices their fundraising activities, as well putting potential donors on the alert. Any donor who wishes to donate, must necessarily "close one eye". It also puts government funding at risk, for it can be pulled at any moment, citing the promotion of

"illegal activities".

153. From the perspective of the gay community, the law deters gay men from seeking medical help even for ailments that might not be related to their sexuality. They are likely to be not honest about their sexual history when it comes to seeking medical advice, or when it comes to medical studies. This is also extended to mental health services, as the same principles apply. This state of affairs is especially bad for public health, given the high prevalence of HIV/AIDS in the gay community.

154. These are not hypothetical claims. There can be an overwhelming amount of evidence to the effect, which the Appellant is procedurally unable to furnish due to ***Rules of Court*****, O 18 r19** for the striking out application. Dr Roy Chan's writing ("***Penal Code Sections 377, 377A and Effect on AIDS Prevention in Singapore***") must once again be referred to, as he cogently explains how the existence of the legislation prejudices HIV/AIDs work.

155. We will point to a recent reported incident to prove that s 377A can affect public health initiatives. Recently, Tan Tock Seng Hospital (TTSH) aimed to conduct research into prevalence of HIV/AIDs and syphilis in gay men (**Melissa Pang, "Study looks at sexual behaviour of gay men", *The Straits Times*, 30 August 2011**), quite recently. Even though the participants were given monetary rewards for taking part in the survey, the response rate, 40, was far less than the targeted number, which was 1000.

156. This is in direct comparison to the Asia Internet MSM Survey, which allows responding gay men to be anonymous while taking the survey. Respondents for

the survey are unpaid but enjoys far greater response rates. Precisely, 1997 men from Singapore responded for the 2010 survey **("*Asia Internet MSM Survey Preliminary Report*")**. It is quite possible that the reason even a monetary rewards did not work, is because of s 377A. The respondents in the former study are quite likely afraid of prosecution, if they declare themselves to be gay and engaging in gay sex. This is so even if their details are promised to be confidential.

157. Clearly, the existence of the law is potentially affecting something as simple, yet, important, as studies on public health even though there is a promise on non-enforcement. If those involved in public health are not able to collect accurate data due to a non-enforced law, it is difficult to claim that non-enforcement means nothing is affected. Information and data on public health are essential to making decisions and formulating programs to tackle those issues.

158. The Appellant's rights to access to health services are being impeded. Hence, it is difficult to claim that s 377A does not affect the Appellant's interest since it is unenforced.

b) s 377A unfairly taints transactions with illegality, impeding access to justice

159. S 377A is not just felt in being prosecuted, or even just to actions in the bedroom. It casts the shadow of illegality in otherwise perfectly innocent transactions and dealings. The Respondent cannot simply state that it will not be enforced, and wash their hands off all other consequences of the law subsisting on the books, namely, the dangers of the illegality and the potential inability to get legal representation.

(1) Illegality

160. Enforced or not, s 377A is a criminal law. There is a real danger is that transactions, even commercial transactions as conducted between parties on a normal basis, if conducted between people who are engaging in sexual relations, or for the benefit of those who do, might be tainted with illegality.

161. This is not a hypothetical line of reasoning. The case of ***Guillaume Levy-Lambert v Goh See Yuen Pierre*** **[2010] SGDC 482** ["*Guillaume*"] adequately illustrates that even a joint bank account and the trust created thereupon could be called into question due to the existence of s 377A. In *Guillaume*, on the facts, the trial judge decided that s 377A did not impact upon the legality of the trust, but this is only a first instance decision at the District Court level. Clarity with respect to this question is far away from being achieved.

162. A much more direct example might flow thus: a gay couple hire a local hotel room for a romantic weekend in Singapore, and they experience personal injuries due to a fault on the part of the hotel. The hotel might be able to use s 377A as a defence to a contractual claim, as the purpose of hiring the room was for them to further their relationship, which includes sexual relations.

163. Clarity or certainty is still far away from being achieved in the field of illegality (***Tey Tsun Hang, "Reforming Illegality In Private Law",*** **(2009) 21 SAcLJ 218**). While we might await a legislative reform on illegality like there have been in other countries, it is eminently unfair that illegality due to a provision which is

not even "pro-actively enforced" is continued to allowed to taint contracts.

(2) Termination of contracts for breach of s 377A

164. Many contracts in today's commercial world contain a clause to the effect that the signor will comply with any and all Singapore laws. In a personal context, many employment, personal sponsorship and lease agreements contain this clause. The leading precedent encyclopaedic series, Butterworths, advice one that a lease agreement do and should contain a clause with respect to "anti-social, immoral or illegal activities" (***The Encylopedia of Forms and Precedents,* 5th Edition, vol. 23(1) (London: Butterworths, 2007)** at 179, para. 932**).**

165. Under such a contract, if the lessor discovers that the premises have been used for intimate relations between two men, which would be a crime under s 377A, that would be a breach of the above term. Depending on whether the clause is a condition or a warranty, the contract could be terminated, or damages could be sought for the breach of the term (***RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] SGCA 39; 4 SLR(R) 413**, at [91]-[107]). This could potentially be done even so when the act has not been prosecuted yet.

166. For gay men who might already have trouble finding housing, this might be an additional risk they have to live with, especially if an unscrupulous lessor wants to use it as an excuse to terminate the contract.

167. It is true that in such a situation, the tenants could simply initiate a lawsuit to dispute the termination or the claim for damages. However, as said above, they might be loathe to expose themselves to prosecution by disclosing commissions

of s 377A. Furthermore, most people would prefer not to drag matters to court, and would quietly accept such discrimination.

(3) Legal representation

168. The potential illegality of transactions might create a double-trap: a gay person might not even be able to access legal advice for matters relating to personal transactions.

169. **S22 of the *Legal Profession Act (Professional Conduct Rules)* (Cap. 161, R. 1, 2010 Rev. Ed. Sing.)** states:

> "An advocate or solicitor shall not tender advice to a client when the advocate and solicitor knows or has reasonable grounds to believe that the client is requesting advice for an illegal purpose."

170. This would mean that if interpreted strictly, any transaction that might involve the furtherance of a gay relationship (which presumably involves sexual relations), might be considered in furtherance of an illegal purpose.

171. If a gay man were to seek a lawyer, perhaps with respect to matters relating to his sexuality or his relationship (aside from being convicted under s 377A), this brings up some serious concerns as to whether the advocate or solicitor is in breach of his ethical and professional duties to the bar. To give an example, the transaction could be something as innocent as setting up a trust fund in favour of a same-sex partner, as in ***Guillaume***. Clearly, such a transaction would further the romantic relationship between the people involved, which, as we can reasonably assume, includes intimate relations. In the language of s 377A, it

could reasonably be used as part of "abetment" or "commission" of a "gross indecency".

172. The danger is not that the person in question would be convicted under s 377A, or that the trust would be invalidated, but that the lawyer could potentially simply refuse to represent the client based on his ethical duties. This makes an already marginalised community even more vulnerable. Not to mention, this state of affairs is very much unfair to the client, whose actions in the bedroom might not even subject to prosecution, according to the Respondent.

173. Though, in fairness, while many lawyers might choose to "turn a blind eye" to the fact, this might be considered a violation of his ethical duties. The damage has already been done when a lawyer has to make this judgment call. Potential gay clients who are aware that they are unapprehended criminals who intend to continue engaging in criminal acts by having sex with men, are hence unlikely to seek representation for legal problems they might have, despite the lawyer-client confidentiality.

174. Access to justice is a key component of the integrity of the legal system. S 377A essentially makes it difficult for one to know the Appellant's precise legal right in a lot of situations where the sexuality of the Appellant might interact with other aspects of his life. This is eminently unfair, especially given that we are now attempting to improve access to justice for the underprivileged.

c) Conclusion: Non-enforcement is a mirage

175. It is submitted that s 377A is not just a matter of a law that can be enforced or not enforced, at the pleasure of the executive. It has real, substantiated effects on the

Appellant's life, as well as members of the gay community. These effects cannot be controlled by the Executive, no matter how many promises of non-enforcement they make.

176. Non-enforcement is simply a mirage through which the administration can claim to be striking a balance which is not there. In reality, the onus is shifted to the gay people, in having to step around legal shadows and perpetually fearing the might of the law being brought down upon them. The balance of power is also shifted to the hands of the public, in being able to make a complaint at any time. The ability to access essential services, as well affect the ability of third parties to provide them, is limited due to s 377A.

177. The examples and issues outlined in these submissions are simply the most direct and easily understandable effects of s 377A, as far as can be substantiated without affidavit evidence. There are numerous trickle-down effects that can be proved at a full trial.

178. The issues in this section are not brought up so that the court may make a determination on each of those issues, but so that it is abundantly clear that due to these effects, the Appellant's life is being affected regardless of prosecution. Furthermore, these effects could potentially be in violation of the constitutional guarantee of equality. He has a prima facie case which deserves to be heard at a full hearing.

179. In this case, the Appellant, being a long-standing member of the gay community, perpetually fears the use of the law against him in the ways outlined above.

180. Hence, he has standing to challenge s 377A.

vi. Appellant does not have interest in other areas of sexual conduct

181. The Respondent submits, somewhat confusingly, that the Appellant's interest in engaging in consensual sexual conduct between males will not be protected even if s 377A is struck down. He submits that other provisions will still criminalise his conduct. He highlights **s 376**, **s 376A** and **s 294(a)** of the *Penal Code* as examples.

182. This argument betrays a deep misunderstanding of the nature of the relief the Appellant initially prayed for. The Respondent does not wish for anything more than the basic right to be able to express intimacy with those who are willing, adults, and in private. Under current Singapore law, this basic right is granted to everyone else *except* men who are attracted to other men.

183. Furthermore, the nature of other provisions such as s 376, s 376A and s 294(a) is that they are gender-neutral. This is specifically distinguishable from s 377A. In fact, this is the feature of s 377A which makes it constitutionally suspect.

184. Following from the fact that the laws are gender-neutral, is that the laws are formulated to address specific issues. S376A, for example, is meant to protect young people from sexual assault, regardless of gender. S294(a) protects public decency. and s376 protects everyone, regardless of gender, from non-consensual sexual penetration. S376A and s376 are also laudably gender-neutral in not specifying that the attacker or perpetrator has to be male or female. Furthermore,

the act of penetration is defined widely enough to include non-penile penetration. Hence, these provisions have nothing whatsoever to do with homosexuality in of itself.

185. As such, if someone were to be convicted under these provisions for act that happens to be between two males, that would be *no different* than when someone is convicted for a heterosexual or lesbian act. The constitutional guarantee of equality under **Art 12** would not be offended.

186. If the Respondent was speaking about these provisions from the point of view of **Art 9**, for the constitutional guarantee of liberty, then his argument still would not hold up. Without launching into an exploration of the constitutionality of these provisions, suffice it to say they were enacted to prevent specific harms. Liberty cannot possibly extend to someone sexually assaulting someone under s **376**, or having sexual relations with a minor or **s 376A**. There are public decency concerns that override someone's liberty to engage in obscene acts in public, whatever they may be (which might not be sexual acts at all).

187. The learned Respondent fails to grasp this basic concept. As such, his submission that the remedy sought will not address the injury the Appellant suffered, is plainly wrong and illogical.

IV. CONCLUSION

188. S 377A is more than a straight-forward criminal provision. It is the first and most important layer of state-endorsed discrimination against an innocent minority group.

189. For all the reasons elaborated on above, the Appellant has the standing to, or there is real controversy that allows him to mount a challenge against s 377A. The Court must take a purposive, holistic view of how a law can operate to affect people, even when the law enforcement or Attorney General may not be bothered to enforce it. This is especially so, as the challenge here is against a written law, not an administrative action.

190. The Appellant prays for the decision of the High Court to uphold the decision of the Assistant Registrar to grant out the striking out application, to be reversed.