

**PETITION TO THE HONOURABLE MEMBERS OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES**

REQUEST BY PETITIONERS HOFFMANN, “S.A.” AND “D.H.”

FOR A DECISION RECOMMENDING

**REPEAL OF SECTIONS 9 AND 12 OF
BARBADOS’ *SEXUAL OFFENCES ACT***

**SUBMITTED UNDER ARTICLE 44 OF THE
AMERICAN CONVENTION ON HUMAN RIGHTS AND
ARTICLE 23 OF THE COMMISSION’S RULES OF PROCEDURE**

June 6, 2018

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1. Declaration of Gavin Omar Hope, also known as Alexa Diane Violet Hoffmann, dated June 5, 2018
2. Declaration of S.A., dated June 5, 2018
3. Declaration of D.H., dated June 5, 2018
4. Affidavit of Professor Chris Beyrer, sworn March 19, 2018
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6. The Barbados Rally Poster (event held November 12, 2017)
7. Photographs of injuries suffered by Petitioner Hoffmann in attack of February 18, 2018

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EXECUTIVE SUMMARY

Section 9 of the *Sexual Offences Act* of Barbados (the “SOA”) criminalises the act of “buggery”, which the Barbadian courts have confirmed means anal sex, between men and also between a man and a woman. Section 12 criminalises “serious indecency,” which is sweepingly defined as any act by anyone “involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.” These acts are criminalised notwithstanding the consent of the participants. The maximum penalty for buggery is life imprisonment; the maximum penalty for an act of serious indecency (involving a partner above the age of 16) is 10 years in prison.

Both of these prohibitions cause harm to members of the lesbian, gay, bisexual and transgender (LGBT) community in Barbados, including violations of multiple rights guaranteed by the *American Convention on Human Rights* (“the Convention”) and other international treaties.

By criminalising a wide array of consensual sexual conduct between persons of the legal age of consent established elsewhere in the SOA, these provisions violate the fundamental rights of all sexually active (or potentially active) people in Barbados, such as the right to privacy and the right to freedom of expression.

However, in addition, while these laws appear to be neutral regarding sexual orientation and gender identity, *de facto* they also both embody and encourage discrimination and abuse particularly against LGBT people, in various ways.

Section 9’s criminal prohibition on “buggery” necessarily criminalises intercourse between two men and between (some) trans women and their male partners, and even when seemingly neutral, there is a long history of indecency laws such as section 12 being used to target same-sex intimacy. Aside from criminalising consensual sexual conduct between LGBT people, sections 9 and 12 of the SOA help legitimize broader abuses against those who are, or are perceived to be, LGBT by turning them into presumed criminals in the eyes of other citizens. In the words of the Inter-American Commission on Human Rights (“IACHR” or “the Commission”):

[T]his type of legislation contributes to an environment that condones discrimination, stigmatization, and violence against LGBT persons. The IACHR understands that the existence of ‘buggery’ laws is used as a mechanism for social control and domination that enables states to legitimize and contribute to the stigma of LGBT persons as “immoral” individuals. Moreover, such laws have been used to justify the arbitrary arrests, detention and even torture of LGBT people.¹

The continued criminalisation of LGBT people under SOA sections 9 and 12 also has other harmful effects. Laws that criminalise same-sex conduct create a hostile climate for LGBT people who seek any kind of health services, particularly sexual health services. Among other

¹ IACHR Welcomes Decision to Decriminalise Consensual Sexual Relations between Same Sex Adults in Trinidad and Tobago available at: http://www.oas.org/en/iachr/media_center/PReleases/2018/088.asp.

things, such laws, and the stigma and discrimination to which they contribute, undermine the access of transgender people, gay men and other men who have sex with men (MSM) to critical HIV services, including for testing, treatment, care and support. This undermines an effective national response to the HIV epidemic, especially affecting the health of trans and gay Barbadians.

Sections 9 and 12 of the SOA are a toxic vestige of British colonial rule. The criminal prohibition on buggery (section 9) was first enacted in 1868, but has been defended by successive Barbadian governments since independence in 1966. It appears to be immunized from domestic constitutional review because of a “saving clause” in the *Constitution of Barbados* (section 26) adopted at that time. The criminalisation of “serious indecency” in some form first appeared in Barbadian law in 1978, but its antecedents date back to colonial Britain. Given that domestic courts of Barbados are prevented from subjecting the buggery provision to the rights provisions of the country’s Constitution, it does not appear that an adequate, effective remedy for Barbados’ continued criminalisation of consensual same-sex activity can be obtained from its domestic courts.

The Petitioners therefore seek a remedy via petition to the Commission (and if necessary the Inter-American Court of Human Rights), pursuant to the Convention. Barbados ratified the Convention in 1981 and has accepted the jurisdiction of both the Commission and the Court to consider the Petitioners’ claim that their rights under the Convention have been, and are being, breached by Barbadian law.

The three Petitioners in this action are Barbadian citizens who are members of the LGBT community in Barbados. Petitioner Hoffmann is a transgender woman who is sexually attracted to men. As Barbados does not provide legal recognition of her female identity, she is legally a man who is sexually attracted to other men. Petitioner “S.A.” is a lesbian. Petitioner “D.H.” is a gay man. The Petitioners experience frequent stigma and discrimination due to their sexual orientation and/or gender identity, as well as threats of violence. Petitioners Hoffmann and S.A. have also suffered physical violence as a result of their sexual orientation or gender identity. Petitioner Hoffmann’s efforts to report these crimes to the police have resulted in inaction or delayed action accompanied by discriminatory treatment because of her gender identity.

The Petitioners assert that sections 9 and 12 of the SOA both violate, and encourage violations of, the following rights of the Petitioners and of other LGBT people in Barbados, in breach of multiple provisions of the Convention:

- the rights to **non-discrimination in enjoyment of Convention rights** (Article 1) and to **equality before the law and equal protection of the law** (Article 24);
- the right to **privacy** (Article 11);
- the right to **physical, mental and moral integrity** (Article 5);
- the right to **freedom of expression** (Article 13);
- the rights of the **family** (Article 17); and
- the right to **judicial protection** (Articles 8 and 25)

It is also worth noting that Sections 9 and 12 of the SOA also contravene other international human rights treaties ratified by Barbados, including:

- the *International Covenant on Civil and Political Rights* (the "ICCPR");
- the UN *Convention on the Elimination of all Forms of Discrimination against Women* ("CEDAW") and the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women* ("Convention of Belém do Pará");
- the *Convention on the Rights of the Child* ("CRC"); and
- the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR").

Finally, the continued criminalisation of “buggery” and “serious indecency” by Barbados is also at odds with jurisprudence from the European Court of Human Rights, as well as jurisprudence from courts in other countries in the Americas (throughout which the *American Convention* applies), in which courts have concluded that similar provisions in the law of those countries amount to a breach of fundamental human rights such as those included in this petition. (This includes recent judgments from other countries in the Caribbean, specifically in Belize and in Trinidad and Tobago.²)

In sum, sections 9 and 12 of the SOA directly violate the rights of all sexually active people in Barbados, including those whose partners are of the same sex, and in practice have an additional, broader harmful impact on numerous rights of LGBT people in particular. These provisions must be repealed so as to decriminalise consensual sexual conduct between those of the legal age to consent under Barbadian law.

The Commission should also recommend other, proactive measures to be taken by the Government of Barbados to address the stigma, discrimination, violence and other abuse that LGBT people in Barbados experience as a result of the homophobia and transphobia to which such criminal laws have contributed, including the following:

- condemn and monitor serious human rights violations, including discrimination and hate speech, as well as incitement to violence and hatred, on the grounds of sexual orientation and gender identity in accordance with its international commitments, including the Convention;
- ensure that all allegations of excessive use of force and other human rights violations by law enforcement officials based on real or perceived sexual orientation and gender identity or expression are investigated promptly and thoroughly;

² E.g., *Orozco v. Attorney General of Belize* (10 August 2016), Claim No. 668 of 2010 (Supreme Court of Belize); *Jones v. Attorney General of Trinidad and Tobago* (12 April 2018), Claim No. CV2017-00720 (High Court of Justice, Republic of Trinidad and Tobago).

- train all law enforcement and criminal justice officials on international human rights standards and non-discrimination, including on the grounds of sexual orientation and gender identity;
- conduct awareness-raising programs, especially through the education system, to address social stigma and exclusion of individuals and communities on grounds of their sexual orientation and gender identity and expression, and respect for the human rights of all Barbadians, including the obligation not to discriminate against LGBT people;
- facilitate access to social services, and especially health services, regardless of the individual's sexual orientation, gender identity and expression, and/or HIV status; and
- enact legislation that specifically prohibits discrimination based on sexual orientation and gender identity, in keeping with its obligations under Article 1 of the Convention.

I. INTRODUCTION

*“All of this leaves me wanting to die. I want it to change here, but mentally, I die a little each day.”*³

As the Inter-American Commission on Human Rights (the “Commission”) has previously noted, laws that criminalise consensual sex between same-sex persons contribute “to an environment that condones discrimination, stigmatization, and violence against LGBT persons.”⁴ As a party to the *American Convention on Human Rights*,⁵ Barbados has pledged to ensure that all persons are equal before its law, and are entitled, without discrimination, to equal protection of the law.

Yet Barbados criminalises a vast swath of consensual sexual conduct pursuant to its *Sexual Offences Act* (the “SOA”), and specifically section 9, which prohibits “buggery,” and section 12, which prohibits “serious indecency.” While these laws appear on their face to be neutral regarding the sex, sexual orientation and gender identity of consenting participants, *de facto* they both embody and encourage discrimination against LGBT people in particular, in various ways. With these provisions, Barbados not only violates the rights to privacy and expression of all sexually active Barbadians, but also particularly targets a vulnerable sector of its own population: it denies LGBT people the equality before the law owed to them under the Convention, contributes to numerous other human rights violations against LGBT people, and fails to afford equal protection to the very people it exposes to said violations.

The harm occasioned by SOA sections 9 and 12 extends beyond the punishment they directly prescribe for consensual sexual activity. These provisions also codify and contribute to hatred against the LGBT community in Barbados. They legalize the persecution of a minority, which already struggles to live free from vilification and discrimination, they embolden and encourage hateful speech and actions on the part of its citizens, and they tacitly condone a failure on the part of state actors to protect against such abuse.

The effects of this state-sanctioned conduct are far-reaching and pervasive. Many LGBT Barbadians endure regular harassment and stigmatization, and are afraid to express their true selves for fear of being ostracized, discriminated against and even physically harmed. The stigma and fear engendered by sections 9 and 12 has serious health impacts as well, creating a hostile climate fraught with the risk of discrimination (or worse) for LGBT Barbadians who seek health services, particularly sexual health services, including HIV testing, treatment, care and support.

³ Declaration of S.A., dated June 5, 2018, at para 41.

⁴ Inter-American Commission on Human Rights, “IACHR Welcomes Decision to Decriminalise Consensual Sexual Relations between Same Sex Adults in Trinidad and Tobago,” Press Release, 23 April 2018, available at: http://www.oas.org/en/iachr/media_center/PReleases/2018/088.asp.

⁵ *American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32)*, 22 November 1969, O.A.S. Treaty Series N° 36, 1144 UNTS 123, Article 1(1) [hereinafter American Convention].

This undermines an effective national response to HIV and is contrary to Barbados' international treaty obligations to realize progressively the right to the highest attainable standard of health.

By refusing to repeal—indeed, actively defending—sections 9 and 12 of the SOA, Barbados participates in the persecution of the LGBT community. As the colonial power, Britain enacted the buggery provision in 1868, exactly 150 years ago. Barbados gained independence in 1966, and yet, more than 50 years later, it still clings to this toxic vestige of colonial rule. Barbados also continues to defend its criminalisation of “serious indecency,” an offence rooted in colonial-era English law. In so doing, Barbados not only breaches its obligations under the Convention, but is increasingly out of step with modern practice of the majority of the countries in the Americas and in the world: at last count, 124 states have either repealed laws which prohibit consensual sexual conduct between persons of the same sex or had no such laws to begin with.⁶

The Petitioners accordingly ask the Commission, for the reasons detailed further below, to recommend that Barbados repeal sections 9 and 12 of the SOA, so that consensual sexual conduct between those of the age of consent (established in other provisions of the SOA) is no longer subject to criminal sanction. The Petitioners also ask the Commission to recommend additional, proactive measures by Barbados to address the stigma, discrimination and abuse that LGBT people in Barbados experience as a result of the homophobia and transphobia to which such criminal laws have contributed.

1. Jurisdiction

The twin pillars of personal liberty and social justice are enshrined in the Convention. The Convention's preamble reiterates that, in accordance with the *Universal Declaration of Human Rights*, freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy economic, social, and cultural, as well as civil and political rights.

Barbados pledged to pursue, achieve and uphold these ideals when it ratified the Convention in 1981. As Barbados is a party to the Convention and has accepted the jurisdiction of the Inter-American Court of Human Rights (the "Court"), both the Commission and the Court have jurisdiction to consider the Petitioners' claim that the rights owed to them under the Convention have been, and are being, breached by the continued criminalisation of their sexual activity with consenting partners.

The Petitioners in this case, Alexa Hoffmann ("Petitioner Hoffmann"), S.A. ("Petitioner S.A. ") and D.H. ("Petitioner D.H.") are Barbadian citizens who ask that the Commission require Barbados to fulfill its human rights obligations under the Convention. All events described in

⁶ Aengus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition* (May 2017) at 8, available at http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf.

this application took place in Barbados, and at all times Barbados had jurisdiction over the Petitioners. The Petitioners have standing to appear pursuant to Article 44 of the Convention.

2. Request for Anonymity

Homophobia and transphobia are pervasive in Barbados. As such, the release of Petitioner D.H.'s identity would carry an increased risk of violence and danger to his well-being. Petitioner D.H. agrees that his identity may be revealed to the State of Barbados, but requests that his identity otherwise remain anonymous for public purposes and not appear on any documents published by the Commission or the Court, and that Barbados similarly respect this anonymity.

Petitioner Hoffmann and Petitioner S.A. do not request anonymity. Based on personal experience, they certainly have a concern about risk of violence or other abuses, but are also already publicly visible as advocates for the human rights of LGBT people.

3. Request for Expedient Consideration of the Petition and Decision on the Merits

As set forth below, the Petitioners face serious and urgent hardship, with the ongoing threat of serious violence. Furthermore, this and other violations of their rights, and those of all LGBT people in Barbados, continue each day the impugned provisions of the SOA remain in force. The Commission's decision could repair this ongoing structural denial of the rights of all LGBT persons in Barbados, and promote changes in legislation and the practice of state agents, thereby avoiding the need for multiple petitions on this same matter. Therefore, the Petitioners request the Commission process, admit and decide their case on the merits as expeditiously as possible under Articles 29(2)(d), 30(4), 36(3) and 37(3) of the Commission's Rules of Procedure.

II. LEGAL CONTEXT

Under sections 9 and 12 of the SOA, Barbados criminalises a wide array of consensual sexual conduct between those of a legal age to consent to such activity. On their face, these sections of the SOA appear neutral as to the sex of the participants (and hence neutral in their impact with respect to sexual orientation and gender identity), but there can be no doubt that they historically were meant primarily to target same-sex sexual activity, and continue to be understood in this manner to this day, as the Government of Barbados has specifically acknowledged.⁷ These provisions trench upon the rights of all sexually active people in Barbados, but disproportionately affect LGBT people, both directly and indirectly, including by encouraging state-sanctioned violence and other rights violations suffered by the Petitioners and other LGBT people.

Note that the SOA establishes that, as a general rule, the age of consent for sexual activity is 16 years of age.⁸ Therefore, for the purposes of this petition, in any reference to the decriminalisation in Barbados of consensual sex between “adults,” the Petitioners use that term to include any person who has attained this age, as they seek the removal of criminal penalties under SOA sections 9 and 12 for consensual sexual activity between persons of the recognized legal age of consent. To accept or establish different ages of consent for different sexual acts (e.g., a higher age of consent for anal sex) or based on the sex of the participants would violate the Convention: Article 1(1) requires States Parties to ensure the full exercise of all Convention rights without discrimination, including, as outlined below, not just on the basis of sex but also on the basis of sexual orientation and gender identity.

1. Section 9 of the SOA: “buggery”

Section 9 of the SOA criminalises "buggery." The provision reads as follows:

Any person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life.⁹

“Buggery” has been defined by the Barbados courts as "sexual intercourse (a) committed against the order of nature (i.e. *per anum*) by man with man or in the same unnatural manner by man with woman or (b) by man or woman in any manner with beast."¹⁰

⁷ UN Human Rights Committee, *Report of the Working Group on the Universal Periodic Review: Barbados, Addendum*, A/HRC/10/73/Add.1 (Mar. 16, 2009) at para 26 (specifically in relation to buggery).

⁸ *Sexual Offences Act*, 1 LRO 2002, c. 154, ss. 5 and 11.

⁹ *Sexual Offences Act*, 1 LRO 2002, c. 154, s. 9.

¹⁰ *Hunte v. The Queen* (18 October 2002), Criminal Appeal No. 43 of 2001 (Barbados Court of Appeal) at para 16. Based on the research conducted in the course of preparing this petition, the Petitioners understand that this remains the state of the law in Barbados at the time of filing this petition; they are unaware of any subsequent jurisprudence contradicting this statement by the Court of Appeal.

The definition of the “buggery” offence is, on its face, sex-neutral in that it prohibits any penile-anal intercourse, whether the receptive partner is male or female. However, it necessarily and discriminatorily prohibits intercourse between two men (which is also clearly the starting point of the definition as presented by the Court of Appeal in *Hunte*, just cited), and also between (some) trans women and their male partners. Furthermore, the provision is broadly (and accurately) understood as criminalising anal sex between men.¹¹

This understanding is undoubtedly rooted in the history of the criminalisation of “buggery” in the Western world, which has primarily (albeit not always exclusively) connected it to sexual relations between men, from its ostensible origins in Biblical injunctions against a “man ... [lying] with mankind, as he lieth with a woman,” to its appearance in early English law first using the term “sodomy” and then later the term “buggery” by the mid-1500s.¹² Thus, for example, leading British jurist Edward Coke recounted the following definition in the late 18th century, with a clear emphasis on sexual activity between men:

Buggery is a detestable, and abominable sin, amongst Christians not to be named. ... [It is] committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.¹³

It is, therefore, not surprising that, more than two centuries later, the Government of Barbados also understands its own buggery law, first enacted during the colonial era in 1868, primarily in terms of criminalising same-sex sexual activity. In 2009, in response to recommendations to Barbados made in the course of its first cycle of review via the Universal Periodic Review

¹¹ For example, in a report commissioned by the Attorney General of Barbados, Professor The Hon. E.R. Walrond, is clearly of the view that section 9 of the *SOA* is an anti-gay provision, and does not address its gender-neutral language: Prof. The Hon. E.R. Walrond, *Report on the Legal, Ethical and Socio-Economic Issues Relevant to HIV/AIDS in Barbados* (June 2004).

¹² The offence of “buggery” first appeared in in the civil law, as opposed to ecclesiastical law, of England, via the *Buggery Act of 1533* (25 Hen. 8 c. 6), in which reference appears to the “detestable and abominable Vice of Buggery committed with Mankind or with Beast,” but without further definition. For a detailed review of the development of the law of buggery in English law and its spread to its colonies, see the article by the Hon. Michael Kirby, retired justice of the High Court of Australia: Michael Kirby, “The Sodomy Offence: England’s Least Lovely Criminal Law Export?” (2011) 1 J. of Commonwealth Criminal Law 22.

¹³ Edward Coke, *The Institutes of the Laws of England* (3rd part), “Cap. X: *Of Buggery, or Sodomy*” (1797), cited in Kirby, at p. 24 (and also available online at https://upload.wikimedia.org/wikipedia/commons/8/8a/Edward_Coke%2C_The_Third_Part_of_the_Institutes_of_the_Laws_of_England_%281797%29.pdf, see pp. 58-59.) While Coke’s commentary does note that “buggery” could be committed by a woman, referring to the use of the word “person” in the statute, in making this observation, he also only refers to a woman committing “buggery with a beast.” That the primary focus of the offence was on criminalizing anal sex between men was evident in a dispute of legal interpretation that arose in the English courts in the early 1700s, more than a century and a half later, over the question of whether a man having anal sex with a female partner was indeed captured under the offence of “buggery.” Ultimately, in *R. v Wiseman* (judgment in 1718), reported at (1748) Fortes Rep 91, [1748] EngR 270, 92 ER 774, the courts confirmed that the offence should be so interpreted.

(“UPRs”), conducted by the Member States of the UN Human Rights Council, the Barbadian government stated:

The Sexual Offences Act of Barbados criminalises buggery. Barbados cannot accept at this time, the recommendation to decriminalise such sexual acts between consenting adults of the same sex.¹⁴

2. Section 12 of the SOA: “serious indecency”

Section 12 of the SOA criminalises "serious indecency." The provision states the following:

(1) A person who commits an act of serious indecency on or towards another or incites another to commit that act with the person or with another person is guilty of an offence and, if committed on or towards a person 16 years of age or more or if the person incited is of 16 years of age or more, is liable on conviction to imprisonment for a term of 10 years.

(2) A person who commits an act of serious indecency with or towards a child under the age of 16 or incites the child under that age to such an act with him or another, is guilty of an offence and is liable on conviction to imprisonment for a term of 15 years.

(3) An act of "serious indecency" is an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.¹⁵

The provision applies even where there is consent. In *Woodall v. The Queen*, the Barbados Court of Appeal stated: "for the purposes of this offence it is irrelevant whether the person on whom, with whom or towards whom this serious indecency is committed consents to the act."¹⁶

As is evident from the definition in SOA subsection 12(3), in theory the provision effectively criminalises *every* sexual act involving the genital organs by *every* person in Barbados. Yet despite this sweeping scope, it cannot be ignored that the “serious indecency” offence is rooted in Victorian-era legislation overtly aimed at consensual sexual activity *between men*. This was

¹⁴ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Barbados, Addendum*, A/HRC/10/73/Add.1 (Mar. 16, 2009) at para 26 [emphasis added]. Similar recommendations were made again in the course of the UPR of Barbados in 2013, and again the government rejected these recommendations, referring during the interactive dialogue specifically to “persons who engaged in same-sex relationships”: UN Human Rights Committee, *Report of the Working Group on the Universal Periodic Review: Barbados*, A/HRC/23/11 (Mar. 12, 2013), para. 21. Subsequently, in its formal, written response to the recommendations, the Government simply declared that “Barbados is unable, at this time, to repeal legislation that criminalises buggery”: UN Human Rights Committee, *Report of the Working Group on the Universal Periodic Review: Barbados, Addendum*, A/HRC/23/11/Add.1 (Jun. 5, 2013) at para. 28 (and Annex). The documents from reviews of Barbados via the UPR process are available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BBIndex.aspx>.

¹⁵ *Sexual Offences Act*, 1 LRO 2002, c 154, s 12.

¹⁶ *Woodall v. The Queen* (21 April 2011), Criminal Appeal No. 14 of 2008 (Barbados Court of Appeal).

noted by the High Court of Trinidad and Tobago in a recent decision considering the constitutionality of that state's version of the "serious indecency" offence, in which the High Court traced the historical origins of this provision in British law as follows:

The 1885 Labouchere amendment [of the United Kingdom's *Offences Against the Person Act, 1861*] in relation to gross indecency provided:

"11. Outrages on decency. Any male person who, in public or private, commits, or is a party to the commission of or procures (a) or attempts (b) to procure the commission by any male person of, any act of gross indecency (c) with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

This amendment was intended, according to several commentators, to extend the laws against homosexuality. As described by Cooks:

"The Criminal Law Amendment Act was passed, as we have seen, on the back of mass protest. Section 11 of the Act which criminalised acts of gross indecency between men was a last minute addition, made by the maverick Member of Parliament Henry Labouchere and introduced and passed in a chamber that was virtually empty. It was not the subject of government comment and was barely mentioned in press coverage of the Act's passing. Neither did it significantly add to the available statutes that could be deployed against men having sex with other men, all of which remained in force. The amendment was symptomatic of confusion rather than intentionality in the making of laws on sex in England, and raises the key question of whose will this law, but also other laws, enshrined."

The amendment was further described:

"The other purpose was met by the ineffably awful clause XI, the Labouchere amendment, which made illegal all types of sexual activity between males (not just sodomy, as hitherto), and irrespective of either age or consent. It is not clear whether this was a genuine attempt to deal with male prostitution or a Purity measure, opportunistically and irrelevantly tacked on to the Bill, or whether it was Labouchere's way of trying to overturn a Bill he disliked by a ridiculously extravagant amendment. Whatever the intention, the effect of its enactment is clear: Britain ended up with a proscription going far beyond anything else in any other country at the time. Italy and the Netherlands actually abolished punishment for consenting adults in private in the late 1880s, while it took the advent of Hitler to make Germany follow the new British model."¹⁷

While the offence of serious (or gross) indecency did not appear in Barbados' original *Offences Against the Person Act* imposed by the British, this is not surprising: the Act was adopted in 1868, before the Labouchere amendment introduced the offence to British law in 1885, as

¹⁷ *Jones v. Attorney General of Trinidad and Tobago*, at paras 25-27.

described above. The offence eventually appeared in the OAPA as a result of amendments in 1978, but clearly based upon the provision that had by then been adopted by Britain during the colonial era.

The breadth of section 12 entails a widespread violation of the rights of all sexually active Barbadians. However, despite its gender-neutral wording, section 12 of the SOA has a disproportionate impact on LGBT persons, not surprisingly in light of its origins and intended target.¹⁸ As Human Rights Watch has observed about similar laws across the Caribbean, "the vague wording of the law means that LGBT persons are susceptible to arrest and prosecution for a wide range of sexual acts."¹⁹ This stands to reason, given the provision's historically anti-gay roots and the widespread perception of the sexuality of LGBT people as indecent.

3. Ongoing harm of a colonial legal legacy

Although sections 9 and 12 of the SOA are antiquated holdovers from British colonialism, they continue to do significant harm to a minority now globally recognized as unjustly persecuted. The consequences are severe: social condemnation of homosexuality is condoned, violence toward LGBT persons is commonplace, families are torn apart, and the participation of LGBT people in the democratic fabric of Barbados is undermined. As noted by the High Court of Trinidad and Tobago in a case finding that similar provisions in that country breach numerous fundamental human rights:

The claimant has given uncontroverted evidence of the discrimination, threats and abuse that he has suffered by being an openly homosexual male in Trinidad and Tobago. The court is in no doubt that the sanction imposed on him by the State under these provisions affects his ability to freely express himself and his thoughts in public. Those criminal sanctions have the potential to be used oppressively by differently minded citizens as a foundation for hate as condoned by the State. ...²⁰

The historical, social, and political context of Barbados does not provide any legitimate justification for denying LGBT individuals their fundamental human rights guaranteed under the Convention (and other international legal instruments). To the contrary, many countries with similar histories of both colonialism and widespread societal opposition to homosexuality have recognized that fundamental human rights belong to all individuals, and that no state can exercise infringe or restrict those rights without a compelling reason. In this case, there are no compelling reasons justifying such a veto.

¹⁸ Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OAS/Ser.L/V/II.rev.1, Doc. 36 (Nov. 12, 2015) at para 70.

¹⁹ Human Rights Watch, *"I Have to Leave to Be Me": Discriminatory Laws against LGBT People in the Eastern Caribbean* (Mar. 2018) at 11.

²⁰ *Jones v. Attorney General of Trinidad and Tobago*, at para 94. In its ruling, the High Court concluded that the criminal prohibitions on "buggery" and "serious indecency" in Trinidad and Tobago violated the rights to private life and family life, equality before the law and equal protection of the law, and freedom of thought and expression (at paras. 92-94).

III. FACTS DEMONSTRATING VIOLATIONS OF PETITIONERS' HUMAN RIGHTS UNDER THE CONVENTION

1. Numerous documented attacks against LGBT individuals

The existence of sections 9 and 12 of the SOA has helped create and maintain an environment of fear and harassment in Barbados that not only affects gay men but all members of the LGBT community. In responses to Barbadian radio shows, newspapers, and online sites, many listeners and readers refer to the Barbadian law as proof of the illegitimacy of homosexuality.²¹ Professor Errol Walrond, an expert commissioned by the Attorney General's Office in Barbados to perform a comprehensive review of the legislation relevant to HIV and AIDS, has also connected the law with the broader stigmatization of LGBT people. More than 14 years ago, he commented in his report: "There is a need to begin the process of destigmatising homosexuals by bringing into line same sex acts with that of other sexual acts between consenting adults."²²

To the best of the Petitioners' knowledge, there is relatively little systematic documentation and compilation of the abuse and harassment experienced by LGBT people in Barbados, and the frequency with which it occurs. However, the Petitioners present below, in roughly chronological order, a list of just some of the documented incidents recorded in recent years. The number of such incidents is striking, given the small population of Barbados (approximately 286,000 people as of 2017²³), and they are illustrative of the situations encountered or rightly feared by many LGBT Barbadians:

- Darcy Dear, the founder of the group United Gays and Lesbians Against AIDS Barbados ("UGLAAB"), has frequently experienced harassment, including threats and actual violence directed to him and his home. Stones were thrown through his windows, his home was broken into, and someone tried to burn down his home in Brittons Hill in 2002.²⁴ More recently, in 2015, his truck windows were smashed at least three times and he has continued to receive hate letters condemning his lifestyle.²⁵

²¹ For example, in response to a foreigner's post on www.justbajan.com asking whether gay tourists were welcome in Barbados, one user stated: "People like you might think *our law against homosexuals* is wrong, but if you respect our laws and by extension the people of this country, you will abide by the laws of this country" (*emphasis added*). See also David A.B. Murray, *Flaming Souls: Homosexuality, Homophobia, and Social Change in Barbados* (University of Toronto Press, 2012) at 19-20.

²² Prof. The Hon. E.R. Walrond, *Report on the Legal, Ethical and Socio-Economic Issues Relevant to HIV/AIDS in Barbados* (June 2004) at 34, at http://www.bamp.org.bb/publications/HIV%20Report%20June2004_Prof%20W.pdf.

²³ United Nations, Department of Economic and Social Affairs, Population Division (2017). World Population Prospects: The 2017 Revision, Key Findings and Advance Tables. Working Paper No. ESA/P/WP/248, available at: https://esa.un.org/unpd/wpp/Publications/Files/WPP2017_KeyFindings.pdf.

²⁴ Katrina Bend, *Gay man: I'm a target*, Nation News (Nov. 25, 2007), available at <http://archive.globalgayz.com/caribbean/barbados/gay-barbados-news-and-reports/#article8>.

²⁵ Anesta Henry, *Darcy's dare! UGLAB head wants church to leave gays alone*, Barbados Today (Jul. 25, 2015), available at <https://www.barbadostoday.bb/2015/07/25/darcys-dare/>.

- In 2004, three men physically assaulted three members of Mannequins in Motion, a group of drag performers, at a gas station after one of their performances. The men threw bottles at the performers, hurled homophobic abuse at them, and one man even attempted to shoot them. One performer alleged that when they tried to seek shelter in the gas station's auto-mart, the security guard prevented them by locking the door.²⁶ Little has changed in the 15 years since this attack occurred.
- The Grand Kadooment is a festival which occurs at the end of "Crop Over;" it is a time for celebration and dancing. Yet, this has not always been the case for LGBT individuals, who have faced both physical and verbal abuse during the celebration.²⁷ During the Grand Kadooment 2013, people threw stones and yelled homophobic slurs at Justin Poleon, the flag person for the Youth Explosion band.²⁸
- During the course of a study involving gay men in Barbados, researchers reported that as they conducted interviews with some subjects, neighbours chanted from outside "battyboys, battyboys," because they had seen a number of gay men enter the premises and the owner of the house was a well-known gay man ("Batty boys" is a common pejorative for gay men).²⁹
- In May 2015, in Bridgetown, a female bus passenger reported receiving death threats and other verbal abuse from a bus driver and fellow passengers for being a lesbian. The bus conductor proposed cutting her throat, and none of the passengers objected.³⁰
- In the summer of 2015, in Bridgetown, two tourists watched as a shopkeeper hurled homophobic slurs at a group of local boys whom the tourists also perceived to be gay.³¹

²⁶ Robert Best, *Best on Tuesdays: Danger signals*, Nation News (Feb. 13, 2007); Andre Maiorana, Greg Rebchook, Nadine Kassie & Janet J. Myers, "On Being Gay in Barbados: "Bullers" and "Battyboys" and their HIV Risk in a Societal Context of Stigma" (2013) 60:7 J. Homosex 984 at 995.

²⁷ Anesta Henry, *Gays were happy this Crop Over, says Dear*, Barbados Today (Aug. 13, 2016), available at <https://www.barbadostoday.bb/2016/08/13/gays-were-happy-this-crop-over-says-dear/>.

²⁸ Dawne Parris, *Gay plea*, Nation News (Aug. 7, 2013), available at <http://www.nationnews.com/nationnews/news/50972/gay-plea>; U.S. Dept. of State, *2013 Country Reports on Human Rights Practices, Barbados*, available at <https://www.state.gov/documents/organization/220630.pdf>.

²⁹ Andre Maiorana, Greg Rebchook, Nadine Kassie & Janet J. Myers, "On Being Gay in Barbados: "Bullers" and "Battyboys" and their HIV Risk in a Societal Context of Stigma" (2013) 60:7 J. Homosex 984 at 997.

³⁰ Maurice Tomlinson, *Will tourist-dependent Barbados risk staying anti-gay?*, Erasing 76 Crimes (May 11, 2015), available at <https://76crimes.com/2015/05/11/will-tourist-dependent-barbados-risk-staying-anti-gay/>.

³¹ Maurice Tomlinson, *Story with a moral: 2 gay tourists, 1 anti-gay merchant*, Erasing 76 Crimes (Aug. 27, 2015), available at <https://76crimes.com/2015/08/27/story-with-a-moral-2-gay-tourists-1-anti-gay-merchant/>.

- Kim Watson, a transgender woman who fled Barbados for the United States, reported in 2015 that she was frequently bullied, had verbal abuse spewed at her, and rocks and bottles thrown at her as a result of her gender identity.³²
- In May 2016, a transgender man was publicly raped and photos of the aftermath were posted online. On May 21, 2016, a gossip-column writer for the *Nation*, one of Barbados' leading newspapers, gleefully reported on the rape under the headline "'Gentleman' gets taste of male medicine" as follows:

SHE HAS BEEN a good "man" to many women. And they can attest to this. Her habits are no secret and she prefers to be referred to as the masculine sex.

She has often been seen with a young girl on her arm, sometimes the envy of many men, as she takes them out dining or to watch a game of football.

But someone scored on her on her last outing, and it was not a woman.

You see, she had one too many drinks in a farming community recently and, while out cold, a man had his own way with her. He even left the evidence on her body.

Residents say that "my gentleman" has now gone into hiding after she realised what had happened to her. They have not seen her for days.

Someone even had the gall to take pictures of her indecently exposed in the grass behind a paling and sent it around social media.

Some fear "my gentleman" may never be the same after being emasculated.³³

Instead of focusing on the atrocity of the rapist's actions, the article was written in a joking tone, trading in mockery of the victim's gender identity and presentation. The article has since been removed. The *Nation* eventually issued an apology for the article in which it recognised that "gloating" over the rape was repugnant and apologised to the

³² James Fanelli, *Transgender Woman Facing Deportation Can Stay in Bronx to Avoid Torture*, DNAinfo (Dec. 7, 2015), available at <https://www.dnainfo.com/new-york/2015/12/07/kingsbridge/transgender-woman-facing-deportation-can-stay-bronx-avoid-torture>.

³³ CODE RED for Gender Justice!, *Barbados newspaper describes rape as "male medicine"*, Feminist Conversations on Caribbean Life (May 27, 2016), available at <https://redforgender.wordpress.com/2016/05/27/barbados-newspaper-describes-rape-as-male-medicine/>; Arshy Mann, *Battleground Barbados: LGBT activists face off against North American homophobes in the Caribbean*, Daily Xtra (Apr. 13, 2017), available at <http://www.dailyxtra.com/canada/news-and-ideas/news/battleground-barbados-lgbt-activists-face-north-american-homophobes-in-the-caribbean-218885>.

"right thinking members of our community" (although not to the victim whose rape was treated as fodder for jocularity).³⁴

- In February 2017, a gay man was attacked at about 10:30 p.m. in the area of Kew Road, Bank Hall, St Michael, having been targeted because of his flamboyant nature. He was hospitalized with stab wounds.³⁵
- An anti-gay march and rally entitled "Stand Up, Step Out" was organized for October 28, 2017 by two youth organizations, Hannah's Mission and Youth For Christ Barbados. Hundreds of young people and adults marched against the so-called declining values and morals in Barbados. The subsequent rally's aim was "taking back the rainbow" and involved worship, dance, and declarations.³⁶ On November 12, 2017, a Church-led anti-gay rally was held in Barbados, including a panel discussion on "Alternate Sexuality: The Inherent Dangers."³⁷
- LGBT individuals have been known to isolate themselves from certain public spaces to avoid verbal abuse, including phrases such as 'shoot them batty boys'."³⁸ For example, in a report compiled by Barbados Gays, Lesbians and All-Sexuals Against Discrimination (B-GLAD), a leading LGBT group, a 23-year-old transgender woman recounted that, after receiving death threats, she stayed home for two months, scared for her life:

People started calling my parents, my mother actually, telling her they were going to kill me, that I want killing [...] that I want running over. And, obviously scared for my life, I stayed home for like 2 months straight until I regained my confidence. And, that was it.³⁹

The harassment and abuse endured by LGBT individuals is not restricted to public spaces. A member of UGLAAB reported that due to lack of acceptance, LGBT teenagers are more likely to

³⁴ Barbados Nation, *We apologize*, Nation News (May 25, 2016), available at: <http://www.nationnews.com/nationnews/news/81626/-apologise>.

³⁵ Alexa DV Hoffmann, *Barbados Pride combats nation's anti-LGBT hatred*, Erasing 76 Crimes (Nov. 28, 2017), available at <https://76crimes.com/2017/11/28/barbados-pride-combats-nations-anti-lgbt-hatred/>.

³⁶ Emmanuel Joseph, *Youth organization to march against declining morals*, Barbados Today (Oct. 23, 2017), available at <https://www.barbadostoday.bb/2017/10/23/youth-organization-to-march-against-declining-morals/>.

³⁷ Exhibit 6 to Petition: The Barbados Rally Poster (November 12, 2017).

³⁸ Maurice Tomlinson, *Will tourist-dependent Barbados risk staying anti-gay?*, Erasing 76 Crimes (May 11, 2015), available at <https://76crimes.com/2015/05/11/will-tourist-dependent-barbados-risk-staying-anti-gay/>; Sir Arthur Lewis Institute of Social and Economic Studies, *Barbados Country Assessment of Living Condition 2010: Vulnerable Groups* (Jul. 2012), available at <http://www.caribank.org/uploads/2012/12/Barbados-CALC-VOLUME-5-PPA-Vulnerable-Groups.pdf> [hereinafter Assessment of Living Condition 2010].

³⁹ B-GLAD, *Voices – Barbados LGBT Speaking Out Report* (Dec. 7, 2014), available at <https://www.youtube.com/watch?v=qR92dhAKfM&feature=youtu.be>.

drop out of school, especially if they lack support at home.⁴⁰ They are also vulnerable to bullying, which is, at times, encouraged by teachers.⁴¹ LGBT teenagers and young adults are also likely to be kicked out of their homes by family members who are upset with, or angered by, their sexual orientation.⁴² Even older LGBT people are subjected to abuse and violence from family members. In one of the testimonials recently gathered by Human Rights Watch, one of the participants recounted that when, at the age of 23, he told his mother he was gay, she began to verbally abuse him (yelling "how could you like men, that's nasty, you give up that shit, you're nasty, you're nasty!") before then encouraging his brothers to beat him; she eventually kicked him out of the family home, after three of his uncles beat him up for being gay.⁴³

2. Police Involvement and Inaction in the Harassment of LGBT Individuals

Harassment of LGBT individuals occurs not only by members of the public, but also by police officers. These are the same police officers who should be keeping all Barbadians, including LGBT Barbadians, safe. Again, the Petitioners present a number of documented incidents that are reflective of a much deeper, wider pattern of anti-LGBT attitudes on the part of law enforcement and of the kind of harassment, threats and abuse encountered and/or legitimately feared by LGBT people:

- In May 2013, individuals were stopped by a police officer for noise disturbances during an LGBT group's bus crawl event. The police officer made anti-LGBT comments to the individuals.⁴⁴
- In 2015, a police officer banged on Donnya Piggott's car window, while she was sleeping in the car with her former girlfriend, and called them "nasty."⁴⁵
- In September 2016, Raven Gill, a transgender woman, alleged that after she was arrested for causing a disturbance, the police verbally abused her and publicly humiliated her by

⁴⁰ Andre Maiorana, Greg Rebchook, Nadine Kassie & Janet J. Myers, "On Being Gay in Barbados: "Bullers" and "Battyboys" and their HIV Risk in a Societal Context of Stigma" (2013) 60:7 J. Homosex 984 at 1002.

⁴¹ Human Rights Watch, *"I have to Leave to Be Me": Discriminatory Laws against LGBT People in the Eastern Caribbean* (Mar. 2018) at 37.

⁴² B-GLAD, *Voices – Barbados LGBT Speaking Out Report* (Dec. 7, 2014), available at https://www.youtube.com/watch?v=qR92dhA_KfM&feature=youtu.be,

⁴³ Human Rights Watch, *"I have to Leave to Be Me": Discriminatory Laws against LGBT People in the Eastern Caribbean* (Mar. 2018) at 30-31.

⁴⁴ U.S. Dept. of State, *2013 Country Reports on Human Rights Practices, Barbados*, available at <https://www.state.gov/documents/organization/220630.pdf>.

⁴⁵ Joe Morgan, *This young gay woman has gone from being homeless to a hero for LGBTI rights*, Gay Star News (May 16, 2015), available at <http://www.gaystarnews.com/article/young-gay-woman-has-gone-being-homeless-hero-lgbti-rights160515-131931/>.

forcing her to strip before male police officers. Ms. Gill also claims the police officers repeatedly questioned her about her gender and placed her in a male holding cell.⁴⁶

Not only do police officers contribute to the harassment of LGBT Barbadians directly, they also do so indirectly by not reacting to reports of harassment. During a study conducted on gay men in Barbados, participants alleged that filing a police report for verbal or physical abuse usually did not result in any action taken by the police.⁴⁷ One gay man stated, "if something happens, 'they don't take you that seriously.'"⁴⁸ Another survey found that 75% of gay men who reported their problems to the police were not assisted.⁴⁹ A 40-year-old-gay man explained that when he was raped in 2011, the police were dismissive. Whenever he has interacted with police officers, they focus on what his role was in the crime, rather than on the perpetrator's actions.⁵⁰ A 35-year-old lesbian, while reporting a theft to the police, was asked "who is the man and who is the woman?" In September 2007, the Chief of Prisons for Barbados admitted that even though some LGBT prisoners had been placed in special security cells, they were still beaten by other inmates for their sexuality.⁵¹

The inaction on the part of law enforcement fosters and perpetuates a dangerous environment for LGBT individuals in Barbados. This is further demonstrated below in the experiences of the Petitioners themselves, presented in detail in their respective declarations filed with this Petition and also summarized below.

3. Barbados' Official Position on Discrimination & Abuse Against LGBT People

Barbados has repeatedly refused to decriminalise sexual conduct between consenting LGBT adults. In response to recommendations to decriminalise consensual same-sex conduct made in

⁴⁶ Arshy Mann, *Battleground Barbados: LGBT activists face off against North American homophobes in the Caribbean*, Daily Xtra (Apr. 13, 2017), available at <http://www.dailyxtra.com/canada/news-and-ideas/news/battleground-barbados-lgbt-activists-face-north-american-homophobes-in-the-caribbean-218885>.

⁴⁷ Andre Maiorana, Greg Rebchook, Nadine Kassie & Janet J. Myers, "On Being Gay in Barbados: "Bullers" and "Battyboys" and their HIV Risk in a Societal Context of Stigma" (2013) 60:7 J. Homosex 984 at 996.

⁴⁸ Andre Maiorana, Greg Rebchook, Nadine Kassie & Janet J. Myers, "On Being Gay in Barbados: "Bullers" and "Battyboys" and their HIV Risk in a Societal Context of Stigma" (2013) 60:7 J. Homosex 984 at 996.

⁴⁹ Marlon Madden, *No Justice: Survey: Cops not taking homosexuals seriously*, Barbados Today (Dec. 2, 2015), available at <https://www.barbadostoday.bb/2015/12/02/no-justice-2/>; Jacqueline Wiltshire-Gay & Nicole Drakes, *Examining stigma and discrimination experienced by gay men through a human rights lens* (Paper presented at the National HIV/AIDS Commission Research Dissemination Meeting: "Men & HIV: Removing the Cloak of Invisibility", Dec. 1, 2015), available at <http://www.hivgateway.com/entry/27881c7c9084215d5910d5441b6255f5/>.

⁵⁰ Human Rights Watch, *"I have to Leave to Be Me": Discriminatory Laws against LGBT People in the Eastern Caribbean* (Mar. 2018) at 48.

⁵¹ U.S. Dept. of State, *2007 Country Reports on Human Rights Practices, Barbados*, available at <http://www.refworld.org/docid/47d92c68c.html>.

Barbados' 2009 Universal Periodic Reviews (“UPRs”), conducted by the Member States of the UN Human Rights Council, the Barbadian government stated:

The Sexual Offences Act of Barbados criminalises buggery. Barbados cannot accept at this time, the recommendation to decriminalise such sexual acts between consenting adults of the same sex. There is to-date no political mandate to do so and in fact significant sections of the community are opposed to such decriminalisation. In a national consultation conducted by National HIV/AIDS Commission the weight of public opinion was against the recommendation to decriminalise the afore-mentioned consensual sexual acts between adults of the same sex. This is a topic which has been widely considered in society not only on the basis of its legality but from the socio-cultural and historical perspectives. It must be noted that Barbados is a heavily religious society and there is a significant lobby by the church on such issues.⁵²

Over nearly a decade, Barbados has repeatedly rejected recommendations to decriminalise consensual sexual conduct between adults of the same-sex by multiple countries.⁵³ Barbados has also rejected the recommendations to introduce legislation and policy measures to promote tolerance and reduce discrimination against LGBT people, promote tolerance to increase the effectiveness of educational programmes for the prevention of HIV and AIDS, and to take all necessary actions to protect LGBT people from harassment, discrimination, and violence.⁵⁴

In 2016, the Organization of American States (the “OAS”) adopted a number of resolutions regarding the protection of human rights in relation to sexual orientation and gender identity and expression. Along with other resolutions, the OAS urged member states to condemn all forms of discrimination, violence, and human rights violations by reason of sexual orientation and gender

⁵² UN Human Rights Committee, *Report of the Working Group on the Universal Periodic Review, Barbados, Addendum, A/HRC/10/73/Add.1* (Mar. 16, 2009) at para 26.

⁵³ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Barbados, A/HRC/10/73* (Jan. 9, 2009) at para 77. Similar recommendations were made again in the course of the UPR of Barbados in 2013, and again the government rejected these recommendations, referring during the interactive dialogue specifically to “persons who engaged in same-sex relationships”: UN Human Rights Committee, *Report of the Working Group on the Universal Periodic Review: Barbados, A/HRC/23/11* (Mar. 12, 2013), para. 21. Subsequently, in its formal, written response to the recommendations, the Government simply declared that “Barbados is unable, at this time, to repeal legislation that criminalises buggery”: UN Human Rights Committee, *Report of the Working Group on the Universal Periodic Review: Barbados, Addendum, A/HRC/23/11/Add.1* (Jun. 5, 2013) at para. 28 (and Annex). Finally, Barbados has just been reviewed via the UPR most recently in January 2018, and numerous countries again recommended the repeal of all legislative provisions that criminalize consensual same-sex sexual activity (and take other measures to protect people against discrimination and violence based on sexual orientation or gender identity): UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Barbados, A/HRC/38/12* (Apr. 6, 2018). The official responses of Barbados are to be submitted to the Human Rights Council no later than its 38th session (June-July 2018): *ibid.*, para. 96. All documents from reviews of Barbados via the UPR process are available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BBIndex.aspx>.

⁵⁴ UN Human Rights Committee, *Report of the Working Group on the Universal Periodic Review, Barbados, A/HRC/10/73* (Jan. 9, 2009) at para 77.

identity or expression.⁵⁵ In response, Barbados stated that they were unable to approve these resolutions, given that the issues are not reflected in its national laws nor the subject of national consensus.⁵⁶ (The government delegation did not make specific reference to the buggery law, but given its previous statements, including its repeated rejection of recommendations advanced at the UN Human Rights Council to decriminalize consensual sexual activity between persons of the same sex, and the reasons given for that rejection, it seems more than reasonable to assume that it had such laws in mind in stating this position at the OAS.)

Not only has the Government of Barbados made clear that it, and a majority of Barbadians, understand that the purpose of the buggery law in the SOA is to criminalise same-sex sexual activity, paradoxically government officials have simultaneously tried to defend the law by blatantly misrepresenting it. In 2017, then-Prime Minister Freundal Stewart incorrectly stated that section 9 of the SOA only applies to non-consensual same-sex conduct, equating the provision to laws against rape.⁵⁷ The former Attorney General, Adriel Brathwaite, had similar incorrect views to Prime Minister Stewart regarding the buggery laws, stating that gay men were not persecuted in Barbados because the current laws did not affect consenting adults.⁵⁸ Prime Minister Stewart has also dismissed the broader persecution that is engendered and encouraged by the criminalisation of LGBT people in Barbados under such laws: he stated in 2017 that the more than 300 LGBT Barbadians who have applied for asylum abroad must have “made untrue representations of Barbados in this regard, about people being in prison and being persecuted.”⁵⁹

It is stunning that such statements could be made by Prime Ministers and the Attorney General, the country’s chief legal officer. They are a wholly unpersuasive attempt to obfuscate reality. For one thing, such statements blatantly misrepresent the state of the law in Barbados—there is no doubt that sections 9 and 12 of the SOA criminalise *consensual* sexual activity between adults.⁶⁰ As explained above, this is clear from the plain wording of the provisions themselves and has been confirmed by the Court of Appeal;⁶¹ it has also been recognized explicitly by the

⁵⁵Organization of American States, General Assembly, Promotion and Protection of Human Rights, AG/RES.2887 (XLVI-O/16) (2016). Subsection xix, on pages 160-161, specifically deal with sexual orientation, gender identity, and gender expression.

⁵⁶Organization of American States, General Assembly, *Promotion and Protection of Human Rights*, AG/RES.2887 (XLVI-O/16) (2016). Page 158

⁵⁷ Arshy Mann, *What does Barbados’ prime minister have to say about the country’s harsh buggery laws?*, Daily Xtra (Apr. 19, 2017), available at <http://www.dailyxtra.com/world/news-and-ideas/opinion/barbados%E2%80%99s-harsh-buggery-laws-219170>.

⁵⁸ Malissa Brathwaite, *Gay Persons Not Persecuted In Barbados*, Government Information Services (Apr. 12, 2017), available at <http://gisbarbados.gov.bb/blog/gay-persons-not-persecuted-in-barbados/>.

⁵⁹ Arshy Mann, *What does Barbados’ prime minister have to say about the country’s harsh buggery laws?*, Daily Xtra (Apr. 19, 2017), available at <http://www.dailyxtra.com/world/news-and-ideas/opinion/barbados%E2%80%99s-harsh-buggery-laws-219170>.

⁶⁰ Human Rights Watch, *“I have to Leave to Be Me”: Discriminatory Laws against LGBT People in the Eastern Caribbean* (Mar. 2018) at 11.

⁶¹ *Hunte v. The Queen* (2002) with respect to SOA s. 9; *Woodall v. The Queen* (2011) with respect to SOA s. 12.

Government before the UN Human Rights Council (in the government's response to the recommendations of the 2009 Universal Periodic Review, also noted above).⁶² Furthermore, even though there appear to have been no recent *prosecutions* under sections 9 and 12 of the SOA, the existence of these provisions has resulted in the *persecution* of the LGBT community, as outlined in this Petition and as documented elsewhere—and the Inter-American Commission itself has already expressed concern about the broader harms to human rights of such laws.⁶³

Such misrepresentation by the Government is perhaps not surprising when considering that a number of representatives of the government of Barbados have publicly stated their anti-LGBT biases. For example, in 2016, Dr. Denis Lowe, the then Minister of Environment, opposed amendments to make the *Domestic Violence Act* gender-neutral to give equal protection to heterosexual and homosexual couples. He threatened to resign if the amendments were made, stating as "a man of The Bible, a person of faith, [this legislation] runs against the grain of what I have always known to be the biblical way."⁶⁴ Of course, as the Inter-American Court of Human Rights has previously recognized, invoking religion or a purported majority opinion is no answer to an utter failure to respect human rights and fulfill Barbados' legal obligations.⁶⁵

4. Link Between HIV and Criminalisation of Homosexuality in Barbados

The presence of sections 9 and 12 of the SOA profoundly affect LGBT people in relation to HIV and HIV services. It is well established that laws which criminalise same-sex sexual conduct exacerbate the public health challenge of HIV, especially among gay men, wherever they are implemented.⁶⁶ There are a variety of reasons for this, including, *inter alia*:

- i) LGBT people fear that their sexuality will not be kept confidential and therefore do not divulge this information to health care workers;⁶⁷

⁶² UN Human Rights Committee, *Report of the Working Group on the Universal Periodic Review, Barbados, Addendum, A/HRC/10/73/Add.1* (Mar. 16, 2009) at para 26.

⁶³ IACHR Welcomes Decision to Decriminalise Consensual Sexual Relations between Same Sex Adults in Trinidad and Tobago available at: http://www.oas.org/en/iachr/media_center/PReleases/2018/088.asp

⁶⁴ *Barbados MP: Accept the existence of gay relationships*, Antillean Media Group (Feb. 3, 2016), available at <http://www.antillean.org/jones-accept-homosexual-relationships-246/>.

⁶⁵ Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at para 223: "...it is the Court's opinion that such [philosophical or religious] convictions cannot condition what the Convention establishes in relation to discrimination based on sexual orientation."

⁶⁶ Affidavit of Professor Chris Beyrer, sworn March 19, 2018 (Exhibit 4) at para 6.

⁶⁷ Mistrust in confidentiality of the health system was specifically identified as a stigmatizing element in one study of Barbadian MSM. See Andre Maiorana, Greg Rebchook, Nadine Kassie & Janet J. Myers, "HIV among MSM in Barbados: "Bullers" and "Battybowys," Context and Evidence" (Presentation at the 2010 CAPS HIV Prevention Conference, 2010) at 22, available at: https://caps.ucsf.edu/uploads/conference/2010/pdf/MSM_Barbados.pdf. See also Andre Maiorana, Greg Rebchook, Nadine Kassie & Janet J. Myers, "On Being Gay in Barbados: "Bullers" and "Battyboys" and their HIV Risk in a Societal Context of Stigma" (2013) 60:7 J. Homosex 984 at 1000.

- ii) Health care workers respond to LGBT people with contempt or hostility, and sometimes refuse to treat them;
- iii) In some settings, depending on the legal but also political context, health care workers may fear that they will be perceived as “condoning” or even abetting illegal behaviour (i.e. “buggery”) should they provide non-judgmental services to patients engaging in criminalised activity;
- iv) Educational forums addressing HIV risk among gay men, other MSM and/or trans people may be targeted by police;⁶⁸
- v) Untrained health services providers often lack sufficient knowledge or resources to counsel and support LGBT people on issues of sexual health, including HIV prevention; and
- vi) LGBT people may fear that they will be arrested if they access healthcare, or disclose their (criminalised) sexual activity to their doctor.⁶⁹

In his affidavit, HIV expert Chris Beyrer notes further that “criminalization and stigmatization...restrict the extent to which healthcare providers can effectively offer and [men who have sex with men] can safely access healthcare services that would reduce HIV transmission and treat HIV infection.”⁷⁰ Consequently, HIV infections among men who have sex with men tend to be higher in countries which criminalise same-sex intimacy,⁷¹ such as Barbados. One study noted that “HIV prevalence in the Caribbean...among [men who have sex with men] rose from 1 in 15 in countries where homosexuality is not criminalized to 1 in 4 in countries where it is criminalized.”⁷² The increase is attributable to systemic risks facing LGBT persons in countries which criminalise same-sex intimacy, including fewer education and labour opportunities and greater poverty.⁷³

This adverse impact of criminalisation on the HIV response has been of human rights and public health concern for many years. In their *International Guidelines on HIV/AIDS and Human Rights*, UNAIDS and the Office of the UN High Commissioner for Human Rights have recommended for more than two decades that countries repeal criminal laws prohibiting

⁶⁸ Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights & Health* (Jul. 2012) at 47, available at <https://hivlawcommission.org/report/>.

⁶⁹ Affidavit of Professor Chris Beyrer at para 12-14, 17.

⁷⁰ Affidavit of Professor Chris Beyrer at para 9.

⁷¹ Affidavit of Professor Chris Beyrer at para 10, with reference to: UNAIDS, *Keeping Score II: A progress report towards universal access to HIV prevention, treatment, care and support in the Caribbean* (2008), available at: http://data.unaids.org/pub/report/2008/20081206_keepingcoreii_en.pdf; Gregorio A Millett et al., “Common roots: a contextual review of HIV epidemics in black men who have sex with men across the African diaspora,” *Lancet* 2012; 380: 411-423, DOI: [https://doi.org/10.1016/S0140-6736\(12\)60722-3](https://doi.org/10.1016/S0140-6736(12)60722-3).

⁷² Affidavit of Professor Chris Beyrer at para 10, citing Gregorio A Millett et al., “Common roots: a contextual review of HIV epidemics in black men who have sex with men across the African diaspora,” *Lancet* 2012; 380: 411-423, DOI: [https://doi.org/10.1016/S0140-6736\(12\)60722-3](https://doi.org/10.1016/S0140-6736(12)60722-3).

⁷³ Affidavit of Professor Chris Beyrer at para 11.

consensual sexual acts, including ‘sodomy,’ between adults.⁷⁴ The UN Human Rights Committee observed more than a quarter-century ago that the criminalisation of sex between men “would appear to run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention,”⁷⁵ and has more recently observed in its Concluding Observations to Jamaica that laws criminalizing consensual same-sex relationships contributes to HIV stigma and undermines access to treatment and medical care by persons living with HIV/AIDS, including gay men.⁷⁶

In the Inter-American regional system, former Commissioner Rose-Marie Belle Antoine of the Commission has noted that the existence of such laws “negatively impacts on the full enjoyment and exercise of [LGBT persons] of their human rights — including their right to the highest attainable standard of health — and severely undermine effective national responses to HIV. The dire impact of the buggery laws on the human rights of persons most at risk for contracting HIV, such as men who have sex with men...is an issue of deep concern to the Commission.”⁷⁷

In its submission to the UN Human Rights Council during its UPR of Barbados in 2013, Amnesty International noted: “[t]he existence of laws criminalizing consensual same-sex leads to a reluctance amongst lesbian, gay, bisexual and transgender people to undergo HIV testing and to access other HIV/AIDS services.”⁷⁸ The Government of Barbados itself has acknowledged the problem: the Ministry of Health noted in 2012 that HIV stigma hinders accessibility of services for key vulnerable populations, which includes men who have sex with men.⁷⁹ The concern is borne out by the available evidence from the national context. In one Barbadian study, a medical services provider reported that some patients with HIV are afraid of visiting HIV clinics due to the association between having the virus and being gay.⁸⁰ This restricts their access to HIV testing and HIV and AIDS services.⁸¹ In some instances, this fear is so intense that medical

⁷⁴ Office of the UN High Commissioner for Human Rights & Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated Version, Guideline 4, para. 21(b).

⁷⁵ *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994).

⁷⁶ UN Human Rights Committee, *Concluding observations of the Human Rights Committee, Jamaica*, CCPR/C/JAM/CO/3 (Nov. 1, 2011) at para 9.

⁷⁷ Commissioner Rose-Marie Belle Antoine, Speech entitled “Human Rights, HIV/AIDS and Discrimination in the Americas on the Occasion of the Exhibit of the AIDS Quilt at OAS Grounds in the Context of the World AIDS Conference” (July 23, 2012), available at <http://www.oas.org/en/iachr/activities/speeches/07.23.12.asp>.

⁷⁸ Amnesty International, *Barbados: Death penalty and discrimination against LGBT people still to be addressed: Amnesty International submission to the UN Universal Periodic Review* (Jul. 1, 2012) at 5, available at <https://www.amnesty.org/en/documents/amr15/001/2012/en/>.

⁷⁹ Ministry of Health, Barbados, *Global AIDS Response Progress Report 2012, Barbados* (Mar. 2012) at 20, available at http://www.unaids.org/sites/default/files/country/documents/ce_BB_Narrative_Report%5B1%5D.pdf.

⁸⁰ Andre Maiorana, Greg Rebhook, Nadine Kassie & Janet J. Myers, “On Being Gay in Barbados: “Bullers” and “Battyboys” and their HIV Risk in a Societal Context of Stigma” (2013) 60:7 J. Homosex 984 at 997.

⁸¹ Amnesty International, *Barbados: Death penalty and discrimination against LGBT people still to be addressed: Amnesty International submission to the UN Universal Periodic Review* (Jul. 1, 2012) at 5, available at <https://www.amnesty.org/en/documents/amr15/001/2012/en/>.

service providers must deliver medication to the homes of HIV patients because they are afraid of being seen at the HIV clinic as a result of not only HIV stigma, but also homophobia.⁸² In a study looking at interactions between general practitioners and LGBT patients in Barbados, it was determined that most general practitioners lacked knowledge of LGBT-specific health care needs. Moreover, the general practitioners were worried that their patient notes lacked confidentiality, and that the LGBT patient could be stigmatized by anyone intercepting the notes during routine handling (e.g. records clerks).⁸³

Ultimately, “[c]riminalization of same sex intimacy both causes and expands HIV risk.”⁸⁴ In Professor Beyrer’s view, “eliminating criminalization and stigmatization and applying a rights-based approach to healthcare are essential to one day eradicating the HIV epidemic.”⁸⁵

5. Facts Relating to Petitioner Hoffmann

Background

Petitioner Hoffmann was born in Barbados on December 9, 1993 and has lived in Barbados her entire life.⁸⁶ Petitioner Hoffmann is a human rights advocate. For the past five years, she has advocated to eliminate stigma and discrimination against LGBT people.⁸⁷

Petitioner Hoffmann is a transgender woman who is sexually attracted to men. She was born as Gavin Omar Hope, but now uses the name Alexa Diane Violet Hoffmann. Petitioner Hoffmann identified as female since early childhood, and transitioned to live her life as a woman in 2013, at the age of 20. She became aware of her sexual attraction to men when she was a teenager.⁸⁸ As Barbados does not provide legal recognition of her female identity, Petitioner Hoffmann is treated by the law as a man sexually attracted to other men.⁸⁹ As a result, she and any male partner are at risk of criminal prosecution for their consensual sexual activity under the SOA.

Petitioner Hoffmann is concerned that she will not be able to have a successful romantic relationship with a male partner because of the rampant homophobia and transphobia in Barbados. Her only romantic relationship to date ended because her male partner did not think it

⁸² Andre Maiorana, Greg Rebchook, Nadine Kassie & Janet J. Myers, “On Being Gay in Barbados: “Bullers” and “Battyboys” and their HIV Risk in a Societal Context of Stigma” (2013) 60:7 J. Homosex 984 at 996.

⁸³ Nastassia Rambarran & Pippa Grenfell, “An Exploration of the Perspectives and Experiences of General Practitioners in Barbados in Relation to Lesbian, Gay, Bisexual and Transgender (LGBT) Patients” (2016) 28:4 Int. J. Sex. Health 325.

⁸⁴ Affidavit of Professor Chris Beyrer at para 20.

⁸⁵ Affidavit of Professor Chris Beyrer at para 23.

⁸⁶ Declaration of Petitioner Hoffman at para 5.

⁸⁷ Declaration of Petitioner Hoffman at para 7.

⁸⁸ Declaration of Petitioner Hoffman at para 5.

⁸⁹ Declaration of Petitioner Hoffman at para 6.

was safe for him to be seen with Petitioner Hoffmann. Since then, she has not been in a relationship because prospective partners have also had concerns about their safety.⁹⁰

Discrimination and abuse during childhood and adolescence

In primary school, Petitioner Hoffmann had no friends. She was frequently teased and bullied for her gender expression and her suspected sexual orientation.⁹¹ Teachers punished Petitioner Hoffmann for her feminine mannerisms and preference to be addressed with female pronouns and by her chosen female name.⁹² Fellow classmates excluded her from both school and extracurricular activities.⁹³

Petitioner Hoffmann was targeted for verbal abuse and was constantly harassed about her gender identity and sexual orientation in secondary school, resulting in depression and anxiety.⁹⁴ False rumours were spread about her sexual relations with certain male classmates, and even a 35-year-old man.⁹⁵ She was frequently called a "buller, faggot, batty-boy, batty-man, girly-girl, chichi, he-she, and taperd", and was derogatorily nicknamed "Shirley" by her classmates.⁹⁶ Petitioner Hoffmann remained an outcast throughout the rest of her education. The nature and variety of the derogatory epithets hurled at Hoffman over the years are indicative of how closely intertwined homophobia and transphobia are – in essence, any perceived deviation from widely accepted and enforced (albeit ultimately arbitrary) norms of gender is often conflated with others – be it variant gender presentation or sexual activity (real or assumed) with someone of the same sex. Distinctions between a person's sexual orientation and their gender identity are often not made by those holding stigmatizing views and engaging in discriminatory and abusive actions toward those they perceive as "queer" in one or more ways.

Impaired familial relationships

Petitioner Hoffmann has a difficult relationship with her family members. When she was young, her mother reprimanded her for her gender expression, and in particular, her desire to be referred to by female pronouns and by a girl's name.⁹⁷ As Petitioner Hoffmann grew older, her mother attempted to curtail her gender non-conformity by increasing Petitioner Hoffmann's exposure to religion, enforcing masculine behaviour, and policing her clothing choices.⁹⁸

⁹⁰ Declaration of Petitioner Hoffman at para 33.

⁹¹ Declaration of Petitioner Hoffman at para 10.

⁹² Declaration of Petitioner Hoffman at para 9.

⁹³ Declaration of Petitioner Hoffman at paras 9-13, 15.

⁹⁴ Declaration of Petitioner Hoffman at para 14.

⁹⁵ Declaration of Petitioner Hoffman at paras 17-18.

⁹⁶ Declaration of Petitioner Hoffman at para 15.

⁹⁷ Declaration of Petitioner Hoffman at para 8.

⁹⁸ Declaration of Petitioner Hoffman at paras 21-22.

When Petitioner Hoffmann told her mother that she was sexually attracted to men in 2010, her mother was distraught.⁹⁹ Petitioner Hoffmann never told her stepfather, who died in 2011, about her gender identity. Her mother had warned her that he would not be accepting, and might have evicted her from their family home.¹⁰⁰

Petitioner Hoffmann began her transition to live her life as a woman in 2013. Her mother was uncomfortable with her transition, and was harassed by her co-workers about it.¹⁰¹ In early 2013, Petitioner Hoffmann and her mother had an altercation about Petitioner Hoffmann's difficulty in obtaining employment as a transgender person. Her mother was angry that she refused to act masculine to make herself a more viable candidate. This resulted in her mother trying to permanently evict Petitioner Hoffmann from their family home. Petitioner Hoffmann's mother even called the police to oversee the eviction. When the responding constable learned about the situation, he became verbally abusive and said that Petitioner Hoffmann was causing her mother unnecessary embarrassment. The constable also stated "How do you expect anybody to hire you? Nobody knows what you are supposed to be!" along with a number of expletive terms. The police ultimately escorted Petitioner Hoffmann from the premises, told her not to contact her mother, and tried to dissuade her mother from allowing her to pack any personal items to take with her.¹⁰² Petitioner Hoffmann and her mother eventually reconciled, but their relationship remained strained. For example, her mother did not want to travel with her to a literary arts event because she was concerned about being subjected to harassment or violence as a result of Petitioner Hoffmann's gender identity and sexual orientation.¹⁰³

Following the passing of her mother in December 2013, Petitioner Hoffmann's extended family, from whom she had been estranged for years, became aware of her transition. Her relatives had expressed anger, shame, and embarrassment at her transition.¹⁰⁴ She received many harassing phone calls from her extended family, including a message on her answering machine from her grandfather, threatening to "take care of [her and her friends]."¹⁰⁵ Petitioner Hoffmann became estranged from her extended family as a result of their homophobic and transphobic attitudes, and, in particular, their unfounded allegations that her gender identity was a result of sexual abuse by her stepfather.¹⁰⁶

⁹⁹ Declaration of Petitioner Hoffman at para 26.

¹⁰⁰ Declaration of Petitioner Hoffman at para 27.

¹⁰¹ Declaration of Petitioner Hoffman at para 28.

¹⁰² Declaration of Petitioner Hoffman at para 29.

¹⁰³ Declaration of Petitioner Hoffman at para 30.

¹⁰⁴ Declaration of Petitioner Hoffman at para 31.

¹⁰⁵ Declaration of Petitioner Hoffman at para 32.

¹⁰⁶ Declaration of Petitioner Hoffman at para 31.

Discrimination during adulthood

Until she found employment in August 2015, Petitioner Hoffman had difficulties in obtaining employment because she is a Trans woman, Petitioner Hoffmann experiences stigma and discrimination because of her gender expression. As the Commission has noted, laws such as section 9 and 12 of the SOA directly contribute to this stigma and discrimination.¹⁰⁷

In public spaces, particularly in government institutions, there is resistance to Petitioner Hoffmann's gender expression, and her preference to be addressed as Alexa and with female pronouns.¹⁰⁸ When she attempts to commute using public transportation, drivers and conductors sometimes refuse to stop or prevent her from boarding. They put their arm out across the door or physically step off the bus and block her from entering.¹⁰⁹

Petitioner Hoffmann has also had difficulties in obtaining employment since she began her transition. For example, Petitioner Hoffmann participated as an extra in a locally produced film and was invited to the premiere in November 2013. However, when the producer found out about her transition, he told her that he "had to ask that [she] respect what [his production company] was doing, and that [she] did not attend the screening unless [she] was dressed as a man." Petitioner Hoffmann refused and her passes to the premiere were transferred to someone else.¹¹⁰

In or about June 2014, she applied to a local car dealership for a sales representative position. During the job interview, she revealed she was transgender and the tone of the interview changed significantly. The interview was quickly ended by the interviewer. Two weeks later, she received a letter from the dealership stating that "while they were impressed with [her] qualifications, [she] did not meet the criteria for the position." When Petitioner Hoffmann questioned the criteria, the dealership's human resources department refused to discuss it and stated "the answer is no."¹¹¹

Threats of violence, violent encounters, and police inaction

Petitioner Hoffmann has been subjected to regular threats of violence because she is a transgender woman who is sexually attracted to men—which discrimination is rooted, in part, in the criminalisation under sections 9 and 12 of the SOA of the sexual activity in which she is presumed to engage with a male partner. While expressing homophobic and/or transphobic statements, people frequently make hand gestures at her, imitating the firing of a gun, or loud

¹⁰⁷ IACHR Welcomes Decision to Decriminalise Consensual Sexual Relations between Same Sex Adults in Trinidad and Tobago, available at: http://www.oas.org/en/iachr/media_center/PReleases/2018/088.asp.

¹⁰⁸ Declaration of Petitioner Hoffman at para 55.

¹⁰⁹ Declaration of Petitioner Hoffman at para 56.

¹¹⁰ Declaration of Petitioner Hoffman at para 57.

¹¹¹ Declaration of Petitioner Hoffman at para 58.

outbursts reminiscent of gunfire.¹¹² People have also loudly recited lyrics from anti-gay songs in Petitioner Hoffmann's vicinity, such as Buju Banton's "Boom Bye Bye," the whole purpose of which is to advocate explicitly for the murder of gay men.¹¹³ These homophobic and/or transphobic statements are not only made by adults, but also by children. Recently, a 3-year-old, apparently as a result of encouragement from his father, charged at Petitioner Hoffmann, calling her a battyboy and a buller.¹¹⁴

Petitioner Hoffmann fears for her safety when she is away from home, and tries to avoid public transportation because she has frequently experienced these threats of violence while commuting. Certain drivers have yelled the lyrics of anti-gay songs out their window at Petitioner Hoffmann when they drive by her.¹¹⁵ Petitioner Hoffmann also tries to avoid going to a doctor's office or hospital because of past incidents of LGBT individuals either being harassed by other patients or made to feel uncomfortable by nurses or doctors by being asked invasive questions about their sexual and reproductive health.¹¹⁶

On the night of January 6, 2016, Petitioner Hoffmann's car was vandalized while it was parked in her driveway at home. The rear window was smashed.¹¹⁷ Petitioner Hoffmann reported the incident to the police, and the car was subsequently photographed and checked for fingerprints by the responding constables.¹¹⁸ However, it took nearly three weeks for the responding constables to contact Petitioner Hoffmann to ask her to give an official statement, despite her attempts to contact and follow up with the constables after the incident occurred.¹¹⁹ The matter is still open for investigation and no culprits have been charged. Petitioner Hoffmann has since sold the vandalized car because she feared being too easily identifiable while driving the car.¹²⁰

On the night of April 13, 2016, Petitioner Hoffmann was assaulted by a group of men outside a grocery store near her home. The men threw stones and glass bottles at her. For years, the men had harassed and threatened Petitioner Hoffmann, but they had not previously physically attacked her. To defend herself, she threw a few bottles back at them.¹²¹ After leaving the grocery store, Petitioner Hoffmann contacted the police to report the assault.¹²² The responding

¹¹² Declaration of Petitioner Hoffman at para 52.

¹¹³ Declaration of Petitioner Hoffman at para 53; "Boom Bye Bye" Lyrics, Exhibit 5.

¹¹⁴ Declaration of Petitioner Hoffman at para 34.

¹¹⁵ Declaration of Petitioner Hoffman at para 56.

¹¹⁶ Declaration of Petitioner Hoffman at para 61.

¹¹⁷ Declaration of Petitioner Hoffman at para 35.

¹¹⁸ Declaration of Petitioner Hoffman at para 36.

¹¹⁹ Declaration of Petitioner Hoffman at para 37.

¹²⁰ Declaration of Petitioner Hoffman at para 38.

¹²¹ Declaration of Petitioner Hoffman at para 39.

¹²² Declaration of Petitioner Hoffman at para 40.

constable, in response to her report of the incident, focused on the fact she defended herself against the group of men, rather than on the original assault. The constable stated, "You can't be throwing at people like that."¹²³

After giving her report, Petitioner Hoffmann tried to follow up with the constable, but was unable to reach him.¹²⁴ On May 11, 2016, nearly a month after the original assault, she visited the police station, as she wanted to find out what was happening with the investigation because she feared for her safety.¹²⁵ Petitioner Hoffmann spoke with another constable and learned that there was no information in the Station Diary regarding the assault aside from the fact the original constable had responded to her call. No investigation had been conducted. The responding constable had gone on vacation shortly after responding to the call, and had not delegated the matter to another constable.¹²⁶

Petitioner Hoffmann gave an official statement to the current constable and took him to the grocery store where the assault occurred. She pointed out the group of men to the constable, and asked him to observe their behaviour while she went into the grocery store. The constable remained in the unmarked police jeep, and watched while the group of men harassed Petitioner Hoffmann, from the moment she left the jeep until she returned.¹²⁷

On May 13, 2016, Petitioner Hoffmann was contacted by the constable and was asked to come to the police station to pick out an individual in an identification parade. During the parade, she identified one of the men as belonging to the group who assaulted her outside the grocery store. The man was charged, but the matter has not yet been heard before the court. Petitioner Hoffmann is unaware of the current status of the case or the location of the man she identified. She is concerned for her safety, as the other members of the group have not been apprehended. She is also worried about possible reprisals by the man she identified, or the group in general. As a result of her worries, she has not returned to the grocery store.¹²⁸

On the night of February 18, 2018, Petitioner Hoffmann was brutally attacked by Brandon Keron Aákeem Coward when she tried to return property to him and questioned him about taking some of her belongings. In response, Coward pulled a meat cleaver from his pocket and swung at her face. Petitioner Hoffmann was badly injured, with lacerations on her forehead, nose, upper lip, shoulder, and the side of her neck.¹²⁹ Her glasses were also destroyed during the attack.¹³⁰

¹²³ Declaration of Petitioner Hoffman at para 41.

¹²⁴ Declaration of Petitioner Hoffman at para 42.

¹²⁵ Declaration of Petitioner Hoffmann at para 43.

¹²⁶ Declaration of Petitioner Hoffmann at para 44.

¹²⁷ Declaration of Petitioner Hoffman at para 45.

¹²⁸ Declaration of Petitioner Hoffman at paras 46-47.

¹²⁹ Photos of injuries suffered by Petitioner Hoffman in attack of February 18, 2018 (Exhibit 7).

¹³⁰ Declaration of Petitioner Hoffman at para 48.

Petitioner Hoffmann reported the attack to the police and, after receiving medical attention, gave her official statement.¹³¹ On February 20, she returned to the police station to follow up on her report. Coward had not been arrested and was allowed to roam freely. Petitioner Hoffmann was upset about the handling of her case, especially because when a similar attack occurred in 2017, leaving a (apparently) straight young man bleeding from stab wounds on a lawn, the police immediately had his attacker in custody. Meanwhile, Coward remained free, two days after the attack, despite being identified right away and easily locatable. Petitioner Hoffmann voiced her concerns, and about the need to escalate the situation if the police were not taking her case seriously. In response, the sergeant she was speaking to made a number of negative comments about Petitioner Hoffmann, including a transphobic statement referring to her as "he/she/I don't know!"¹³²

6. Facts Relating to Petitioner S.A.

Background

Petitioner S.A. was born in Barbados on February 17, 1986. She has lived in Barbados her entire life, but for one year when she lived in Trinidad & Tobago. She considers Barbados to be her home,¹³³ and it is where her family resides. Despite having a Bachelor's degree in Sociology from the University of the West Indies Cave Hill Campus, she is currently unemployed.¹³⁴ She has been told by a human resources person that "people don't want your kind of person in a customer service job, because they are afraid that customers won't come back."¹³⁵

She volunteers with the charity Think B.I.G. Caribbean, providing one-on-one tutoring and other academic support to youth living in poverty who have learning and special needs.¹³⁶ She is responsible for most of the charity's work, including providing one-on-one tutoring, program coordination, and human resources tasks.¹³⁷

Petitioner S.A. is a lesbian. Since she was 4 years old, she knew she was attracted to girls.¹³⁸ When she was younger, she kept her attraction to herself; she did not know other people like her existed.¹³⁹ Petitioner S.A. is also male-presenting,¹⁴⁰ meaning she has a masculine appearance

¹³¹ Declaration of Petitioner Hoffman at para 49.

¹³² Declaration of Petitioner Hoffman at para 50.

¹³³ Declaration of Petitioner S.A. at para 6.

¹³⁴ Declaration of Petitioner S.A. at para 20.

¹³⁵ Declaration of Petitioner S.A. at para 20.

¹³⁶ Declaration of Petitioner S.A. at para 22.

¹³⁷ Declaration of Petitioner S.A. at para 22.

¹³⁸ Declaration of Petitioner S.A. at para 6.

¹³⁹ Declaration of Petitioner S.A. at para 8.

and prefers to dress in men's attire. Petitioner S.A. married a woman in Canada in August 2017.¹⁴¹ They live together in Barbados but their marriage is not legally recognized or well-known.

Violence & threats of violence

Petitioner S.A. has experienced and witnessed verbal attacks on LGBT individuals in Barbados because of their sexuality, including by her own family. When she was seven years old, her mother humiliated her for wearing clothes she considered “too boyish” by forcing her to change into a girl’s swimsuit to attend a church picnic when nobody else was wearing one.¹⁴² Throughout her youth, her mother meted out “extra punishment” to S.A. for refusing to wear a dress, including angry verbal abuse. When she was 13, her mother stabbed her for forgetting to turn a bathroom light off. A year later, she was stabbed by her mother again. Her mother has twice thrown hot water on her.¹⁴³ Her other siblings, who are all cisgender heterosexuals, did not experience such violence.

Petitioner S.A. has also experienced threats of violence. In one instance, a man threatened her, uttering: "You want to be a man, you want killing."¹⁴⁴ In another instance, after telling her wife that she loved her, Petitioner S.A. was told by a motorist who overheard this that he wished he had “hit [her] ass and killed [her].”¹⁴⁵ She has also observed other LGBT individuals being terrorized with threats of murder and rape. For example, she has personally heard LGBT individuals being told: "you need a good man to give you some", "you need a killing", and "just go die".¹⁴⁶ In a public Facebook event page for Barbados Pride, someone posted an image of a man on fire. This terrified LGBT individuals, who were worried about experiencing violence if they attended Pride.¹⁴⁷

Petitioner S.A. and many other LGBT individuals are uncertain whether the police will protect them. When a male-presenting lesbian was raped in 2016, Petitioner S.A. heard one of the male officers tell the woman, "If you looked like a woman, this would not have happened."¹⁴⁸

Sexual abuse

¹⁴⁰ Declaration of Petitioner S.A. at paras 7, 20 and 29.

¹⁴¹ Declaration of Petitioner S.A. at para 32.

¹⁴² Declaration of Petitioner S.A. at para 10.

¹⁴³ Declaration of Petitioner S.A. at para 11.

¹⁴⁴ Declaration of Petitioner S.A. at paras 28.

¹⁴⁵ Declaration of Petitioner S.A. at para 32.

¹⁴⁶ Declaration of Petitioner S.A. at para 27.

¹⁴⁷ Declaration of Petitioner S.A. at para 31.

¹⁴⁸ Declaration of Petitioner S.A. at para 29.

When she was 12 years old, Petitioner S.A. was seen by her step-uncle kissing a girl. He used this information to facilitate his sexual abused of her for the next five years:

My step-uncle told me that what I had done was wrong, and that I needed a man's touch. He continually threatened that he would tell my mother what he had seen. I did not speak out because I was scared he would tell my mother that I was a lesbian. Because of what I had gone through with my mother, I was very fearful of her.¹⁴⁹

She was only a child, but as a result of her sexual orientation, she was left vulnerable to sexual abuse by a man able to wield this cultural and legal homophobia as a weapon, as a tool of coercion. This abuse contributed to Petitioner S.A.'s ongoing struggle with depression and anxiety.¹⁵⁰

Only when she became suicidal did she tell another adult, her godfather, about the abuse. Although this forced an end to it, Petitioner S.A.'s mother continues to be friends with her attacker. Her mother even threatened to leave her alone with him again.¹⁵¹ The step-uncle continued to harass Petitioner S.A. for the next five years.¹⁵²

Familial and romantic relationships

Because of Barbados' homophobic society, some of Petitioner S.A.'s familial relationships have been greatly impaired. Her experiences, particularly with her mother and step-uncle, affected her psychologically. She experiences both severe depression and anxiety, and has been suicidal since she was 12 years old.¹⁵³

Petitioner S.A.'s relationship with her mother has contributed to her depression and anxiety. When she was young, her mother criticized her attire and forced her to wear feminine clothing. According to her mother, she was too boyish. As described above, her mother seriously assaulted her on a multiple occasions, including stabbings and scalding. While still a minor and as an adult, she faced a constant fear of homelessness.¹⁵⁴ At times, her mother locked her out of their home. In one instance, her mother kicked her out and Petitioner S.A.'s only option was to go next door to the step-uncle who had molested her.¹⁵⁵

Petitioner S.A.'s relationship with her godfather has also been strained by her sexual orientation. Although she relied upon him for food after she managed to leave her mother's house at the age

¹⁴⁹ Declaration of Petitioner S.A. at para 12.

¹⁵⁰ Declaration of Petitioner S.A. at para 12.

¹⁵¹ Declaration of Petitioner S.A. at paras 13, 40 and 41.

¹⁵² Declaration of Petitioner S.A. at para 13.

¹⁵³ Declaration of Petitioner S.A. at paras 7, 13, 40, 41.

¹⁵⁴ Declaration of Petitioner S.A. at para 16.

¹⁵⁵ Declaration of Petitioner S.A. at para 18.

of 30, she did not feel comfortable telling him about her girlfriend (now wife). After she got married, she was so nervous about telling him about her wife that she avoided him and occasionally went hungry.¹⁵⁶

Barbados is a highly homophobic society. Petitioner S.A. is worried that her participation in LGBT advocacy will affect her family and her wife. For example, for many years, Petitioner S.A. wore a mask to all LGBT events because she was concerned her godfather's job as a reverend would be at risk if it was known that his goddaughter was involved in LGBT advocacy.¹⁵⁷ Petitioner S.A. also does not show signs of public affection with her wife outside of their home because she is worried about their physical safety and because it might affect her wife's job.¹⁵⁸ After Petitioner S.A.'s wife was photographed attending the launch of Barbados Pride in 2017, her colleagues accused her of not coming to work in order to go to "this type of event". Petitioner S.A.'s wife had legitimately taken the morning off of work, but she was still worried that her pay would be docked or that she would be fired.¹⁵⁹ The couple are considering leaving Barbados if they decide to start a family because they are worried about how a child with two mothers will be treated.¹⁶⁰

Petitioner S.A. continues to think about suicide weekly, but goes on because she feels that her students need her.¹⁶¹ She now keeps to herself in order to avoid the hatred and harassment in the streets.¹⁶² Petitioner S.A.'s experience motivates her to seek the legislative reform sought in this petition, but also notes that some of the damage done to her in her life as a result of the criminalisation of LGBT people in Barbados is irreparable. She states in her declaration: "I am so scarred by my experiences that I don't think that even if the laws change, it will make much difference for me."¹⁶³

7. Facts Relating to Petitioner D.H.

Petitioner D.H. was born in Barbados on January 13, 1972.¹⁶⁴ He grew up in Barbados, with two Barbadian parents. He is currently unemployed, after working in a data entry job for over 9 years, and receives disability benefits from Barbados' National Insurance Scheme.¹⁶⁵ Petitioner

¹⁵⁶ Declaration of Petitioner S.A. at paras 33-35.

¹⁵⁷ Declaration of Petitioner S.A. at para 19.

¹⁵⁸ Declaration of Petitioner S.A. at para 36.

¹⁵⁹ Declaration of Petitioner S.A. at para 36.

¹⁶⁰ Declaration of Petitioner S.A. at para 37.

¹⁶¹ Declaration of Petitioner S.A. at paras 23 and 42.

¹⁶² Declaration of Petitioner S.A. at para 40.

¹⁶³ Declaration of Petitioner S.A. at para 41.

¹⁶⁴ Declaration of Petitioner D.H. at para 4.

¹⁶⁵ Declaration of Petitioner D.H. at paras 8-9.

D.H. is HIV-positive, and accesses healthcare services at Lady Meade Reference Unit, a special clinic for persons living with HIV.¹⁶⁶

When Petitioner D.H. was a teenager, around age 14 or 15, he became aware he was gay, although he did not have any romantic or sexual encounters until he was 18.¹⁶⁷ His family and a few of his close friends know about his sexual orientation, but he does not fit common stereotypes of gay men.¹⁶⁸ In public, he can generally “pass” as a straight man.¹⁶⁹ However, people who know or suspect Petitioner D.H. is gay will frequently call him a "buller man", "he-she", and other derogatory terms based on his sexual orientation. He tends to keep to himself and tries to ignore these negative comments to keep himself safe.¹⁷⁰

Petitioner D.H. has been verbally attacked, including being threatened with severe violence and death, because of his sexual orientation. One man in his neighbourhood used to yell homophobic slurs at him, such as "Batty boy."¹⁷¹ When Petitioner D.H. lived with his male partner, his neighbours made a slew of negative comments and threats of violence, including "Bulla men living here", "You is a bulla man", and "Your house want burning down". He has also heard his neighbours talking about keeping their sons away from "that buller" because the neighbours were worried Petitioner D.H. would turn their sons gay.¹⁷²

Petitioner D.H.'s familial and romantic relationships are affected by Barbados' homophobic society. His parents tolerated his sexual orientation, but his brother is less accepting of the fact he is gay. When their mother died in 2016, his brother did not want Petitioner D.H.'s two gay friends to be pallbearers at the funeral, even though the two friends had been very close with their family. His brother stated he was not lifting any coffin with "those people".¹⁷³ In terms of romantic relationships, Petitioner D.H. is unwilling to show any signs of public affection with a male partner because of the stigma, discrimination, and possible violence they would face. He only feels safe expressing intimacy in the privacy of either his own or his partner's home or at private LGBT events.¹⁷⁴

¹⁶⁶ Declaration of Petitioner D.H. at para 10.

¹⁶⁷ Declaration of Petitioner D.H. at para 6.

¹⁶⁸ Declaration of Petitioner D.H. at para 7.

¹⁶⁹ Declaration of Petitioner D.H. at para 7.

¹⁷⁰ Declaration of Petitioner D.H. at paras 14-15.

¹⁷¹ Declaration of Petitioner D.H. at para 15.

¹⁷² Declaration of Petitioner D.H. at para 14.

¹⁷³ Declaration of Petitioner D.H. at para 12.

¹⁷⁴ Declaration of Petitioner D.H. at para 13.

IV. ADMISSIBILITY OF THIS PETITION

1. The Commission has Jurisdiction to Consider the Petitioners' Claims

All relevant acts described in this petition occurred in Barbados at times when Barbados had jurisdiction over the Petitioners. As Barbados is a party to the Convention,¹⁷⁵ the Commission has jurisdiction to consider the Petitioners' claims that the rights owed to them under the Convention were breached. The Petitioners have standing to appear under Article 44 of the Convention and Article 23 of the Rules of Procedure of the Commission.

2. Petitioners Cannot Exhaust Domestic Remedies Because None Exist: Barbados' "saving clause"

Generally, Article 31(1) of the IACHR Rules requires the exhaustion of domestic remedies prior to filing a petition before the Commission.¹⁷⁶ However, the Petitioners qualify for an exemption from the exhaustion requirement because Barbadian law does not and cannot provide an adequate domestic remedy to the violations of Convention-guaranteed rights identified by the Petitioners.

Article 31(2) of the IACHR Rules provides for an exemption from the exhaustion requirement in the following circumstances:

- (a) the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
- (b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or,
- (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.¹⁷⁷

The Petitioners qualify for an exemption under either or both of Articles 31(2)(a) and 31(2)(b).

¹⁷⁵ Barbados ratified the Convention on December 5, 1981.

¹⁷⁶ Inter-American Commission on Human Rights, *Rules of Procedure of the Inter-American Commission on Human Rights* (Approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2nd, 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on August 1st, 2013), Article 31 [hereinafter IACHR Rules of Procedure].

¹⁷⁷ IACHR Rules of Procedure, Article 31.

Barbados' domestic law *does not afford due process of law* for the protection of the rights that have been violated by the criminalisation of consensual sexual activity, including between persons of the same sex, under the SOA— i.e., the situation contemplated in Article 31(2)(a) of the Convention. It could equally be said that the law of Barbados *denies a remedy* for the violation of said rights—the situation contemplated in Article 31(2)(b). In either case, the petitioners are entitled to seek relief from the Commission and, ultimately, the Court.

The chief reason for this is the “saving clause” in the *Constitution of Barbados* that immunizes from constitutional challenge, before the domestic courts, the most prominent aspect of the continued criminalisation of LGBT people in Barbados, and the harms related to that criminalised status — namely, the criminal prohibition on “buggery” under section 9 of the SOA.

History of the buggery provision (SOA s. 9) and its immunity from domestic challenge

Section 62 of the *Offences Against the Person Act, 1868* in Barbados (“OAPA 1868”) first criminalised buggery in Barbados as follows:

62. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.¹⁷⁸

This provision remained unchanged for decades, and was the buggery law in effect when Barbados gained its independence from Great Britain and enacted its own constitution in November 1966—a historical fact of considerable current significance, including for this Petition, as described further below.

Subsequently, in 1978, *after* the adoption of the 1996 Constitution, the buggery section of the OAPA was amended. It was renumbered (as section 64) and placed under the heading “Part VIII - Unnatural offences.” Most significantly, the new formulation prescribed a new maximum penalty of life imprisonment:

64. Any person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to imprisonment for life.

In 1992, the new *Sexual Offences Act* (SOA) repealed the Part VIII of the OAPA in its entirety, including s. 64 criminalising buggery. In its place, it introduced two separate offences of buggery and bestiality, with the current section 9 of the SOA, which is complained of in this Petition, reading as follows (and as already set out above):

¹⁷⁸ *Offences Against the Person Act, 1868*, s. 62. Section 63 of the Act also criminalised *attempting* to commit buggery, with a penalty of either penal servitude lasting between three and ten years (i.e., somewhat less than the maximum period of lifetime servitude for the completed offence of buggery) or imprisonment for up to two years, with or without hard labour (the same penalty as for the completed offence).

9. Any person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life.¹⁷⁹

In sum, *before* the 1996 Constitution was adopted, buggery had been criminalised in Barbados since 1868 with already very harsh penalties. In 1978, *after* the independence Constitution had been adopted, Parliament adopted the even harsher maximum penalty of possible life imprisonment. In 1992, Parliament transferred the offence of buggery (and its maximum penalty of life imprisonment) from the original statute (the OAPA) to the current SOA.

The Constitution adopted upon independence in 1996 included Chapter III, titled “Protection of Fundamental Rights and Freedoms of the Individual.” Section 24 of Chapter III empowers the Barbadian High Court to provide redress to individuals alleging violations of the rights and freedoms contained in Chapter III.

However, Chapter III also includes section 26, which “saves” from constitutional scrutiny any law existing prior to the adoption of the new Constitution in 1966. The provision states:

26. (1) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question—

(a) is a law (in this section referred to as “an existing law”) that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;

(b) repeals and re-enacts an existing law without alteration; or

(c) alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent.

(2) In subsection (1)(c), the reference to altering an existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it, and in subsection (1) “written law” includes any instrument having the force of law; and in this subsection and subsection (1) references to the repeal and re-enactment of an existing law shall be construed accordingly.¹⁸⁰

The result of this “saving clause” is this: the domestic courts of Barbados are constitutionally prevented from finding that the law of Barbados criminalising buggery *that existed at the time the Constitution was adopted* in 1996 is contrary to the Constitution’s provisions protecting fundamental rights and freedoms. At most, a Barbadian court could rule that the enhanced maximum penalty of life imprisonment, first enacted in 1978 *after* the adoption of the

¹⁷⁹ *Sexual Offences Act*, 1 LRO 2002, c. 154, s. 9.

¹⁸⁰ *Constitution of Barbados*, 1 LRO 2002, c 3, s 26.

Constitution, contravenes various rights protected by the Constitution (which the Petitioners assert it surely does). However, the criminalisation of buggery *per se* and the harsh penalties already enacted pre-1996, cannot be remedied by the Barbadian courts, by deliberate design of the saving clause—and this is why the Petitioners necessarily seek redress from the Commission for the ongoing violation of multiple Convention rights that the Petitioners and other LGBT people in Barbados experience as a result of the continued criminal prohibition on buggery.

History of criminalisation of “serious indecency” (SOA s. 12) in Barbados

As already observed, section 12 of the SOA is a sweeping prohibition on any act of “serious indecency,” with a particular impact on LGBT people that is not surprising given its homophobic origins that are similar to those of the buggery law. The Petitioners identify the harms SOA section 12 causes and exacerbates as part of this Petition seeking redress from the Commission.

The offence of “gross indecency,” the precursor to the current offence in section 12 of the SOA, did not appear in the original OAPA enacted in Barbados in 1868; this is perhaps not surprising since the Labouchere amendment introducing this new offence of “gross indecency” into English law was only enacted in the United Kingdom in 1885. However, that evolution in English law would eventually have an impact in Barbados.

The offence of gross indecency was first enacted in Barbadian law in 1978 as an amendment to the OAPA, clearly modelled on the colonial-era British provision. It was placed in “Part VIII - Unnatural offences” alongside the buggery offence (which was s. 64 at that time) and its wording makes plain the goal of criminalising (consensual) sexual acts between men beyond just the act of buggery (i.e., anal sex), exclusively singling them out for this additional sanction. The provision introduced into the OAPA read as follows:

66. Any male person who in public or private commits or is a party to 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 guilty of a misdemeanor and being convicted thereof shall be liable to imprisonment for two years.

As noted above in relation to the history of the buggery offence, with the SOA adopted in 1992, Parliament repealed the entire “Unnatural offences” part of the OAPA and replaced it with a new set of offences. The OAPA offence of “gross indecency” was replaced with the SOA offence of “serious indecency.” The provision intensified the scope of criminalisation, extending it beyond simply acts between men to any act by anyone that involves the genitals for sexual purposes, and making the penalty even more draconian. Section 12 of the SOA, which is complained of in this Petition, now reads as follows (as already set out above):

12.(1) A person who commits an act of serious indecency on or towards another or incites another to commit that act with the person or with another person is guilty of an offence and, if committed on or towards a person 16 years of age or more or if the

person incited is of 16 years of age or more, is liable on conviction to imprisonment for a term of 10 years.

(2) A person who commits an act of serious indecency with or towards a child under the age of 16 or incites the child under that age to such an act with him or another, is guilty of an offence and is liable on conviction to imprisonment for a term of 15 years.

(3) An act of "serious indecency" is an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.¹⁸¹

The Petitioners recognise that serious (or gross) indecency was not *per se* a criminal offence under the law of Barbados before the 1966 Constitution was adopted. As a result, unlike the prohibition on buggery, it is not saved from constitutional scrutiny by section 26 of the Constitution.

The Petitioners submit that the Commission should nonetheless examine the violation of Convention rights arising out of section 12 of the SOA, alongside its assessment of the violations arising out of the criminalisation of buggery under section 9 of the SOA (for which it is clear that Barbadian law offers no domestic remedy).

The gravamen of the Petitioners' claim is that Barbados continues to criminalise consensual sexual activity, in particular by LGBT people, without justification. That criminalisation of consensual sexual activity between persons of the same sex arises not only pursuant to the prohibition on "buggery" under section 9 of the SOA (for which there clearly is no adequate, effective remedy available from domestic courts under Barbadian law), but also pursuant to the companion, and broader, prohibition on "serious indecency" under section 12 of the SOA. It is this criminalisation that violates, and contributes to violations, of their rights under the Convention. The Petitioners note that it is clear from the legislative history that section 12 is rooted in the same objective of criminalising same-sex sexual activity, and it operates in a context in which the sexual activity of LGBT people is far more likely to be seen as "indecent" than that of heterosexuals.

In a 2016 article by Mahalia Jackman, the author evaluates public opinions regarding anti-gay laws in Barbados, Guyana and Trinidad and Tobago. In the article, the author references both Barbados' prohibition on anal sex and on "serious indecency" and notes:

"The anti-gay laws in Barbados, Guyana and T&T can be generally classified as relics of British imperialism. Particularly, during the Middle Ages, male homosexuality in England was viewed as perverting the state and regarded as offences against God (Nichols 1984). Needless to say, Barbados, Guyana and T&T did not escape their colonial masters' condemnation of homosexuality. Colonial legislators believed that inflicting such laws could bring European

¹⁸¹ *Sexual Offences Act*, 1 LRO 2002, c 154, s 12.

morality to these uncivilised colonies (Gupta and Long 2008). Britain exported its views on sexuality to its colonies (LaFont 2001) and so, these countries were subjected to the 1861 Offences to the Person Act—which carried a penalty of imprisonment for the ‘abominable crime of buggery’ (that, is, anal sex)—and later, the 1885 Criminal Law Amendment Act, which introduced penalties for acts of ‘gross indecency’ between men. It should be noted that while the 1885 laws gave no formal definition of what exactly constituted gross indecency, in practice, acts of gross indecency have often been interpreted as all intimate acts between men other than anal sex (Waites 1998).

While the anti-gay laws were largely imposed on Barbados, Guyana and T&T during colonialism, today, these laws are often seen as representative of their culture. Several decades after gaining their independence from England,¹ these three countries still have laws policing sexuality. As shown in Table 1, penalties for engaging in private consensual anal sex are quite serious. **It should be noted that the bans on anal sex are not specified to be limited to acts between males; hence, technically, anal sex between a man and woman is also a criminal offence. However, in these countries, individuals tend to use the terms ‘decriminalisation of buggery’ and ‘decriminalisation of homosexuality’ interchangeably (Abramschmitt 2008), hinting that the laws are widely perceived as condemnations of male homosexuality, rather than the act of anal sex itself (AIDS-Free World 2010; Gaskins 2013).**

...

Barbados is the only country not to explicitly target any same-sex intimate acts: unlike its Guyanese and T&T neighbours, acts of serious indecency are not specific to gender or sexual orientation. **But, in spite of the gender neutrality of Barbados’ laws on acts of serious indecency, like the buggery laws, they are often mischaracterised as applying to individuals of a specific sexual orientation. Thus, the laws have symbolic power and leads to the marginalisation of homosexuals.**¹⁸²

Such operation of the criminalisation of serious (or gross) indecency alongside buggery, with the common intent and effect of targeting same-sex sexual activity in particular, is also observed more globally, in various other former British colonies.

In Canada, for example, both prohibitions appeared in law during the colonial era. The federal Department of Justice has acknowledged that the offence of “gross indecency” found its origin in “antiquated sodomy laws, dating back to the middle ages and earlier, and were included in

¹⁸² Mahalia Jackman, “They called it the ‘abominable crime’: an analysis of heterosexual support for anti-gay laws in Barbados, Guyana and Trinidad and Tobago,” *Sex Res Social Policy*. 2016; 13: 130–141, doi: [10.1007/s13178-015-0209-6](https://doi.org/10.1007/s13178-015-0209-6) [emphasis added].

Canada's first *Criminal Code* in 1892.”¹⁸³ While the offence was amended in 1953 to apply to “every one,”¹⁸⁴ “gross indecency” continued to be understood to include virtually any gay sexual conduct,¹⁸⁵ including between women.¹⁸⁶ In 1969, “gross indecency” was further amended in the *Criminal Code* to decriminalize acts of gross indecency when engaged in in private, between husband and wife or between any two consenting persons over the age of 21.¹⁸⁷ As one commentator noted, “the practical effect of the amendment was to partially decriminalize gay sexuality,” although the criminal stigma attached to gay sexuality persisted.¹⁸⁸ The offence was finally fully repealed in Canada in 1987.¹⁸⁹)

In his detailed 2008 report for Human Rights Watch, Scott Long traces how courts in a variety of newly independent states interpreted vague language laid down in colonial codes.¹⁹⁰ With respect to “gross indecency” offences, the report demonstrates how such a provision gave police opportunities to arrest people on the basis of suspicion or appearance, and also an opening for governments looking to criminalize sex between women as well:

"Gross indecency" in British-derived penal codes is highly elastic.... In practice it was used to root out men who have sex with men who were caught in non-sexual circumstances, allowing arrests wherever they gathered or met—parks and railway stations, bathhouses and bars, and private homes and spaces. And unlike "carnal knowledge," the absence of penetration meant a lower standard of proof. No forensic tests or flower-shaped anuses were needed.

The usefulness of "gross indecency" in convicting men for homosexual conduct comes clear in the 1946 Singapore case of Captain Marr. A naval officer faced charges of

¹⁸³ Government of Canada Department of Justice, *Questions and Answers - An Act related to the repeal of section 159 of the Criminal Code*, December 15, 2016. Available at http://www.justice.gc.ca/eng/csj-sjc/pl/s159/qa_s159-gr_s159.html. Note that the adoption of this *Criminal Code* came *after* the Labouchere amendment had first created the offence of gross indecency in British law in 1885; it is unsurprising that it then appeared in the colonial law in Canada – unlike the situation in Barbados, where the Offences Against the Person Act in 1861 predated this development in British law.

¹⁸⁴ *Criminal Code*, S.C. 1953-54, c. 51, s. 149: “Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.”

¹⁸⁵ B. Ryder, “Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege,” *Canadian Journal of Family Law* (1990) 9 Can. J. Fam. L. 39–97.

¹⁸⁶ See, for example, *R. v. C.*, (1981) 30 Nfld. & P.E.I.R. 451 (Nfld. C.A.).

¹⁸⁷ *Criminal Law Amendment Act*, 1968-69, S.C. 1968-69, c.38, s. 7.

¹⁸⁸ Bruce Ryder, “Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege,” (1990) 9 *Canadian Journal of Family Law* 39–97.

¹⁸⁹ *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985 (3d Supp.), c. 19, s. 4. This statute came into force 1987.

¹⁹⁰ Scott Long, “This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism” (Human Rights Watch, 2008), Chapter IV, pp. 48-51, available at: <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>.

committing gross indecency with an Indian man. There were no witnesses, but police found the Indian's shirt in the captain's room. Such circumstantial evidence persuaded the court to convict.

The authorities are free to infer "gross indecency" from any suspicious activity. The term is insidious, a legal bridge between "unnatural" sexual acts and the associated identity of a certain kind of person: the "homosexual" as a criminal offender. Homosexuality becomes a crime of the "personal condition." This broader understanding of "unnatural acts" permits state and police harassment on a wider scale. A homosexual need not be caught in the act: presumptions fed by prejudice, or stereotypes of attire, manner, or association, are enough.

"Gross indecency" has been used to extend criminal penalties to sex between women. Lesbian sex had never been expressly punished in English law. The colonial court in *Khanu* excluded it from "carnal knowledge" because a woman lacked a penis. A recent Ugandan commentary explains that "women who perform sexual acts on each other are not caught by the current law because they do not possess a sexual organ with which to penetrate each other." Non-penetrative sex is not "real" sex.

Between men, however, it was seen as something sex-like enough to be "grossly indecent." There was no reason the same logic could not extend to women. Some modern governments did want lesbian acts and identities moved under the criminal law. They found their chance through public debate about reforming rape laws.

In the late 1980s the Malaysian women's movement campaigned for a new, gender-neutral definition of rape, as well as for criminalizing marital rape. Partially in response to their lobbying, the legislature in 1989 moved to amend the Penal Code.

In the end, however, legislators ignored the calls to modernize law on rape, and instead turned their scrutiny to Section 377. Their comprehensive re-write divided the Section into five different parts, while broadening its meaning and reach more than ever before. Their excuse? They could make rape effectively gender-neutral by adding a new crime of non-consensual "carnal intercourse against the order of nature." The new provision also offered limited protection for children against sexual abuse. But the two most significant changes were:

- For the first time in a British-derived legislative provision, "carnal intercourse" was expressly defined as both anal and oral sex.
- In a vengeful and almost parodic response to the demands of women's rights activists, the offence of "gross indecency" was made gender-neutral. It could now be applied to heterosexual couples-and also to lesbian and bisexual women.

A similar, regressive rape law change occurred in Sri Lanka. Falling back on religious and communal values, the state rejected women's rights activists' demands to legalize abortion, criminalize marital rape, and make the crime of rape gender-neutral. However, it did amend the "gross indecency" provision to make it gender-neutral and apply to sex between women.

Meanwhile, in Botswana, legislators put gender-neutral language in both the "carnal knowledge" and "gross indecency" provisions of the British-derived Penal Code, in a general revision aiming at gender equity in 1998.¹⁹¹

In sum, the Petitioners submit that the Commission should examine SOA section 12's criminal prohibition on serious indecency alongside SOA section 9's prohibition on buggery. As it is the criminalisation of consensual sexual activity by LGBT people—whether of a specific act prohibited as “buggery” or instead a broader, more amorphous category of “indecent” acts—that is objectionable and causes the harms, it makes no sense for the Commission to simply recommend repeal of the one provision (SOA section 9 on buggery) and yet artificially ignore the same or similar harms that arise out of the very closely-linked provision (SOA section 12 on indecency), with its roots in the same homophobic targeting of consensual sexual activity, first between men and then later between women in some jurisdictions. Artificially truncating the Commission's inquiry in such a fashion would not be in keeping with the spirit and purpose of the Convention, and would be at odds with a purposive interpretation of the Convention provisions so as to protect rights. If the Commission were to recommend repeal of the SOA section 9 prohibition on buggery (and Barbados were to act on that recommendation), but fail to address the SOA section 12 provision on indecency, this would leave the Petitioners (and other LGBT people in Barbados) still exposed to much the same taint of criminalisation as before, with all the harmful consequences that flow from such status.

The pernicious persistence of “saving clauses” and the violations they enable

The Privy Council of the United Kingdom (the highest court of appeal for Barbados until 2005)¹⁹² has handed down decisions upholding Barbados' saving clause, as well as similar general saving clauses in the constitutions of other countries. For example, in *Boyce et al. v. Barbados*, the Privy Council upheld the constitutionality of Barbados' mandatory death penalty, stating it was preserved by section 26 of the Constitution, even though the provision itself was found to be substantively in violation of the rights guarantees of the Constitution.¹⁹³

General saving clauses were only included in the constitutions of the first five Caribbean territories to gain independence (Jamaica, Trinidad and Tobago, Guyana, Barbados and the Bahamas). Such a provision operates as a procedural device that casts blanket immunity on all existing laws, protecting them from scrutiny for conformity with any of the fundamental rights provisions in the Constitutions. Part of the rationale for this clause was to avoid the chaos that was feared from enshrining supreme, enforceable fundamental rights in the written constitution

¹⁹¹ Ibid., references omitted.

¹⁹² In 2005, Barbados replaced the Judicial Committee of the Privy Council in the appeals process with the Caribbean Court of Justice: Andrew N. Maharajh, "The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court" (2014) 47 Cornell Intl L.J. 735 at 765.

¹⁹³ *Boyce et al. v. Barbados* [2004] UKPC 32 at para 69.

upon independence from Britain.¹⁹⁴ However, when such chaos did not materialize, the remaining countries of the Commonwealth Caribbean did not include general saving clauses in their independence Constitutions.

From the inception, Caribbean courts have consistently held that these general saving clauses must be construed narrowly, in order for the full effect of the fundamental rights' guarantees to be realized.¹⁹⁵ As Justice Devindra Rampersad observed most recently in reviewing the saving clause of Trinidad and Tobago that is similar to that of Barbados, and specifically in the context of a domestic constitutional challenge to the criminalising of buggery and serious indecency, the time has long passed for a review of the function of saving clauses.¹⁹⁶ As he explained, since the underlying purpose of these clauses, to obviate chaos, has never proven necessary, their continued retention in Caribbean constitutions is unjustifiable. By immunizing certain laws from judicial review, the latter are automatically "saved" and the merits of their constitutional validity can never be ascertained. However, as a matter of principle, where the State wishes to retain the benefit of any existing law that possibly violates a constitutionally-guaranteed fundamental right, it should be able to justify that law on the basis of its rationality and proportionality, meaning that only laws that promote a greater social objective can be regarded as reasonably required. Instead, a saving clause relieves the State of having to conduct any such balancing or justification exercise. This procedural device therefore perpetuates violations of constitutionally-entrenched fundamental rights, making it inimical to the rule of law.

Leading commentators on Caribbean constitutional law have deplored this mechanism of immunizing existing laws as immoral and unjustifiable. Foremost among these is Professor Simeon McIntosh, former Dean of the Faculty of Law of the University of the West Indies, who argues that a literal interpretation of these provisions leads to a "very restrictive and crabbed reading" of the fundamental rights' provisions, urging that they must be "read down."¹⁹⁷

After the Privy Council, then Barbados' highest court, ruled in *Boyce* that the saving clause prevented it from ruling the country's mandatory death penalty unconstitutional, thereby exhausting domestic remedies, the Inter-American Court of Human Rights was seized of the matter. It concluded not only that the mandatory death penalty violated the right not to be arbitrarily deprived of life, but that the retention by Barbados of its saving clause is itself a breach of Article 2 of the Convention, which requires State Parties to undertake to adopt such legislative

¹⁹⁴ *DPP v Nasralla* [1967] 2 AC 238, see 24 G

¹⁹⁵ See *Lambert Watson v. R* (2004) 64 WIR 241 at para 42; *R v. Hughes* [2002] 2 AC 259 at 35.

¹⁹⁶ *Jones v The Attorney General of Trinidad and Tobago*, Claim No. CV2017-00720 at para 48. In that case, given the historical evolution of the domestic law, the High Court concluded that the saving clause did not preclude it from subjecting the prohibitions on buggery and serious indecency to constitutional scrutiny; it found the prohibitions contrary to various rights guaranteed by the Constitution of Trinidad and Tobago.

¹⁹⁷ Simeon C.R. McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity* (Kingston: Caribbean Law Publishing Company, 2002) at 260.

or other measures as may be necessary to give effect to the rights contained in the Convention.¹⁹⁸
The Court stated:

[T]he Court has found on previous occasions that a similar “savings clause” found in the Constitution of Trinidad and Tobago had the effect of protecting from judicial scrutiny certain laws that would otherwise breach fundamental rights. Similarly, in the present case, section 26 of the Constitution of Barbados effectively denies its citizens in general, and the alleged victims in particular, the right to seek judicial protection against violations of their right to life.

Accordingly, in light of the Court’s jurisprudence, and to the extent that section 26 of the Constitution of Barbados prevents judicial scrutiny over section 2 of the Offences Against the Person Act, which in turn violates the right not to be arbitrarily deprived of life, the Court finds that the State has failed to abide by its obligations under Article 2 of the Convention, in relation to Articles 1(1), 4(1), 4(2) and 25(1) of such instrument.¹⁹⁹

The Petitioners provide the above observations about “saving clauses” in general—including the conclusion of the Inter-American Court itself (in *Boyce*)—to underscore just how antithetical such provisions are to the protection of human rights in those jurisdictions where they remain. It is also worth noting that LGBT people are among those who have paid, and continue to pay, a serious price, caught between domestic judicial systems blocked by saving clauses from performing their duty of ensuring the protection of constitutional rights and politicians paradoxically clinging to British colonial law in defence of “national” values.

Conclusion: impact of Barbados’ “saving clause” and admissibility of Petition

The Petitioners submit that because, on its face, Barbados’ saving clause prevents constitutional review of the core of section 9 of the SOA, Barbados has failed to afford due process of law for the protection of their rights under the Convention, which this section violates directly and indirectly by criminalising consensual sexual activity, with a particularly adverse impact on LGBT people. The saving clause could equally be characterised as denying access to a remedy under domestic law. Consequently, the Petitioners are exempted from the exhaustion requirement of the Convention under Article 31(2)(a) and/or 31(2)(b) and the Commission should admit their claims and assess their merits.

The Petitioners further submit the Commission should assess the Petitioners’ complaint against section 12 of the SOA, which is in its origins substantially similar to section 9 of the SOA and which, by extending the criminalisation of consensual sexual activity, again with disproportionate impact on LGBT people, carries substantially similar harms to their rights under the Convention.

¹⁹⁸ *Boyce et. al. v. Barbados* Inter-American Court of Human Rights, Series C, No. 169 (Nov. 20, 2007) at paras 75-80, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_169_ing.pdf.

¹⁹⁹ *Boyce et. al. v. Barbados* (IACtHR, 2007) at paras 79-80.

3. Petitioners' Claims Are Made Within a Reasonable Period of Time

As described above, the Petitioners are not required to exhaust domestic remedies, since the law of Barbados appears not to provide any remedies that can be exhausted. It follows that, if no domestic remedy is available, the six-month statute of limitations in Article 32(1) does not apply.²⁰⁰

If exhaustion of domestic rights is unavailable, Article 32(2) of the IACHR Rules allows parties a “reasonable period of time” to file a petition.²⁰¹ Whether a petition is filed within a “reasonable period of time” is determined by the Commission with reference to “the date on which the alleged violation of rights occurred and the circumstances of each case.”²⁰² In cases of a continuing violation of a petitioner’s human rights, the Commission has stated, “[T]here is no single date from which to calculate the reasonable period of time.”²⁰³ The facts above demonstrate the Petitioners’ legitimate, continuing fear of ongoing human rights violations and personal insecurity as long as sections 9 and 12 of the SOA remain part of the law of Barbados. Given the current state of the law in Barbados—and specifically, the effect that the “saving clause” has in immunizing sections 9 and 12 from constitutional review—the Petitioners have no recourse to domestic remedies and have filed this petition in response to the ongoing violation of their rights. This petition therefore has been filed within a reasonable period of time under Article 32(2) of the IACHR Rules.

4. Petitioners' Claims Are Not Under Consideration in Another International Proceeding

The Petitioners confirm that their case is presently not under consideration in another international proceeding.

²⁰⁰ IACHR Rules of Procedure, Article 32(2).

²⁰¹ IACHR Rules of Procedure, Article 32(2).

²⁰² IACHR Rules of Procedure, Article 32(2).

²⁰³ See Inter-American Commission on Human Rights, *The Kalina and Lokono Peoples v. Suriname*, Petition 198-07, Report N^o 76/07, Admissibility OEA/Ser.L/V/II.130, doc. 22, rev.1 (Oct. 15, 2007) at para 63.

V. SECTIONS 9 AND 12 OF BARBADOS' *SEXUAL OFFENCES ACT* VIOLATE RIGHTS OF PETITIONERS AND OTHERS UNDER THE CONVENTION

*“There can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”*²⁰⁴

The Government of Barbados, through its criminalisation of consensual sexual activity between LGBT adults pursuant to sections 9 and 12 of the SOA, has violated Articles 1, 4, 5, 8, 11, 13, 17(1), 24, and 25 of the Convention. The SOA is inherently a violation of the rights of LGBT people whom it unjustifiably criminalises; it also operates as legislative encouragement to the government of Barbados, as well as private citizens, to commit blatant abuses of the human rights of LGBT people.

States have an obligation to “ensure the free and full exercise of the rights recognized by the American Convention.”²⁰⁵ The Court has recognized that this includes “prevent[ing], investigat[ing], and punish[ing] any violation of the rights recognized by the Convention.”²⁰⁶ The Court has reasoned that when a State permits a violation of one’s rights to occur without taking measures to prevent the violation or punish those responsible, the State has failed to comply with its duty under the Convention.²⁰⁷

As the following sections illustrate, by continuing to criminalise consensual sexual conduct pursuant to sections 9 and 12, Barbados violates multiple human rights of LGBT people.

²⁰⁴ *Romer v. Evans*, 517 U.S. 620 (1996) at 641, expressly cited in *Lawrence v. Texas*, 539 U.S. 558 (2003) at 583.

²⁰⁵ Organization of American States, *American Convention on Human Rights "Pact of San Jose, Costa Rica"* (B-32), 22 November 1969, O.A.S. Treaty Series N° 36, 1144 UNTS 123, Article 1(1) [hereinafter American Convention].

²⁰⁶ *Velásquez Rodríguez v. Honduras* at para 66.

²⁰⁷ *Velásquez Rodríguez v. Honduras* at para 66.

1. Right to Non-Discrimination (Article 1) and Rights to Equality Before the Law and Equal Protection of the Law (Article 24)

The Law

Article 1 of the Convention obligates Barbados to respect the rights and freedoms enumerated in the Convention, without discrimination. It states:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, "person" means every human being.²⁰⁸

Article 1(1) has been interpreted by the Inter-American Court to prohibit any discriminatory norm, act, or practice that reduces or restricts an individual's Convention rights based on one of the prohibited grounds of discrimination, whether the norm, act, or practice is applied by the State or by private parties.²⁰⁹ Discrimination does not need to be deliberate; it can occur indirectly. Even if a norm, act, or practice appears neutral, it can have a disproportionate impact on certain groups of people.²¹⁰

The list of prohibited grounds of discrimination under Article 1 is not exhaustive; it enumerates several specific grounds but also refers to "any other social condition." Like the European Court of Human Rights²¹¹ and the UN Human Rights Committee²¹², the Court has interpreted "without discrimination" to include without discrimination *for reasons of sexual orientation or gender identity*. In *Atala Riffo and Daughters v. Chile*, the Court ruled that Ms. Atala was discriminated against when her custody of her children was revoked on the basis of her sexual orientation, violating the Convention.²¹³ The Court established that:

²⁰⁸ *American Convention*, Article 1 [emphasis added].

²⁰⁹ *Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile* at para 206; *Atala Riffo and Daughters v. Chile* at para 82.

²¹⁰ *Expelled Dominicans and Haitians v. Dominican Republic* at para 263.

²¹¹ *Salgueiro da Silva Mouta v. Portugal* (No. 33290/96) at para 28; *Fretté v. France* (No. 36515/97) at para 32; *L. and V. v. Austria* (No. 39392/98, No. 39829/98) at para 45. *Kozak v Poland* (No. 13102/02) at para 92; *Clift v. United Kingdom* (No. 7205/07) at para 57; *J.M. v. United Kingdom* (No. 37060/06) at para 55.

²¹² *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994) at para 8.7; *Young v. Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000 (Sept. 18, 2003) at para 10.4; *X v. Colombia*, Communication No. 1361/2005, CCPR/C/89/D/1361/2005 (May 14, 2007) at para 7.2.

²¹³ *Atala Riffo and Daughters v. Chile* at para 124.

[T]he **sexual orientation** and **gender identity** of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.²¹⁴

In addition to sexual orientation, the Court reiterated in its *Advisory Opinion OC-24/17* that gender identity and gender expression are also grounds upon which discrimination in the exercise of Convention rights is prohibited by Article 1(1).²¹⁵

Article 1(1) extends to all provisions of the Convention.²¹⁶ By virtue of this Article, if a State does not equally respect and protect any Convention right *without discrimination*, that Convention right, in combination with Article 1(1), has been breached. Article 1(1) also imposes a positive obligation on states to “reverse or change any discriminatory situations in their societies that prejudice a specific group of persons.”²¹⁷ This involves the “special obligation of protection that the State must exercise with regard to the actions and practices of third parties who, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations.”²¹⁸

In addition to the cross-cutting obligation under Article 1(1) to ensure equal enjoyment of all Convention rights without discrimination, the Convention contains a specific right to equality: more particularly, Article 24 stipulates that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”²¹⁹ Article 24 has been interpreted to “prohibit discrimination resulting from any inequality derived from domestic law or its application.”²²⁰

In other words, if a State discriminates on any of the grounds protected by Article 1(1) in its respect for, or willingness to guarantee, a right contained in the Convention, it will be failing to comply with its obligation contained in the relevant Article in light of Article 1(1). If, on the other hand, the discrimination refers to inequality before the country's law or unequal protection of said laws on the basis of any ground encompassed by Article 1(1), the State will be failing to

²¹⁴ *Atala Riffo and Daughters v. Chile* at para 91. [emphasis added] That Article 1(1) of the Convention prohibits discrimination based on sexual orientation was reaffirmed by the Court in *Duque v. Colombia*, Series C, No. 310 (Feb. 26, 2016), paras. 104-105, and *Flor Freire v. Ecuador*, Series C, No. 315 (Aug. 31, 2016), paras. 118-124.

²¹⁵ Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at paras 78-79.

²¹⁶ *Nadege Dorzema et al. v. Dominican Republic* at para 224

²¹⁷ *Nadege Dorzema et al. v. Dominican Republic* at para 236.

²¹⁸ *Nadege Dorzema et al. v. Dominican Republic* at para 236.

²¹⁹ American Convention, Article 24. [emphasis added]

²²⁰ *Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile* at para 199.

comply with its obligation under Article 24.²²¹ The two Articles are related but distinct. In the instant case, by maintaining SOA sections 9 and 12 criminalising buggery and serious indecency, Barbados is both (a) in breach of Article 24's equality guarantees and (b) discriminatorily violating other Convention rights (discussed before below), and is therefore contravening several other articles in light of Article 1(1).

Breach of Article 24's guarantees of equality before, and equal protection of, the law

As sexual orientation is a prohibited ground of discrimination (as is gender identity), sections 9 and 12 of the SOA breach Article 24. Although it may be argued that homosexuality is not itself criminalised by sections 9 and 12, which effectively target same-sex *conduct*, this argument must be rejected. Laws which criminalise consensual same-sex sexual conduct transform individuals into criminals on the basis of their sexual orientation. The prohibition of such identity-driven conduct turns "a conduct crime [into] a status crime."²²² As such, it is quintessentially discriminatory. As Justice O'Connor of the United States Supreme Court noted in *Lawrence v. Texas*:

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." [citing *Romer v. Evans*, 517 U.S. 620 at 641] ...

Indeed, Texas law confirms that the sodomy statute is directed toward homosexuals as a class. In Texas, calling a person a homosexual is slander *per se* because the word "homosexual" "impute[s] the commission of a crime." ... The State has admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal. ... Texas' sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law....

The Texas sodomy statute subjects homosexuals to "a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass ... cannot be reconciled with" the Equal Protection Clause.²²³

²²¹ *Atala Riffo and Daughters v. Chile* at para 82; *Advisory Opinion OC-24/17* at para 64.

²²² ICJ Briefing Paper, *International Human Rights Law and the Criminalisation of Same-Sex Sexual Conduct* (May 3, 2010) at 3, available at: http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22974.

²²³ *Lawrence v. Texas*, 539 U.S. 558 (2003) at 583-584 (other references omitted).

As the High Court of Hong Kong (Court of First Instance) noted in *Roy v. Secretary for Justice*, “[w]hen a group of people, such as gays, are marked with perversity by the law then their right to equality before the law is undermined.”²²⁴ It is worth noting that in that case, the buggery law in Hong Kong also applied to anal sex between men and women (and set a higher age of consent for engaging in buggery than other sexual acts). On appeal, the Court of Appeal considered specifically the issue of whether the law could be found to be discriminatory when, on its face, the relevant provision applies to both anal sex between men but also between a man and a woman. It concluded that it could, expressly upholding the lower court’s reasoning as follows:

Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as ‘disguised discrimination.’ It is, I think, an apt description. It is disguised discrimination founded on a single base: sexual orientation.²²⁵

The South African Constitutional Court has similarly concluded that criminalising consensual sex between men violates equality right directly and contributes to other discrimination:

The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man’s right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation ... The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.²²⁶

The Inter-American Court has not yet ruled directly on the whether the application of *criminal sanctions* to consensual same-sex conduct amounts to a breach of Article 24. However, the case of *Flor Freire v. Ecuador* is instructive and supports such a conclusion. In that case, the Court considered the application of Ecuador’s code of military discipline, which imposed serious sanctions for “acts of homosexuality,” which the Court found did not exist for heterosexual acts. Under that code, the complainant was discharged from the military for having engaged in consensual sexual activity with another man. The Court found there was no justification for this differential treatment, and therefore this was a violation of the right to equality before the law under Article 24 of the Convention, and of the right to enjoyment of Convention rights without discrimination under Article 1 of the Convention:

127. Este Tribunal destaca que, con el propósito de preservar la disciplina militar, podría resultar razonable y admisible la imposición de restricciones a las relaciones sexuales al interior de las instalaciones militares o durante el servicio. No obstante, la ausencia de

²²⁴ *Leung TC William Roy v. Secretary for Justice*, [2005] HKCFI 713 at para 115.

²²⁵ *Leung TC William Roy v. Secretary for Justice*, [2006] KHCA 360 at para 48.

²²⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 1999 (1) SA 6 (CC) at para. 36.

una justificación adecuada para la mayor gravedad de la sanción asignada a los actos sexuales homosexuales, genera una presunción sobre el carácter discriminatorio de esta medida. **Asimismo, resalta que la diferencia de regulación existente en el presente caso frente a los actos homosexuales tenía como efecto excluir la participación de personas homosexuales en las fuerzas armadas.** En este sentido, la Corte recuerda que la prohibición de discriminación con base en la orientación sexual de una persona incluye la protección de la expresión de dicha orientación sexual (supra párr. 119). **Al sancionar los “actos de homosexualidad” dentro o fuera del servicio, el artículo 117 del Reglamento de Disciplina Militar castigaba toda forma de expresión de esta orientación sexual, restringiendo la participación de personas homosexuales en las fuerzas armadas ecuatorianas.**

...

140. Teniendo en cuenta todo lo anterior, este Tribunal concluye que la aplicación al señor Flor Freire del artículo 117 del Reglamento de Disciplina Militar, que sancionaba de forma más gravosa los “actos de homosexualismo”, constituyó un acto discriminatorio. Por tanto, **el Estado es responsable por la violación del derecho a la igualdad ante la ley y de la prohibición de discriminación reconocidos en el artículo 24 de la Convención, en relación con los artículos 1.1 y 2 de la Convención,** en perjuicio del señor Flor Freire, en virtud de la discriminación sufrida por la orientación sexual percibida.²²⁷

The Court correctly concluded in *Flor Freire* that is a breach of the Convention—Article 24 in that particular case, in conjunction with Article 1—for the state to impose the penalty of dismissal from employment for having engaged in legally-prohibited consensual sexual activity with a person of the same sex. It must surely follow that it is also a breach of Convention rights to impose a *criminal sanction* for such expression of one’s sexual orientation with a consenting partner — and in the case of Barbados, that harsh penalty is up to life in prison for “buggery” (under SOA section 9), the harshest penalty for buggery in the hemisphere, and 10 years for “serious indecency” (under SOA section 12).

By criminalising consensual same-sex conduct—which the Government of Barbados has explicitly recognised it is doing²²⁸—sections 9 and 12 of the SOA make LGBT individuals criminals and consequently unequal before the law. Barbados is therefore breaching Article 24 of the Convention by preserving sections 9 and 12 of the SOA, as Article 24 requires the domestic laws of Barbados, and their application, to be non-discriminatory.²²⁹

²²⁷ *Flor Freire v. Ecuador*, Series C. No. 315 (Aug. 31, 2016), paras 127, 140.

²²⁸ E.g., UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Barbados, Addendum, A/HRC/10/73/Add.1* (Mar. 16, 2009) at para 26, in which Barbados declared to the UN Human Rights Council that: “The Sexual Offences Act of Barbados criminalises buggery. Barbados cannot accept at this time, the recommendation to decriminalise such sexual acts between consenting adults of the same sex.”

²²⁹ *Yatama v. Nicaragua* at para 186.

The consequences of this inequality before the law manifest not merely in the effective criminalisation of an identity, but also in the failure to equally *protect* LGBT Barbadians under the law, constituting a further breach of Article 24. The Petitioners have faced discrimination, harassment, and violence due to the Government of Barbados' unwillingness to provide the Petitioners equal protection under the law. There have been instances of police harassment of LGBT people and police inaction when harassment by members of the public has been reported to them. When Petitioner Hoffmann reported that she had been assaulted to the police, the responding constable focused on the fact that she had defended herself against the group of men, rather than on the assault against her.²³⁰

Petitioner Hoffmann also has faced delays in investigations, a lack of communication on the police's part, and two of the incidents that she reported to the police in 2016 are still open for investigation.²³¹ More recently, after Petitioner Hoffmann was attacked with a meat cleaver in 2018, there were delays in the arrest of the man who attacked her. Unlike when a similar attack had occurred in 2017 against a young straight man, and the attacker was immediately arrested, Petitioner Hoffmann's attacker remained free more than two days after the attack. When Petitioner Hoffmann expressed her displeasure with how the police were handling the investigation, she was called ungrateful and was referred to as "he/she/I don't know!"²³²

In a recent decision by the High Court of Trinidad and Tobago, which considered the constitutionality of that state's anti-buggery and indecency provisions, the Court noted that the mere existence of the provisions served as a foundation for threats and abuse:

The claimant has given uncontroverted evidence of the discrimination, threats and abuse that he has suffered by being an openly homosexual male in Trinidad and Tobago. The court is in no doubt that the sanction imposed on him by the State under these provisions affects his ability to freely express himself and his thoughts in public. Those criminal sanctions have the potential to be used oppressively by differently minded citizens as a foundation for hate as condoned by the State...²³³

Barbados' continued criminalisation of consensual same-sex sexual activity pursuant to SOA sections 9 and 12 violate Article 24 by (i) treating LGBT people unequally before the law, (ii) encouraging discriminatory abuse by private actors against LGBT people, and then (iii) undermining effective protection of other law (e.g., against assault) for LGBT people.

²³⁰ Declaration of Petitioner Hoffman, 2018 at para 41.

²³¹ Declaration of Petitioner Hoffman, 2018 at paras 37, 38, 42, 44, 47.

²³² Declaration of Petitioner Hoffman, 2018 at para 50.

²³³ *Jones v The Attorney General of Trinidad and Tobago* at para 94.

Breach of Article 24 in light of Article 1(1)

The continued existence of sections 9 and 12 of the SOA also breaches Barbados' combined obligation under Articles 1(1) and 24 "to take affirmative action in order to reverse or change any discriminatory situations in their societies that prejudice a specific group of persons."²³⁴ To the contrary, Barbadian government officials have attempted to obfuscate the issue and have refused to change the law. In September 2016, the Prime Minister denied the existence of harsh buggery laws and stated that the laws against buggery are equivalent to laws against rape—an obvious misrepresentation of the law. Indeed, in the Barbadian government's own responses to the Human Rights Committee, during the Universal Periodic Reviews conducted in 2009 and 2013, the government stated they were unwilling to "decriminalise such sexual acts between consenting adults of the same sex."²³⁵ It also explicitly adverted to the fact that removing this criminalisation would run counter to the weight of domestic public opinion, making it clear that (i) the government and the broader Barbadian public understands the law to be targeting gay sex specifically, and (ii) the government was choosing to endorse, rather than remedy, such discriminatory application of the criminal law.

Barbados is obliged not only to provide equal protection before the law to all individuals (pursuant to Article 24); it must also adopt measures necessary to allow the exercise of all of the rights guaranteed in the Convention (pursuant to Article 1). As the Court stated in *Expelled Dominicans and Haitians v. Dominican Republic*, "[a]ny treatment that can be considered discriminatory in relation to the exercise of any of the rights ensured in the Convention is per se incompatible with [Article 1]."²³⁶

As will be examined in more detail below, sections 9 and 12 discriminatorily infringe on individuals' ability to exercise a variety of the rights guaranteed to them by the Convention. Therefore, Barbados is not only in breach of Article 24 (equality before and equal protection of the law) (and of that article in light of Article 1), but also in breach of Articles 4 (right to life), 5 (right to physical, mental and moral integrity), 11 (privacy), 13 (freedom of expression), 17 (protection of the family), as well as Articles 8 and 25 (judicial protection of rights), in light of Article 1.

²³⁴ *Nadege Dorzema et al. v. Dominican Republic* at para 236.

²³⁵ UN Human Rights Committee, *Report of the Working Group on the Universal Periodic Review, Barbados, Addendum, A/HRC/10/73/Add.1* (Mar. 16, 2009) at paras. 26-7 [emphasis added].

²³⁶ *Expelled Dominicans and Haitians v. Dominican Republic* at para 262.

2. Right to Privacy (Article 11)

Article 11 of the Convention, which enshrines the right to privacy, provides that:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.²³⁷

Criminalisation of consensual sexual activity violates privacy directly

In *Atala Riffo and Daughters v. Chile*, the Court noted that privacy “is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings.”²³⁸ Elsewhere, the Court has noted that the right to a private life includes “the way in which individuals...decide to project themselves towards others”²³⁹ and is fundamentally linked to autonomy and dignity:²⁴⁰

Thus, based on the principle of the free development of the personality or of personal autonomy, everyone is free and autonomous to live in a way that accords with their values, beliefs, convictions and interests.²⁴¹

Similarly, the European Court of Human Rights (ECtHR) observed in *Pretty v. United Kingdom*, with reference to the analogous provision in the *European Convention on Human Rights* (Article 8):

[T]he concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Although no previous case has established as such any right to self-determination

²³⁷ American Convention, Article 11.

²³⁸ *Atala Riffo and Daughters v. Chile* at para 162.

²³⁹ Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at para 87.

²⁴⁰ Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at paras 87-88.

²⁴¹ Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at para 88.

as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.²⁴²

The Supreme Court of India has also emphasized that the right to privacy includes the right to make personal decisions regarding intimate relationships, including in keeping with one's sexual orientation:

Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life...Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised...

The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual...²⁴³

The state is not permitted to intrude upon privacy in ways that abusive or arbitrary.²⁴⁴ As the Commission has explained:

A principal objective of Article 11 is to protect individuals from arbitrary action by State authorities which infringes in the private sphere. Of course, where State regulation of matters within that sphere is necessary to protect the rights of others, it may not only be justified, but required. The guarantee against arbitrariness is intended to ensure that any such regulation (or other action) comports with the norms and objectives of the Convention, and is reasonable under the circumstances.²⁴⁵

The Inter-American Court has held that any restrictions on privacy must be "regulated by the law, pursue a legitimate goal and comply with the requirements of suitability, necessity, and proportionality, in other words, they must be necessary in a democratic society."²⁴⁶

However, Sections 9 and 12 of the SOA advance no such legitimate goal, are disproportionate, and are not necessary in a democratic society, including to protect the rights of others. As has

²⁴² *Pretty v. United Kingdom* European Court of Human Rights (Application no. 2346/02) Judgment Strasbourg 29 April 2002 at para 61, available at: <http://www.bailii.org/eu/cases/ECHR/2002/427.html> [citations omitted],

²⁴³ *Justice K. S. Puttawamy (Retd.) and Anr. vs Union of India and Ors.*, Writ Petition (Civil) No 494 of 2012 at paras 168-169.

²⁴⁴ *Atala Riffo and Daughters v. Chile* at para 164; *Escher et al. v. Brazil* at para 116.

²⁴⁵ See Inter-American Commission on Human Rights, *Maria Eugenia Morales De Sierra v. Guatemala*, Petition 11.625, Report N^o 4/01, Merits, OEA/Ser./L/V/II.111, doc. 20, rev. at 929 (Jan. 19, 2001) at para 47.

²⁴⁶ *Atala Riffo and Daughters v. Chile* at para 164; *Tristan Donoso v. Panama* at para 56.

already been noted, section 12 is a sweeping provision that, on its face, effectively criminalises any consensual sexual activity involving the genitals, regardless of location or other circumstances. As for the criminal prohibition on buggery in section 9, again regardless of location or circumstances, the overwhelming preponderance of the case law, from multiple courts and jurisdictions around the world, has consistently concluded that such a prohibition is an indefensible infringement of the right to privacy in a free and democratic society.

The ECtHR has also considered these arguments in the context of an anti-buggery law as early as 1981, in *Dudgeon v. United Kingdom*, ultimately concluding that the law unjustifiably breached the applicant's right to privacy. In that case, a gay man complained to the ECtHR that his right to privacy had been violated after police searched his home, seized personal papers detailing consensual sexual activities with other men, and was questioned by police about them. The applicant was considered for prosecution under Northern Ireland's anti-buggery law.²⁴⁷

Similar to the past jurisprudence of the Court noted above, Article 8 of the *European Convention for the Protection of Human Rights* (the "European Convention") permits the right to privacy to be restricted where the restriction "is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."²⁴⁸

In *Dudgeon*, the ECtHR held that the "cardinal issue" in the case was the extent to which the legislation was "necessary in a democratic society" to achieve the government's alleged goal of protecting morals and safeguarding the rights of others, namely, protecting youth from allegedly "undesirable and harmful pressures".²⁴⁹ In order to satisfy the necessity requirement, it fell to the government to show both that there was a pressing social need and that the restriction was proportionate to addressing that objective.²⁵⁰ The ECtHR rejected the government's arguments on both fronts.

With respect to the existence of a "pressing social need," the ECtHR held:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States... In Northern Ireland itself, the

²⁴⁷ *Dudgeon v. United Kingdom* (No. 7525/76) at para 33.

²⁴⁸ Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, 213 UNTS 221, Article 8.

²⁴⁹ *Dudgeon v. United Kingdom* (No. 7525/76) at paras 47-48.

²⁵⁰ *Dudgeon v. United Kingdom* (No. 7525/76) at para 53.

authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent.... No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.²⁵¹

With respect to proportionality, the ECtHR held:

On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.²⁵²

Consequently, the ECtHR held that Northern Ireland's anti-buggery law breached the applicant's right to privacy under the European Convention. The ECtHR has affirmed this ruling and reached the same conclusion in subsequent cases as well.²⁵³ More recently, the ECtHR has also observed that "the mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life."²⁵⁴

The UN Human Rights Committee has also considered the right to privacy under the *International Covenant on Civil and Political Rights* (ICCPR) (Article 17), concluding in the landmark 1994 case *Toonen v. Australia* that:

Inasmuch as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that Sections 122(a), (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade.²⁵⁵

²⁵¹ *Dudgeon v. United Kingdom* (No. 7525/76) at para 60.

²⁵² *Dudgeon v. United Kingdom* (No. 7525/76) at para 60.

²⁵³ *Norris v. Ireland*, Application No. 10581/83 (Oct. 26, 1988); *Modinos v. Cyprus*, Application No. 15070/89 (Apr. 22, 1993).

²⁵⁴ *A.D.T. v. the United Kingdom*, Judgment of 31 July 2000, Application No. 35765/97, (2000) 31 EHRR 33, para. 23. [emphasis added]

²⁵⁵ *Toonen v. Australia* at para 8.2.

National courts in countries from around the world have also repeatedly ruled that the right to privacy includes freedom from the state's intrusion by criminally penalising one's intimate relationships.²⁵⁶ Of course, most recently, courts in the Caribbean have reached the same conclusion: in *Orozco*, the Supreme Court of Belize ruled that the (gender-neutral) law criminalising consensual anal sex violates the right to privacy among others,²⁵⁷ and a trial court in Trinidad and Tobago has ruled that both the buggery and serious indecency provisions violate the right to privacy (and other rights) guaranteed by that country's constitution.²⁵⁸

The Petitioners submit that the same logic as evidenced in the above-noted decisions applies with even greater force now, more than thirty years after *Dudgeon* was decided. Homosexuality is understood (and accepted) in even greater measure than in 1981, when *Dudgeon* was decided. The collective experience of democracies around the world has also shown that the legalization of same-sex intimacy does not result in the destruction of societies' moral fiber or wanton violence.²⁵⁹ In these circumstances, laws criminalising consensual same-sex sexual activity (such as SOA sections 9 and 12) cannot be viewed as pursuing legitimate aims — and furthermore, given the documented harms they cause, could not be considered proportionate means for achieving the alleged aims. They are therefore not “necessary in a democratic society”.

With respect to the Petitioners' circumstances, sections 9 and 12 of the SOA directly interfere with their ability to engage in private consensual acts by criminalising those acts. As noted above, both the Inter-American Court and the European Court of Human Rights have found that the right to privacy under the American Convention and the European Convention respectively protect “sexual life.” So, too, have the apex courts of other democracies, including in the Americas. Most recently, it is noteworthy that the High Court of Trinidad and Tobago has also recently agreed with this assessment and found that that country's anti-buggery and serious indecency provisions violate its constitutional “right to a private and family life”:

The claimant, and others who express their sexual orientation in a similar way, cannot lawfully live their life, their private life, nor can they choose their life partners or create the families that they wish. To do so would be to incur the possibility of being branded a criminal. The Act impinges on the right to respect for a private and family life.²⁶⁰

²⁵⁶ E.g., *McCoskar v State* [2005] FJHC 500 (High Court of Fiji); *National Coalition for Gay and Lesbian Equality v Minister of Justice*, CCT11/98, 1999 (1) SA 6 (CC) at para. 116-117 per Sachs J (Constitutional Court of South Africa); *Lawrence v Texas*, 539 U.S. 558 (2003); *Sunil Babu Pant and others v Nepal Government and others*, Judgment of 21 December 2007, Supreme Court of Nepal, translation published [2008] 2 NJA L.J. 262-286 at p.280.

²⁵⁷ *Orozco v. Attorney General of Belize* at para 86.

²⁵⁸ *Jones v. Attorney General of Trinidad and Tobago* at para 92.

²⁵⁹ There are 124 States that do not prohibit same-sex sexual conduct between consenting adults in private. Aengus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition* (May 2017) at 8-9, available at http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf.

²⁶⁰ *Jones v. The Attorney General of Trinidad and Tobago*, Claim No. CV2017-00720 at para 92.

The Petitioners submit that SOA sections 9 and 12, which interfere with their sexual lives, and the lives of all sexually active Barbadians irrespective of the sex or gender of the participating parties, are indefensible breaches of their Article 11 right to privacy. The provisions invade the ‘zone of solitude’ of the Petitioners and other LGBT people (and, due to the gender-neutral language of the provision, the ‘zone of solitude’ of different-sex couples too), without adequate justification.

Criminalisation of consensual sexual activity incites other violations of privacy

Furthermore, sections 9 and 12 encourage non-state actors to commit violations of LGBT peoples' right to privacy. For example, a number of LGBT people have fled from their homes in Barbados to other countries in order to avoid discrimination, harassment, and violence on the basis of their sexual orientation and/or gender identify (and hence their presumed or actual sexual activities), which infringe on personal privacy contrary to Article 11. Members of the LGBT community have also experienced property damage at their homes. In 2015, Darcy Dear, the founder of UGLAAB, had his truck windows smashed at least three times while his truck was in front of his home. On January 6, 2016, Petitioner Hoffmann's car was vandalized, with the rear window smashed. The car had been parked in her driveway at home.²⁶¹ Petitioner D.H. was threatened with physical violence in the privacy of his own home when his neighbours threatened “Your house want burning down.”²⁶² Police conduct that is abusively disrespectful of the honour and dignity of LGBT people is also a violation of Article 11 of the Convention.

Petitioner Hoffmann has also had her right to privacy violated by the police. Around February 2013, Petitioner Hoffmann and her mother had an argument over her difficulty in obtaining employment as an identifiably transgender person. When the police came to oversee the process of her being evicted from her family home, the responding constable did not just oversee the process, but instead inserted himself into the argument. He stated, "How do you expect anybody to hire you? Nobody knows what you are supposed to be, and you're causing all sorts of embarrassment to your mother!"²⁶³ The constable's comments had no respect for Petitioner Hoffmann's dignity or honour. As recounted by Petitioner S.A. from her involvement in the matter, in 2016, a male-presenting lesbian was raped. When the police arrived, one of the male police officers stated: "If you looked like a woman, this would not have happened."²⁶⁴ Such treatment of LGBT people by police—of which the Petitioners' experiences are hardly unique—amount to a violation of Article 11 of the Convention.

The facts demonstrate that the Barbadian Government has failed to protect LGBT peoples, resulting in intrusions into their private lives. Sections 9 and 12 of the SOA have no reasonable, non-discriminatory purpose and they violate Article 11 of the Convention.

²⁶¹ Declaration of Petitioner Hoffman at para 35.

²⁶² Declaration of Petitioner D.H. at para 14.

²⁶³ Declaration of Petitioner Hoffman at para 29.

²⁶⁴ Declaration of Petitioner S.A. at para 30.

3. Right to Respect for Physical, Mental and Moral Integrity (Article 5)

Article 5 of the Convention is titled in English as “Right to Humane Treatment” and more specifically states:

1. Every person has the right to have his physical, mental, and moral integrity respected.

The Petitioners submit that Barbados has failed to respect their physical, mental or moral integrity, contrary to Article 5(1).

The criminalisation of consensual sexual activity under sections 9 and 12 of the SOA are direct attacks on the *moral integrity* of the Petitioners. The provisions purport to criminalise the Petitioners’ identities, unjustifiably subjecting them to the destruction of their credibility and integrity in the eyes of the community. They are viewed as criminals and are consequently stigmatized.

As has been described above, the criminalisation of LGBT people pursuant to sections 9 and 12 of the SOA contributes to a culture in which LGBT people become targets, in various ways, for acts of physical violence and threats of such violence, directly violating their right to *physical integrity* and, necessarily, violating their *mental integrity* as well. Moreover, as a result of Barbadian authorities’ unwillingness to meaningfully investigate harassment and violence against LGBT Barbadians, LGBT Barbadians experience feelings of deep frustration and powerlessness in the face of such threats and violence, further violating their mental integrity.²⁶⁵ This, too, is a breach by Barbados of Article 5(1). In *Fernandez Ortega et al. v Mexico*, delays in an investigation caused the victim emotional harm, humiliation and degradation.²⁶⁶ The delays were characterized as emphasizing the “discrimination, subordination, and racism against the alleged victim and delegitimized her before members of her community.”²⁶⁷ The Inter-American Court found the State had breached Article 5(1), emphasizing the fact that the victim experienced “powerlessness related to the lack of justice in her case.”²⁶⁸

Petitioner Hoffmann has experienced this on more than one occasion. In February 2018, Petitioner Hoffmann was brutally attacked. A meat cleaver was used to cut her forehead, nose, upper lip, shoulder, and neck.²⁶⁹ She reported the attack to the police. However, days after she

²⁶⁵ Declaration of Petitioner S.A. at para 42: “...I don’t think that even if the laws change, it will make much difference for me... All of this leaves me wanting to die.”

²⁶⁶ *Fernandez Ortega et al. v Mexico*, Series C., No. 215 Judgment of August 30, 2010 at para 133, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_215_ing.pdf.

²⁶⁷ *Fernandez Ortega et al. v Mexico* at para 133.

²⁶⁸ *Fernandez Ortega et al. v Mexico* at para 137.

²⁶⁹ Declaration of Petitioner Hoffmann at para 48.

made her report, her attacker remained free despite Petitioner Hoffmann's statement which specified his place of residence and where he would likely be found. This is particularly disconcerting because when a similar attack occurred against a straight man in 2017, the police immediately arrested his attacker.²⁷⁰

Two incidents that Petitioner Hoffmann reported to the police in 2016 are still open for investigation. In April 2016, Petitioner Hoffmann reported that she was assaulted by a group of men, who threw stones and glass bottles at her.²⁷¹ Whenever she tried to follow up about the case, the responding constable was not available.²⁷² It turned out that no investigation had been conducted, and the responding constable had gone on vacation after collecting Petitioner Hoffmann's report, without delegating the matter to another constable.²⁷³ A new investigation began, resulting in the arrest of one of the men. However, the matter has not yet been heard before the courts, and none of the other men have been apprehended.²⁷⁴ Earlier in January 2016, Petitioner Hoffmann's car was vandalized. She reported the incident to the police.²⁷⁵ The investigation was plagued with delays. For example, it took almost a month for the responding constables to prepare a police statement for her to sign.²⁷⁶ Currently, this investigation is still open and no one has been charged.²⁷⁷

Barbados has also failed to ensure to the Petitioners the exercise *without discrimination* of their Article 5 right to physical, mental, and moral integrity, which breaches Article 1(1). As is amply demonstrated by the Declarations of the Petitioners, the existence of sections 9 and 12 of the SOA facilitates harassment and violence against, and induces fear throughout the lives of the Petitioners. For example, the provisions facilitate the fear that kept Petitioner S.A. silent in the face of sexual abuse by her step-uncle.²⁷⁸ Now, she will not show affection to her partner in public because she fears stigmatization, discrimination and violence. This undermines her mental and moral integrity. Similarly, Petitioner D.H. expects that he will never be able to start a family with a male partner in Barbados because of the stigma and discrimination he experiences (and any identified partner would also be at risk of experiencing), including threats of serious physical violence.²⁷⁹

²⁷⁰ Declaration of Petitioner Hoffmann at para 50.

²⁷¹ Declaration of Petitioner Hoffmann at paras 39-40.

²⁷² Declaration of Petitioner Hoffmann at para 42.

²⁷³ Declaration of Petitioner Hoffmann at para 44.

²⁷⁴ Declaration of Petitioner Hoffmann at para 47.

²⁷⁵ Declaration of Petitioner Hoffmann at paras 35-36.

²⁷⁶ Declaration of Petitioner Hoffmann at para 37.

²⁷⁷ Declaration of Petitioner Hoffmann at para 38.

²⁷⁸ See, e.g., Declaration of Petitioner S.A. at para 13.

²⁷⁹ Declaration of Petitioner D.H. at para 15.

Stigmatization, and its attendant consequence for career aspirations, personal security and health care, is also a thread that runs through all of the Petitioners' stories; the experiences they describe are not unique to the petitioners but mark the lives of many LGBT Barbadians. As a result, Petitioner Hoffmann and Petitioner S.A. have developed anxiety and depression, which continue to haunt them.²⁸⁰ All three Petitioners are fearful within their communities.²⁸¹ Barbados' failure to protect the Petitioners' right to have their "physical, mental, and moral integrity respected" constitutes a breach of Article 5(1) of the Convention.

Finally, the Petitioners submit that the continued existence of sections 9 and 12, in light of those provisions' adverse *impact on the mental health and HIV prevalence* among LGBT Barbadians, violates Article 5(1), and also does so in a discriminatory fashion contrary to Article 1(1).

As illustrated above, laws which criminalise same-sex intimacy disproportionately aggravate the HIV epidemic among men who have sex with men. This is for myriad reasons, including stigmatization by healthcare professionals, lack of knowledge on the part of healthcare professionals on issues facing LGBT people, and the reticence of LGBT people to come to health services when they fear arrest. These issues are magnified by the popular stigmatization and discrimination occasioned by provisions like sections 9 and 12.²⁸²

The Inter-American Court observed in *Gonzales Lluy et al. v. Ecuador* that "the right to personal integrity is directly and immediately linked to health care, and that the lack of adequate medical treatment may result in a violation of Article 5(1) of the Convention."²⁸³ Although that case concerned the regulation of health service providers, it would be illogical to conclude that Articles 5(1) and 1(1) do not also oblige the State to take legislative measures to reduce the need for adequate medical treatment in the first place. This is especially true where the impact of the State's failure to act results in a disproportionate health impact on a particular group, on grounds such as sexual orientation or gender identity, contrary to the requirement in Article 1 that the State take steps to ensure exercise of Convention rights without discrimination.

In essence, Barbados' reluctance to eliminate sections 9 and 12 discriminatorily forces a greater medical burden onto one particularly marginalized group. This violates the right to personal integrity guaranteed in Article 5 in light of Article 1(1).

4. Freedom of Expression (Article 13)

²⁸⁰ Declaration of Petitioner Hoffmann at paras 14, 23; Declaration of S.A. at paras 8, 13, 41.

²⁸¹ See e.g. Declaration of Petitioner Hoffmann at paras 34, 47, 64; Declaration of Petitioner S.A. at para 41, Declaration of Petitioner D.H. at paras 13, 15.

²⁸² Affidavit of Professor Chris Beyrer at para 21.

²⁸³ *Gonzales Lluy et al. v. Ecuador* at para 171.

*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.*²⁸⁴

Article 13's guarantee of freedom of expression strikes a balance between the rule of law and the pluralistic demands of democracy. The foundational importance of free expression cannot be understated. Justice Cardozo of the United States Supreme Court described freedom of expression as 'the matrix, the indispensable condition of nearly every other form of freedom.'²⁸⁵ Other jurists, such as Justice Rand of the Supreme Court of Canada, have described it as "little less vital to man's mind and spirit than breathing is to his physical existence."²⁸⁶ The Inter-American Court has itself stated that "[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests."²⁸⁷

With this recognition of the foundational importance of free expression to the democratic spirit in mind, the drafters of Article 13 of the American Convention adopted, and indeed strengthened, much of the language of Article 19 of the ICCPR.²⁸⁸ The relevant provisions of Article 13 read as follows:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.²⁸⁹

Through the inclusion of the words "through any other medium of one's choice," the drafters of Article 13(1) intended to protect a very broad range of modes of expression.²⁹⁰ Indeed, State

²⁸⁴ *National Coalition for Gay and Lesbian Equality and Anor v. Minister of Justice* at para. 28.

²⁸⁵ *Palko v. Connecticut*, 302 US 319 (1937) at 327.

²⁸⁶ *Switzman v. Elbling and A.G. of Quebec* [1957] SCR 285 at 306.

²⁸⁷ Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29, American Convention on Human Rights)*, Advisory Opinion OC-5/85, Series A, No. 5 (Nov. 13, 1985) at para 70, cited in *Herrera-Ulloa v. Costa Rica* at para 112.

²⁸⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Article 19 [hereinafter ICCPR].

²⁸⁹ American Convention, Article 13.

²⁹⁰ Similar words are used in Article 19 of the ICCPR, the *travaux préparatoires* for which confirm the comprehensive scope of application. See Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd Ed. (Germany: NP Engel, 2002) at 445.

Parties to the ICCPR have recognized in their submissions to the Human Rights Committee on the interpretation of the similarly worded Article 19 of the ICCPR, that “the right to freedom of expression does not depend on the mode of expression...”²⁹¹ The Supreme Court of Canada has stated that if an activity “conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the [free expression] guarantee [contained in the Canadian constitution].”²⁹² The United States Supreme Court has held that conduct will be protected when there is “[a]n intent to convey a particularized message” and that message is likely to be understood by those receiving it.²⁹³ The Inter-American Court has itself adopted this expansive approach and stated that the right to freedom of expression includes “the right to use any appropriate method to disseminate ideas...”²⁹⁴

The Petitioners submit that their freedom of expression, and that of all LGBT people in Barbados, has been violated in two ways by the Barbadian government’s refusal to repeal sections 9 and 12 of the SOA:

- First, these sections directly and unjustifiably prohibit a form of expression, namely consensual same-sex intimacy. (As noted, the buggery law also criminally prohibits anal sex committed between a man and a woman, although it is primarily understood as addressing sex between men; the serious indecency provision similarly disproportionately is understood as affecting same-sex sexual expression.)
- Second, the Barbadian government has failed to halt harassment and discrimination by third parties against LGBT people, precluding the full and free exercise of their right to free expression. This takes the form of harassment on the basis of the Petitioners’ sexual orientation and/or gender identity (including their gender expression via their appearance, manner of dress, etc.)

Consensual sexual expression, including same-sex intimacy

By criminalising same-sex intimacy, sections 9 and 12 of the SOA prohibit a particular medium of expression, primarily affecting the LGBT community. It therefore violates Article 13. The consequences to the Petitioners are significant: Petitioner Hoffmann has not been in a relationship in recent years because prospective partners are concerned for their safety, a concern arising in part out of the criminalisation of their potential sexual activity under sections 9 and 12, and the hostile and even dangerous environment such provisions engender. Petitioner D.H. similarly feels he is unlikely to be able to form a long-lasting relationship with a partner given such an environment of criminalisation and hostility. Petitioner S.A. fears the consequences for

²⁹¹ *Kivenmaa v. Finland* (No. 412/90) at para 7.2.

²⁹² *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 SCR 927 at para 42.

²⁹³ *Texas v. Johnson*, 491 US 397 (1989) at 404.

²⁹⁴ “*The Last Temptation of Christ*” (*Olmedo-Busto et al.*) v. *Chile* at 65; *Ivcher-Bronstein v. Peru* at para 147; *Herrera-Ulloa v. Costa Rica* at para 109.

her spouse of being too visibly identified as such (and therefore her presumed sexual partner). All the Petitioners, and many members of the LGBT community, have experienced violence or threats of violence based on their presumed sexual activity with persons of the same sex, which is criminalised or perceived as criminalised under Barbados' prohibitions in the SOA on buggery and serious indecency.

The Petitioners submit that sexual intimacy is clearly expressive conduct and therefore protected by Article 13. The content of that expression is undoubtedly varied and personal to the individual engaging in the intimacy, but can clearly be connected to expressions of love and respect. Sexual intimacy, even when conducted in private, may also carry with it political meaning, for instance as a sign of protest.

The Inter-American Court has explicitly noted that the *expression* of one's sexual orientation, including through consensual sexual activity, attracts protection under the Convention. As noted above, in *Flor Freire v. Ecuador*, Ecuador was found to have breached the Convention for discharging a soldier from the armed forces on the basis of his having engaged in consensual sexual activity with another man. The complaint had not alleged a violation of his freedom of expression *per se*, so the Court did not engage in any specific analysis of Article 13 of the Convention. However, the Court declared that the right to enjoyment of Convention rights without discrimination on the basis of sexual orientation (under Article 1.1) is not limited simply to the status of being homosexual but also includes the expression of that sexual orientation in a person's life. As noted in the passages below, the Court specifically noted that sexual acts are a means of expressing one's sexual orientation (para 119), and that the prohibition of discrimination based on sexual orientation includes protection of the person's expression of their sexual orientation (para 127):

119. Adicionalmente, este Tribunal ha establecido que el alcance del derecho a la no discriminación por orientación sexual no se limita a la condición de homosexual en sí misma, sino que incluye su expresión y las consecuencias necesarias en el proyecto de vida de las personas¹⁷¹. En este sentido, **los actos sexuales son una manera de expresar la orientación sexual de la persona**, por lo que se encuentran protegidos dentro del mismo derecho a la no discriminación por orientación sexual.

[...]

127. Este Tribunal destaca que, con el propósito de preservar la disciplina militar, podría resultar razonable y admisible la imposición de restricciones a las relaciones sexuales al interior de las instalaciones militares o durante el servicio. No obstante, la ausencia de una justificación adecuada para la mayor gravedad de la sanción asignada a los actos sexuales homosexuales, genera una presunción sobre el carácter discriminatorio de esta medida. Asimismo, resalta que la diferencia de regulación existente en el presente caso frente a los actos homosexuales tenía como efecto excluir la participación de personas homosexuales en las fuerzas armadas. **En este sentido, la Corte recuerda que la prohibición de discriminación con base en la orientación sexual de una persona incluye la protección de la expresión de dicha orientación sexual (supra párr. 119). Al sancionar los “actos de homosexualidad” dentro o fuera del servicio, el artículo**

117 del Reglamento de Disciplina Militar castigaba toda forma de expresión de esta orientación sexual, restringiendo la participación de personas homosexuales en las fuerzas armadas ecuatorianas.²⁹⁵

The Court concluded that the State had discriminated against the complainant, contrary to Article 24 and Article 1 of the Convention, for dismissing him from his employment based on his consensual sexual activity that was an expression of his sexual orientation.²⁹⁶

The Petitioners further submit that these provisions in Barbadian law criminalising consensual same-sex sexual activity not only violate Article 24's right to equality before the law, in conjunction with Article 1 (as was found in *Flor Freire*), but given the *dicta* in that ruling, and the obvious expressive value of sexual activity, they also violate freedom of expression contrary to Article 13 of the Convention. The Petitioners submit that the provisions' imposition of a potential criminal sanction violate the freedom of expression of all sexually active adults who engage in the wide array of consensual acts prohibited by SOA sections 9 and 12. Furthermore, since the provisions necessarily infringe the freedom of expression of gay men and (some) trans women with their consenting male partners (i.e., the prohibition on buggery in section 9) and disproportionately infringe the freedom of LGBT people more generally to express their sexual orientation and/or gender identity upon risk of criminal penalty (i.e., under the prohibition on serious indecency in section 12), they also violate the Article 13 guarantee of freedom of expression in a discriminatory fashion, contrary to the guarantee in Article 1 of the right to enjoy all Convention rights without discrimination on the basis of sexual orientation or gender identity.

Obligation to ensure full enjoyment of the right to free expression

The Court has held that “it is possible for freedom of expression to be unlawfully curtailed by *de facto* conditions that directly or indirectly place those who exercise it in a situation of risk or increased vulnerability.”²⁹⁷ States must therefore not act in a manner that “propitiates, encourages, favors or increases that vulnerability” and must adopt measures to “prevent violations or protect the rights of those who find themselves in such a situation.”²⁹⁸

Thus, the obligation imposed by Article 13 on Barbados extends beyond merely refraining from direct interference with the Petitioners' right to free expression. Barbados must take measures to relieve *de facto* conditions contributing to the Petitioners' increased vulnerability and take further measures to prevent and redress violations of their rights.

Where, as here, third parties are also responsible for committing acts which violate an individual's rights, liability will accrue to the State if the State fails to comply, by action or

²⁹⁵ *Flor Freire v. Ecuador* at paras 119 and 127 [emphasis added].

²⁹⁶ *Ibid.*, at para 140.

²⁹⁷ *Uzategui et al. v. Venezuela* at para 190; *Vargas v. Columbia* at para 172; *Rios et al. v. Venezuela* at para 107.

²⁹⁸ *Uzategui et al. v. Venezuela* at para 190; *Vargas v. Columbia* at para 172; *Rios et al. v. Venezuela* at para 107.

omission, with the obligation included in Article 1(1) of the Convention.²⁹⁹ Article 1(1) contains a positive obligation on Barbados to ensure that all individuals under its jurisdiction are able to fully and freely exercise the rights guaranteed to them by the Convention without discrimination:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

A similar provision, Article 2(1), exists within the ICCPR and was the subject of General Comment 34 by the UN Human Rights Committee, which addressed the ICCPR's free expression guarantee:

The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.³⁰⁰

Through its refusal to repeal sections 9 and 12 of the SOA, Barbados has failed to ensure that the Petitioners are able to freely and fully exercise their guaranteed right to free expression. The harassment they experience by private parties may be traced in part to sections 9 and 12.

The Commission has noted this issue before. In its 2010 Annual Report, the Commission noted that Peru should “take positive measures to eradicate socio-cultural practices and discourse contrary to the *freedom of expression of gender-related identities, attitudes, and practices that are not heterosexual* in keeping with the provisions” of a Peruvian plan to protect the rights of homosexuals.³⁰¹

Similarly, the UN Special Rapporteur on the right to freedom of opinion and expression sent a letter of allegation to Jamaican authorities expressing concern that the expression rights of LGBT Jamaicans were being compromised by, in part, “violent attacks by homophobic individuals who may have gained the impression that the Government would not vigorously pursue such violence.”³⁰²

²⁹⁹ *Rios et al. v. Venezuela* at para 109.

³⁰⁰ UN Human Rights Committee, *General comment No. 34*, CCPR/C/GC/34 (Sept. 12, 2011) at para 7.

³⁰¹ Inter-American Commission on Human Rights, *Evaluation of Human Rights in the Americas During IACHR Regular Sessions*, Press Release N° 07/06 (Mar. 17, 2006), available at <http://www.cidh.org/Comunicados/English/2006/7.06eng.htm>

³⁰² UN Commission on Human Rights, *The right to freedom of opinion and expression – Summary of cases transmitted to Governments and replies received*, E/CN.4/2005/64/Add.1 (Mar. 29, 2005) at para 494.

The Inter-American Court itself has linked states' failure to recognize gender and sexual identities with a failure to ensure full enjoyment of freedom of expression. In its *Advisory Opinion OC-24/17*, the Court held:

[T]he Court agrees with the Commission when it pointed out that a lack of recognition of gender or sexual identity could result in indirect censure of gender expressions that diverge from cisnormative or heteronormative standards, which would send a general message that those persons who diverge from these "traditional" standards would not have the legal protection and recognition of their rights in equal conditions to persons who do not diverge from such standards. [emphasis added]³⁰³

The existence of sections 9 and 12 of the SOA facilitates harassment against LGBT people by state and non-state actors, including harassment on the basis of sexual orientation, gender identity and expression (including mannerisms, appearance, and style of dress). Petitioner Hoffmann has experienced precisely this. Since she was a child, Petitioner Hoffmann has been harassed because of her sexual orientation and gender identity, from people she knows and from complete strangers. In public spaces, particularly in government institutions, there is resistance to her gender expression, as well as her choice of name.³⁰⁴ Petitioner Hoffmann has been called a slew of derogative names including "buller, faggot, batty-boy, batty-man, girly-girl, chi-chi, he-she, and taperd."³⁰⁵ These homophobic and transphobic remarks are not only made by adults, but also by children.³⁰⁶ Public transportation drivers and conductors will sometimes refuse to stop or prevent her from boarding. Petitioner Hoffmann tries to avoid certain buses based on their license plates as a result of prior harassment by the drivers and conductors.³⁰⁷ People have physically assaulted her³⁰⁸ and recited the lyrics of homophobic songs at her.³⁰⁹ Others have made hand gestures at her, imitating the firing of a gun.³¹⁰

Unsurprisingly, Petitioner Hoffmann fears for her safety when she is away from home.³¹¹ In other words, she is unable to enjoy the full measure of her right to free expression. In refusing to repeal laws criminalising consensual sexual activity, Barbados continues to contribute to such an environment of hostility, discrimination and violence.

³⁰³ Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at para 97.

³⁰⁴ Declaration of Petitioner Hoffman at para 55.

³⁰⁵ Declaration of Petitioner Hoffman at para 15.

³⁰⁶ Declaration of Petitioner Hoffman at para 34.

³⁰⁷ Declaration of Petitioner Hoffman at para 56.

³⁰⁸ Declaration of Petitioner Hoffman at paras 39, 48.

³⁰⁹ Declaration of Petitioner Hoffman at para 53.

³¹⁰ Declaration of Petitioner Hoffman at para 52.

³¹¹ Declaration of Petitioner Hoffman at para 54.

Similarly, Petitioner S.A. has been verbally abused as a result of her expression. Her mother harassed and humiliated her because of her “boyish” manner of presenting herself. She has been repeatedly intimidated by other people on the basis of her expression and sexual orientation in much the same way as Petitioner Hoffmann. Her appearance also appears to be at the root of her unemployment:

Most of the time, when someone meets me in person, they appear uncomfortable and quickly thank me for coming, while telling me that they won’t hire me. I have been told by a human resources person that “people don’t want your kind of person in a customer service job, because they are afraid that customers won’t come back.” In my experience, if a gay person gets a job, it is because she or he is not very out or very visible. I also believe that gay men are more likely to get a job than a male-presenting lesbian.³¹²

Petitioner D.H.’s situation is somewhat different as he is less often identified as gay³¹³ because his mannerisms, appearance and style of dress do not conform to common stereotypes associated with gay men that are frequently used as supposed “markers” of gay sexual orientation. Nevertheless, having sometimes been identified as a gay man, he has been the subject of homophobic slurs and negative comments, as well as threats of serious violence, made by others about his sexual orientation.³¹⁴ Petitioner D.H. has observed straight individuals treat members of the LGBT community, who are identifiably gay, in a discriminatory manner.³¹⁵ Their free expression of their sexual orientation through their appearance and behaviour resulted in discrimination. As a result of such manifest homophobia, including threats, he tries to keep to himself, and fears that he will never be able to have a long-term relationship openly in Barbados because of the risks.

The facts highlighted in the Petitioners’ Declarations demonstrate a failure by the authorities to adopt measures necessary to halt the harassment and discrimination faced by LGBT people and to allow them to exercise their right to freely express their sexual orientation or gender identity. Instead, the Petitioners live in fear for their safety and have consequently been silenced. When viewed together with Article 1 of the Convention, this is a breach of Article 13 by Barbados.

There is no justification for these restrictions

Similar to the ECtHR³¹⁶ and the UN Human Rights Committee³¹⁷, the Court has stated that a permissible restriction on the right to freedom of expression under Article 13 must be (a) provided by law, (b) have a legitimate aim, and (c) be “necessary in a democratic society”. The

³¹² Declaration of Petitioner S.A. at para 21.

³¹³ Declaration of Petitioner D.H. at para 7.

³¹⁴ Declaration of Petitioner D.H. at para 15.

³¹⁵ Declaration of Petitioner D.H. at paras 16-17.

³¹⁶ *Müller and Others v. Switzerland* (No. 10737/84) at para 26.

³¹⁷ ICCPR, Article 19(3); UN Human Rights Committee, *General comment No. 34*, CCPR/C/GC/34 (Sept. 12, 2011) at paras 21-22.

Court has outlined the following legitimate aims: i) respect for the rights or reputation of others, ii) protection of national security, iii) protection of public order, and iv) protection of public health or morals.³¹⁸ The State must prove the restriction corresponds to one of these purposes.³¹⁹ Moreover, as any such restriction must be “necessary in a democratic society”, a showing of a compelling government purpose is required.³²⁰ A restriction will not be “necessary” if its purpose is merely “useful,” “reasonable” or “desirable”. Rather, the restriction’s purpose must be a “pressing social need.”³²¹ Thus, the restriction must be “proportionate to the legitimate interest that justifies it and must be limited to what is strictly necessary to achieve that objective.”³²² It cannot be overbroad. To determine whether a restriction is proportionate to the legitimate aim, the case as a whole, including context, must be examined.³²³

It is conceded that the restriction is provided by law. However, the restriction does *not* have a legitimate aim and is not necessary in a democratic society.

States can invoke “public health” as a “legitimate aim” justifying a restriction of freedom of expression in order to allow a State to take measures to deal with a serious health threat.³²⁴ However, this would not be a legitimate aim in this case. As explained above, laws which criminalise same-sex sexual behaviour, like section 9 of the SOA, in fact *worsen* the HIV epidemic. Restricting the Petitioners’ right to free expression, as well as other LGBT individuals, would likely increase the risk of HIV transmission and decrease access to HIV services, exacerbating the health threat of HIV.³²⁵

States often invoke the concept of “public morality” as a “legitimate aim” justifying limitations on the right to freedom of expression of individuals and organizations. The UN Human Rights Committee has observed that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations [...] for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”.³²⁶ The limitation must be essential for maintaining respect for the fundamental views of the State.³²⁷

³¹⁸ *Herrera-Ulloa v Costa Rica* at para 120.

³¹⁹ *Claude-Reyes et al. v. Chile* at para 90.

³²⁰ *Herrera-Ulloa v Costa Rica* at para 120, citing *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* at para 46.

³²¹ *Herrera-Ulloa v Costa Rica* at para 122.

³²² *Herrera-Ulloa v Costa Rica* at para 123 [emphasis added].

³²³ *Müller and Others v. Switzerland* (No. 10737/84) at para 32.

³²⁴ *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1984/4, Annex (1984) at para 25.

³²⁵ Affidavit of Professor Chris Beyrer.

³²⁶ UN Human Rights Committee, *General comment No. 22*, CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993) at para 8.

³²⁷ *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1984/4, Annex (1984) at para 25.

In *Handyside v. United Kingdom*, the confiscation of a reference schoolbook geared towards children and adolescents, which included a section on sex, was held not to violate the freedom of expression guarantee in the European Convention. The ECtHR found the book would likely deprave and corrupt most of the children likely to read it, and therefore its confiscation was necessary for the protection of morals in a democratic society.³²⁸ In regards to restricting freedom of expression in order to protect morals, the ECtHR clarified that:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. [...] [I]t is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.³²⁹

The ECtHR has held that State authorities are in a better position to determine whether a restriction is necessary to protect morals, due to the fact that morals differ over time and from location to location. However, the ECtHR makes the final decision on whether the restriction is reconcilable with the right to freedom of expression guarantee.³³⁰

In *Kaos GL v. Turkey*, seizure of all copies of a magazine published by the Kaos cultural research and solidarity association for gays and lesbians (Kaos GL) was held to be in violation of the organization's right to freedom of expression. The magazine did contain articles on pornography related to homosexuality, with a few explicit images, however, Turkey's actions were not proportionate to the aim of protecting society's morals. A less intrusive interference (e.g. not selling the magazine to minors) should have instead been implemented.³³¹ In *Fedotova v. Russian Federation*, a lesbian woman who displayed posters declaring "Homosexuality is normal" and "I am proud of my homosexuality" near a secondary school was fined for displaying propaganda of homosexuality among minors.³³² The UN Human Rights Committee rejected the argument that Russia's law prohibiting propaganda of homosexuality among minors was a permissible restriction on the right of freedom of expression in order to protect morality. The Russian government did not show "that a restriction on the right to freedom of expression in

³²⁸ *Handyside v. United Kingdom* (No. 5493/72) at para 33.

³²⁹ *Handyside v. United Kingdom* (No. 5493/72) at para 49.

³³⁰ *Handyside v. United Kingdom* (No. 5493/72) at para 48; *Müller and Others v. Switzerland* (No. 10737/84) at para 35; *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland* (No. 14234/88) at para 68.

³³¹ European Court of Human Rights, *Judgment Kaos GL v. Turkey – violation of an LGBT association's right to freedom of expression*, Press Release – Chamber Judgments (Nov. 22, 2016), available at <http://hudoc.echr.coe.int/eng?i=003-5554597-6999894>.

³³² *Fedotova v. Russian Federation* CCPR/C/106/D/1932/2010 at paras 2.2-2.3.

relation to “propaganda of homosexuality” – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria.”³³³

The Petitioners submit that the restriction placed on their expression cannot be justified. There is no legitimate aim. In this case, sections 9 and 12 appear to be protecting society's prejudices, not morals. Moreover, the fact that sections 9 and 12 are rarely enforced suggests that they are not essential to protect society's morals. Sections 9 and 12 exacerbate a public health crisis rather than facilitate its resolution.

Even if sections 9 and 12 were proven to protect morals, they are not necessary in a democratic society. To be necessary, the restriction would have to be the least restrictive option available for protecting morality.³³⁴

The absolute criminal prohibition of same-sex intimacy is a disproportionate interference with the Petitioners' expression. The majority of cases dealing with restrictions on freedom of expression to protect morality involve publications dealing with obscenity, pornography, blasphemy, and information on homosexuality, with a focus on access to said publications by minors.³³⁵ In the Petitioners' case, same-sex intimacy is an expression that occurs between consenting adults. Homosexuality, and acts of same-sex intimacy, may offend a significant number of Barbadians, including government officials. However, as stated in *Handyside v. United Kingdom*³³⁶, and reiterated in cases by the Court³³⁷ and the ECtHR³³⁸, the Petitioners should not be restricted from being expressive in a manner which “offends, shocks, or disturbs” the State or population, particularly as this expression occurs in private.

Similarly, the indirect restriction of the manner in which the Petitioners express themselves in public is a disproportionate interference with their freedom of expression and violates Article 13 in light of Article 1(1). The UN Human Rights Committee has held that permissible restrictions on freedom of expression for the purpose of protecting morality must be framed around the

³³³ *Fedotova v. Russian Federation* CCPR/C/106/D/1932/2010 at para 10.6.

³³⁴ *Ricardo Canese v. Paraguay* at para 96; *Palamara Iribarne v. Chile* at para 85.

³³⁵ Elizabeth K. Cassidy, “Restricting Rights? The Public Order and Public Morality Limitations on Free Speech and Religious Liberty in UN Human Rights Institutions” (2015) 13:1 *The Review of Faith & International Affairs* 5 at 10; *Handyside v. United Kingdom* (No. 5493/72); *Müller and Others v. Switzerland* (No. 10737/84); *Fedotova v. Russian Federation* CCPR/C/106/D/1932/2010; *Kaos GL v. Turkey*, European Court of Human Rights, Application No. 4982/07, Judgment of 22 November 2016 (in French only; English summary available in European Court of Human Rights, Press Release: “Seizure of all copies of a magazine published by an association promoting LGBT rights in Turkey breached its right to freedom of expression,” 22 November 2016, available at: <http://hudoc.echr.coe.int/eng?i=003-5554597-6999894>).

³³⁶ *Handyside v. United Kingdom* (No. 5493/72) at para 49.

³³⁷ *Herrera-Ulloa v. Costa Rica* at para 113; “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) *v. Chile* at para 69; *Ríos et al. v. Venezuela* at para 105; *Ivcher Bronstein v. Peru* at para 152; *Perozo et al. v. Venezuela* at para 116.

³³⁸ *Müller and Others v. Switzerland* (No. 10737/84) at para 33; *Otto-Preminger-Institut v. Austria* (No. 13470/87) at para 49; *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland* (No. 14234/88) at para 71.

principle of non-discrimination.³³⁹ However, the Petitioners are being harassed by third parties on the basis of their sexual orientation, a protected ground now recognized under Article 1(1), and the State is not working to stop this harassment so they can freely express themselves. This suggests the restriction on the Petitioners' freedom of expression is not permissible because it is discriminatory.

5. Right to Family (Article 17)

Article 17 of the Convention outlines the rights of the family. Article 17(1) states:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.³⁴⁰

The Court has established that “the State is obliged to promote the development and strengthening of the family unit” because “the mutual enjoyment of the harmonious relations between parents and children is a fundamental aspect of family life.”³⁴¹ The Court has broadly interpreted the term ‘family unit’, including all persons connected by a close relationship.³⁴² Thus, the relationship between parents and children is protected.

Very recently, the Court held that same-sex couples have the right to recognition of their families: “Pursuant to the protection of private and family life (Article 11(2)), as well as the right to protection of the family (Article 17), the American Convention protects the family ties that may derive from a relationship between persons of the same sex.”³⁴³

The High Court of Trinidad and Tobago recently held that that state’s anti-buggery and serious indecency provisions violated Trinidad and Tobago’s constitutional “right to a private and family life.” It noted:

To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any unreasonable intervention by the State. In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and make a family with and not have to live under the constant threat, the proverbial “Sword of Damocles”, that

³³⁹ UN Human Rights Committee, *General comment No. 34*, CCPR/C/GC/34 (Sept. 12, 2011) at para 26.

³⁴⁰ American Convention, Article 17(1).

³⁴¹ *Fornerón and daughter v. Argentina* at para 116; *Vélez Restrepo and family v. Colombia* at para 225; *Expelled Dominicans and Haitians v. Dominican Republic* at para 414.

³⁴² *Fornerón and daughter v. Argentina* at para 98.

³⁴³ Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at para 199.

at any moment she/he may be persecuted or prosecuted. That is the threat that exists at present...

The claimant, and others who express their sexual orientation in a similar way, cannot lawfully live their life, their private life, nor can they choose their life partners or create the families that they wish. To do so would be to incur the possibility of being branded a criminal. The [*Sexual Offences Act*] impinges on the right to respect for a private and family life.³⁴⁴

The criminalisation of same-sex conduct, and by default, homosexuality itself, has had devastating consequences on LGBT individuals' family relationships. By fostering discrimination against LGBT individuals on the basis of their sexual orientation, Barbados has indirectly damaged LGBT individuals' family relationships, causing a breakdown of the family unit. Young people are evicted by their parents and familial bonds are strained or broken.³⁴⁵ One lesbian's mother stated that "she would rather have [her daughter] die than to be this way".³⁴⁶

By criminalising same-sex conduct, Barbados has violated the Petitioners' rights of the family guaranteed under Article 17(1) of the Convention. All three Petitioners state that familial relationships have been strained or severed because of the discrimination and violence they face as a result of being LGBT individuals. Maintaining sections 9 and 12 of the SOA negatively affects the Petitioners' relationships with their family members as it validates family members' homophobic attitudes. Their family relationships are further strained because their family members may face discrimination and harassment themselves if they continue to associate with the Petitioners.

All three Petitioners have difficult relationships with their families. Petitioner Hoffmann's mother was distraught upon learning she was sexually attracted to men, and was uncomfortable with her transition.³⁴⁷ Her father never knew of Petitioner Hoffmann's sexual orientation or gender identity, out of fear that he would evict her from their family home.³⁴⁸ At one point, her mother tried to permanently evict Petitioner Hoffmann from their family home after an argument over Petitioner Hoffmann's difficulty in obtaining employment,³⁴⁹ given widespread societal discrimination rooted in homophobia and transphobia—discrimination that is encouraged by the criminalisation of consensual same-sex intimacy under sections 9 and 12 of the SOA. Despite

³⁴⁴ *Jones v. The Attorney General of Trinidad and Tobago*, Claim No. CV2017-00720 at paras 91-92.

³⁴⁵ B-GLAD, Voices – Barbados LGBT Speaking Out Report (Dec. 7, 2014), available at <https://www.youtube.com/watch?v=qR92dhAKfM&feature=youtu.be>; Joe Morgan, *This young gay woman has gone from being homeless to a hero for LGBTI rights*, Gay Star News (May 16, 2015), available at <http://www.gaystarnews.com/article/young-gay-woman-has-gone-being-homeless-hero-lgbti-rights160515-131931/>.

³⁴⁶ B-GLAD, Voices – Barbados LGBT Speaking Out Report (Dec. 7, 2014), available at <https://www.youtube.com/watch?v=qR92dhAKfM&feature=youtu.be>.

³⁴⁷ Declaration of Petitioner Hoffmann at paras 26, 28.

³⁴⁸ Declaration of Petitioner Hoffmann at para 27.

³⁴⁹ Declaration of Petitioner Hoffmann at para 29.

reconciliation after the argument, their relationship remained strained until her mother's death, particularly because her mother was concerned about being subjected to harassment or violence when she was in public with Petitioner Hoffmann.³⁵⁰ Petitioner Hoffmann is estranged from her extended family because of their homophobic and transphobic attitudes, to which SOA sections 9 and 12 contributes.³⁵¹

As a result of her sexual orientation, Petitioner S.A. suffered from physical, psychological, and sexual abuse at the hands of her mother and step-uncle. Her mother threw hot water at her and her step-uncle sexually abused her for five years, beginning when she was 12. She was too frightened to tell anybody in case her step-uncle told her mother that she was a lesbian.³⁵² Her mother humiliated her by forcing her to wear female swimsuit at an inappropriate event.³⁵³ Her relationship with her godfather was strained.³⁵⁴ When she was older, from her late teenage years to her early twenties, Petitioner S.A. faced a constant threat of homelessness from her mother because of her sexual orientation.³⁵⁵ Currently, Petitioner S.A. is considering moving away from Barbados if she decides to have children with her wife. She is worried their children will be treated poorly if it becomes known that they have two mothers because of the homophobia that runs rampant in Barbados—homophobia which is maintained by the presence of sections 9 and 12 of the SOA.³⁵⁶

As evidenced by the Petitioners' experiences with familial relationships, Barbados is failing in their duty to support the development of the family unit for LGBT individuals from the continued existence of sections 9 and 12 of the SOA.

³⁵⁰ Declaration of Petitioner Hoffmann at para 30.

³⁵¹ Declaration of Petitioner Hoffmann at para 31.

³⁵² Declaration of Petitioner S.A. at para 13.

³⁵³ Declaration of Petitioner S.A. at para 11.

³⁵⁴ Declaration of Petitioner S.A. at paras 34-36.

³⁵⁵ Declaration of Petitioner S.A. at para 17.

³⁵⁶ Declaration of Petitioner S.A. at paras 38-40.

6. Right to a Hearing for Determination of Rights (Article 8) & Right to Judicial Protection (Article 25)

Article 8 of the Convention outlines the right to have one's rights determined by a tribunal. Article 8(1) states:

1. Every person has the **right to a hearing**, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or **for the determination of his rights** and obligations of a civil, labor, fiscal, or any other nature.³⁵⁷

Meanwhile, Article 25 of the Convention guarantees the right to judicial protection:

1. Everyone has the **right to simple and prompt recourse**, or any other effective recourse, to a competent court or tribunal **for protection against acts that violate his fundamental rights** recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.³⁵⁸

Under Article 25, the Court has recognized that the State has an obligation to "guarantee the rights of all persons under its jurisdiction to an effective judicial remedy against violations of their fundamental rights. Mere availability of said remedies will not suffice; **these remedies must be effective; i.e. they must be suitable to offer results or answers to violations of the rights protected under the Convention.**"³⁵⁹

Based on the protection granted by both Articles 8 and 25, the Court has established there is a positive obligation on the State to not only prevent violations of human rights, but to investigate alleged violations as well.³⁶⁰ This is an obligation of means and not of results. The State must

³⁵⁷ American Convention, Article 8(1). [emphasis added]

³⁵⁸ American Convention, Article 25. [emphasis added]

³⁵⁹ *Baldeón García v Peru* at para 144. [emphasis added]

³⁶⁰ *Barrios family v Venezuela* at para 174.

investigate diligently in an attempt to avoid impunity and the repetition of human rights violations.³⁶¹ The Court has stated:

In light of this obligation, once the State authorities are aware of an incident, they must open, *ex officio* and immediately, a serious, impartial and effective investigation using all legal means available, designed to determine the truth and to pursue, capture, prosecute and eventually punish all the perpetrators of the acts, especially when State agents are or could be involved.³⁶²

Moreover, the obligation exists even if the perpetrator is a private individual, because, if "their acts are not investigated genuinely, they would, to some extent, be assisted by the public authorities."³⁶³ In *Baldeón García v Peru*, the State was found to infringe the obligations outlined in Article 8(1) of the Convention because they failed to carry out an effective investigation.³⁶⁴ The "State should have attempted...an efficient investigation and judicial proceedings aimed at clarifying the events, punishing the perpetrators of the acts and granting an appropriate compensation."³⁶⁵

The continued existence of sections 9 and 12 of the SOA help maintain a homophobic environment in Barbados.³⁶⁶ Police officers, who should be working to keep all Barbadians safe, instead contribute to the harassment of LGBT individuals and do not react seriously when LGBT individuals report verbal or physical abuse, or even prevent LGBT people who experience assault from seeking protection and recourse against acts that violate their fundamental rights. . This is in direct violation of Articles 8 and 25, which require serious, impartial, and effective investigations.

Petitioner Hoffmann has experienced police inaction and ineffective investigations firsthand. In 2016, she was assaulted by a group of men, who threw stones and glass bottles at her. She attempted to defend herself, and threw a few bottles back at them.³⁶⁷ Petitioner Hoffmann reported the assault to the police. Instead of focusing on the original assault, the responding

³⁶¹ *Vélez Restrepo and family v Colombia* at 247.

³⁶² *Barrios family v Venezuela* at para 176.

³⁶³ *Barrios family v Venezuela* at para 177.

³⁶⁴ *Baldeón García v Peru* at para 148.

³⁶⁵ *Baldeón García v Peru* at para 147.

³⁶⁶ As noted elsewhere in this Petition, the High Court of Trinidad and Tobago found precisely this in its consideration of that state's equivalent anti-buggery and serious indecency provisions: "The claimant has given uncontroverted evidence of the discrimination, threats and abuse that he has suffered by being an openly homosexual male in Trinidad and Tobago. The court is in no doubt that the sanction imposed on him by the State under these provisions affects his ability to freely express himself and his thoughts in public. Those criminal sanctions have the potential to be used oppressively by differently minded citizens as a foundation for hate as condoned by the State...": *Jones v. Attorney General of Trinidad and Tobago*, at para 94.

³⁶⁷ Declaration of Petitioner Hoffmann at para 39.

constable concentrated on the fact she had defended herself against the assault.³⁶⁸ When Petitioner Hoffmann tried to follow up with the constable, she was unable to reach him.³⁶⁹ She learned that he had gone on vacation after responding to her report and had not delegated the case to another constable. No investigation had been conducted.³⁷⁰ All of the constable's actions, from not focusing on the original assault to not delegating the case, suggest the investigation was not being carried out effectively. There is also the issue of investigations being carried out impartially. Recently, in 2018, Petitioner Hoffmann was brutally attacked.³⁷¹ She reported the attack to the police. While following up on the case, the sergeant Petitioner Hoffmann was speaking with referred to her as "he/she/I don't know!"³⁷² This is of concern, and raises the worry that the investigation may not be carried out impartially or at all because of Petitioner Hoffmann's sexual orientation and gender identity.

Petitioner S.A. has also experienced the police's failure to act first hand. On another occasion in 2016, a lesbian was raped and Petitioner S.A. phoned the police. When the police arrived, Petitioner S.A. heard one of the male officers tell the victim: "If you looked like a woman, this would not have happened."³⁷³ The woman who was raped decided not to proceed with a report to the police about the rape because "she thought they would not investigate her case seriously based on the officer's comment."³⁷⁴ It is also a cruel irony that the actual sexual abuse experience by Petitioner S.A. as a young adolescent, at the hands of her step-uncle who threatened to expose her as a lesbian if she did not accede, goes unreported and unprosecuted, with no effective protection of Petitioner S.A.'s rights to freedom from violence.

Owing to the homophobic atmosphere created by sections 9 and 12, Barbados is failing in its obligation to effectively investigate human rights violations, in breach of Articles 8(1) and 25.

Beyond this, the Petitioners have also noted above the challenge posed by the "saving clause" in Barbados' Constitution. As a result of that clause, the Petitioners and other members of the LGBT community are denied domestically an *effective* judicial remedy against the criminalisation of their consensual sexual activity, and the all violations of Convention rights that such criminalisation represents or engenders, as described above. Therefore, the combination of that criminalisation (under SOA sections 9 and 12) and the Constitution's saving clause itself amounts to a breach of the obligation under Article 25 for an effective judicial remedy for violation of Convention rights.³⁷⁵

³⁶⁸ Declaration of Petitioner Hoffmann at paras 40-41.

³⁶⁹ Declaration of Petitioner Hoffmann at para 42.

³⁷⁰ Declaration of Petitioner Hoffmann at para 44.

³⁷¹ Declaration of Petitioner Hoffmann at para 48.

³⁷² Declaration of Petitioner Hoffmann at para 50

³⁷³ Declaration of Petitioner S.A. at para 30.

³⁷⁴ Declaration of Petitioner S.A. at para 31.

³⁷⁵ *Baldeón García v Peru* at para 144.

VII. SECTIONS 9 AND 12 OF BARBADOS' *SEXUAL OFFENCES ACT* CONTRAVENE OTHER INTERNATIONAL LAW

1. *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women*

On February 8, 1995 Barbados ratified the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women* (“*Convention of Belém do Pará*”). However, Barbados has violated Articles 3, 4, 6, 7 and 8 of the *Convention of Belém do Pará* with regards to Petitioners Hoffmann and S.A..

Article 1 of the *Convention of Belém do Pará* defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.” Article 3 of this Convention declares that “Every woman has the right to be free from violence in both the public and private spheres.” Article 9 of this Convention also provides:

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.

In its 2015 report, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas* the Inter-American Commission on Human Rights identified the special vulnerability of trans women and lesbians such as Petitioners Hoffmann and S.A. to violence and the application of the Convention of Belém do Pará to them.³⁷⁶ Specifically, the Commission stated that:

Finally, the IACHR notes that sexual orientation and gender identity are not expressly included in the Convention of Belém do Pará. However, the IACHR is of the view that the Convention of Belém do Pará is a “living instrument.” Thus, the Commission considers that when Article 9 of the Convention of Belém do Pará speaks of the State obligation to take special account of factors of special vulnerability to violence, listing certain examples “among others,” these other factors would necessarily include sexual orientation and gender identity.³⁷⁷

³⁷⁶ Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OAS/Ser.L/V/II.rev.1, doc. 36 (Nov. 12, 2015) pg. 154-161. Available at: <http://www.oas.org/en/iachr/reports/pdfs/ViolenceLGBTIPersons.pdf>;

³⁷⁷ Ibid. para. 54.

As described in detail above, Petitioners Hoffmann and S.A. have suffered physical, sexual and psychological harm because of the existence of sections 9 and 12 of the SOA and the transphobia and lesbophobia that they engender in Barbadian society. This violence has been perpetrated in public and private by family members and the general public. Among other things, Petitioner Hoffmann has been attacked by stone-throwing youth, and endured years of threats and verbal assaults because of her gender expression. Petitioner S.A. has been sexually assaulted as a minor because of her sexual orientation (and the threat of ‘outing’ her as a lesbian was used to perpetuate that abuse); she has also been threatened and taunted with homophobic slurs.

Article 4 of the Convention of Bélem do Pará provides:

Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others:

...

- b. the right to have her physical, mental and moral integrity respected;
- c. the right to personal liberty and security;
- d. the right not to be subjected to torture;
- e. the rights to have the inherent dignity of her person respected and her family protected;
- f. the right to equal protection before the law and of the law;
- g. the right to simple and prompt recourse to a competent court for protection against acts that violate her rights;
- h. the right to associate freely; ...

Petitioners Hoffmann and S.A. have been victims of physical and mental abuse that infringe on their dignity as trans and lesbian women. This abuse has impeded their physical security and freedom of movement across Barbados, and undermined their family relations. Petitioner S.A.’s same-sex marriage is not recognized under Barbadian law and so her family enjoys no legal protection. As outlined above, because of the “saving clause” in the Constitution of Barbados, Petitioner Hoffmann is unable to challenge section 9 of the SOA before the domestic courts, despite the direct impact of this law on the enjoyment of her rights. And the state of lesbophobia and transphobia created by the existence of sections 9 and 12 of the SOA makes it very difficult for Barbadian trans and lesbian women to associate freely.

Article 6(a) of the Convention of Bélem do Pará provides that the right to be free from violence includes “The right of women to be free from all forms of discrimination.” Yet both Petitioners Hoffmann and S.A. have been subjected to discrimination because of their sexual orientation and gender identity. Among other things, both women have been denied employment because of how they present and their perceived sexuality.

Article 7 of the Convention of Bélem do Pará also obliges Barbados to take proactive measures against violence of the sort experienced by Petitioners Hoffman and S.A.. That article states:

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;

apply due diligence to prevent, investigate and impose penalties for violence against women;

include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;

adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;

take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; ...

Both Petitioners Hoffmann and S.A. have witnessed and experienced police inaction in response to violence against lesbian and trans women. Barbadian police have also hurled lesbophobic and transphobic insults at trans and lesbian women, including petitioner Hoffmann, with impunity. Despite overwhelming evidence of violence against trans and lesbian women like the Petitioners, the government of Barbados has steadfastly refused to repeal the laws that criminalize consensual intimacy between adults, which directly contribute to this violence, and failed to adopt laws prohibiting discrimination on the basis of sexual orientation or gender identity.

Finally, Article 8 of the Convention of Bélem do Pará provides that:

The States Parties agree to undertake progressively specific measures, including programs:

...

b. to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women;

...

e. to promote and support governmental and private sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women;

...

g. to encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of violence against women in all its forms, and to enhance respect for the dignity of women;....

Despite the vulnerability of trans and lesbian women there is no evidence that the government of Barbados consistently supports programmes to specifically counteract prejudices and practices which legitimize or exacerbate violence against trans and lesbian women or raise public awareness of the problems and remedies of violence against trans and lesbian women such as Petitioners Hoffmann and S.A. Neither are there media guidelines aimed at eradicating violence against trans and lesbian women or to enhance respect for their dignity. This is not surprising as the Government of Barbados still criminalizes all forms of same-sex intimacy through sections 9 and 12 of the SOA. The plight of women like Petitioners Hoffmann and S.A. is simply disregarded by the Government of Barbados.

2. *International Covenant on Civil and Political Rights*

On January 5, 1973, Barbados acceded to the *International Covenant on Civil and Political Rights* (ICCPR), publicly pledging to incorporate the majority of aspects of the ICCPR.³⁷⁸ In 1994, the United Nations Human Rights Committee (“Human Rights Committee”), the body charged with interpreting the ICCPR, unanimously ruled in *Toonen v. Australia* that Sections 122(a), (c) and 123 of the *Criminal Code* of the Australian State of Tasmania criminalising, *inter alia*, private, sexual contact between adult men violated the non-discrimination and privacy rights guaranteed by the ICCPR (Articles 2(1) and 17 of the ICCPR, respectively).³⁷⁹

The articles are set out below:

Article 2(1)

Each State Party to the Present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 17

³⁷⁸ Barbados reserved the right not to apply in full the guarantee of free legal assistance in accordance with paragraph 3(d) of Article 14 of the ICCPR.

³⁷⁹ *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994).

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

In its decision, the Human Rights Committee concluded that Article 2(1)'s reference to 'sex' includes sexual orientation,³⁸⁰ that "it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy,'" and that the challenged criminal prohibitions interfered with Mr. Toonen's privacy, even if these provisions had not been enforced for a decade.³⁸¹ Relying on the Human Rights Committee's General Comment 16 on the Right to Privacy to interpret Article 17 of the ICCPR, the Human Rights Committee held that "interference provided for by the law should be... in any event, reasonable in the particular circumstances."³⁸² In reaching its conclusion that the infringement of Toonen's right to privacy was arbitrary and not reasonable, the Human Rights Committee interpreted "the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case."³⁸³

Furthermore, the Human Rights Committee rejected Tasmania's contention that the challenged criminal prohibitions provided a reasonable means and proportionate measure to prevent the spread of HIV and AIDS.³⁸⁴ The Human Rights Committee noted "criminalisation would be counter to effective education programs with regards to HIV/AIDS prevention" and concluded that there was "no link between continued criminalisation of homosexual activity and effective control of the spread of HIV/AIDS."³⁸⁵

Finally, the Committee rejected Tasmania's claim that for the purposes of article 17 of the ICCPR, moral issues are exclusively a matter of domestic concern, as this would "open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy."³⁸⁶

This ruling, as a definitive interpretation of the substantive content of the ICCPR's right to privacy, effectively means that sections 9 and 12 of Barbados' SOA places Barbados in breach of its international obligations under the ICCPR.

³⁸⁰ *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994) at para 8.7.

³⁸¹ *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994) at para 8.2.

³⁸² *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994) at para 8.3, citing UN Human Rights Committee, *General comment No. 16: Article 17 (Right to Privacy)* (Apr. 8, 1988) at para 4.

³⁸³ *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994) at para 8.3.

³⁸⁴ *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994) at para 8.5.

³⁸⁵ *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994) at para 8.5.

³⁸⁶ *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994) at para 8.6.

Moreover, Barbados' ongoing criminalization of same-sex intimacy has been found to be in violation of Article 26 of the ICCPR, which states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁸⁷

During the Human Rights Committee's third periodic review of Barbados at its 89th Session in 2007, the Committee made the following observation and recommendation regarding the criminalisation of consensual homosexual activity:

The Committee expresses concern over discrimination against homosexuals in the State party, and in particular over the criminalising of consensual sexual acts between adults of the same sex (art. 26).

The State party should decriminalise sexual acts between adults of the same sex and take all necessary actions to protect homosexuals from harassment, discrimination and violence.³⁸⁸

In response, the Government of Barbados stated:

The Sexual Offences Act of Barbados criminalises buggery. Barbados cannot accept at this time, the recommendation to decriminalise such sexual acts between consenting adults of the same sex. Decriminalisation of sexual acts between adults of the same sex has not received the consensus of religious denominations or the public of Barbados as a whole. In fact significant sections of the community are opposed to such decriminalisation. In a national consultation conducted by National HIV/AIDS Commission the weight of public opinion was against the recommendation to decriminalise the consensual sexual acts between adults of the same sex. This is a topic which has been widely considered in society not only on the basis of its legality but from the sociocultural and historical perspectives. It must be noted that Barbados is a heavily religious society and there is a significant lobby by the church on such issues.³⁸⁹

The concerns articulated by the Human Rights Committee with respect to Barbados' compliance with the ICCPR surfaced again, not surprisingly, during the 2008, 2013 and 2018 reviews of Barbados by other Member States via the Universal Periodic Review (UPR) of the UN Human Rights Council, during which Member States have repeatedly recommended that

³⁸⁷ ICCPR, Article 26.

³⁸⁸ UN Human Rights Committee, *Concluding observations of the Human Rights Committee, Barbados*, CCPR/C/BRB/CO/3 (May 11, 2007) at para 13.

³⁸⁹ UN Human Rights Committee, *Information received from Barbados on the implementation of the concluding observations of the Human Rights Committee*, CCPR/C/BRB/CO/3/Add.1 (Jun. 2, 2009) at paras 11-12.

Barbados decriminalize consensual same-sex sexual relations.³⁹⁰ At its inaugural 2008 review, for example, Member States recommended that Barbados “[b]ring its criminal laws on criminalization of consenting relations between adults of the same sex, and on offences of indecent assault and serious indecency that are defined vaguely, into line with international norms with respect to privacy and non-discrimination,” “decriminalize consensual sexual acts between adults of the same sex,” “take measures to promote tolerance in this regard, which would encourage more effective educational programmes for the prevention of HIV/AIDS,” “take all necessary actions to protect homosexuals from harassment, discrimination and violence,” and “consider introducing specific legislation and additional policy measures to promote tolerance and non-discrimination of lesbians, gays, bisexuals and transsexuals.”³⁹¹ In response, Barbados repeated, in essence, its statement to the Human Rights Committee in response to the recommendations.³⁹²

Since its observations directed to Barbados, the Human Rights Committee has also issued similar concluding observations to numerous states recommending repeal of anti-sodomy laws similar to those still in force in Barbados. For example, two other former British colonies have been urged to repeal such colonial-era legislation.

During its review of **Malawi** in 2014, the Committee recommended:

The Committee is concerned that consensual same-sex sexual activity among consenting adults is still criminalized. It is also concerned about reports of cases of violence against lesbian, gay, bisexual, transgender and intersex persons and that, owing to the stigma, these persons do not enjoy effective access to health services (arts. 2 and 26).

The State party should:

- (a) Review its legislation to explicitly include sexual orientation and gender identity among the prohibited grounds of discrimination and repeal the provisions that criminalize homosexuality and other consensual sexual activities among adults (arts. 137 (A), 153, 154 and 156 of the Penal Code);
- (b) Introduce a mechanism to monitor cases of violence against lesbian, gay, bisexual, transgender and intersex persons and undertake all necessary measures to prevent those cases, prosecute the perpetrators and compensate the victims;

³⁹⁰ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Barbados*, A/HRC/10/73 (Jan. 9, 2009), UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Barbados*, A/HRC/23/11 (March 12, 2013) and UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Barbados*, A/HRC/38/12 (April 6, 2018).

³⁹¹ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Barbados*, A/HRC/10/73 (Jan. 9, 2009) at para 77(17).

³⁹² UN Human Rights Committee, *Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, Barbados*, A/HRC/10/73/Add.1 (Mar. 16, 2009) at paras 26-27.

- (c) Ensure that public officials refrain from using language that may encourage violence and raise awareness to eliminate stereotyping and discrimination;
- (d) Guarantee effective access to health services, including HIV/AIDS treatment, for lesbian, gay, bisexual, transgender and intersex persons.³⁹³

Also, in 2016, the Committee recommended repeal of **Jamaica's** laws against buggery and “gross indecency”, which have similar origins and objectives as sections 9 and 12 of the Barbados SOA. The Committee observed:

The Committee is concerned that the Charter of Fundamental Rights and Freedoms does not protect all persons against all forms of discrimination and contains saving clauses contrary to provisions of the Covenant. It regrets that the right to freedom from discrimination is based only on the grounds of “being male or female”, failing to prohibit discrimination on other grounds, such as sexual orientation, gender identity, marital status, disability and health status. The Committee also reiterates its concern that the State party continues to retain provisions under the Offences against the Person Act that criminalizes consensual same-sex relationships, thus promoting discrimination against homosexuals (arts. 2, 3 and 17, 26).

The State party should amend its laws and enact comprehensive anti-discrimination legislation to prohibit all forms of discrimination. It should also decriminalize sexual relations between consenting adults of the same sex to bring its legislation in compliance with the Covenant and put an end to prejudices and social stigmatization of homosexuality. Saving clauses in the Charter of Fundamental Rights and Freedoms relating to the Offences of the Persons Act and Sexual Offences Act should be removed where they obstruct the amendment of legislation that enhances the rights of women or any other group.³⁹⁴

3. *International Covenant on Economic Social and Cultural Rights*

Barbados is also a party to the *International Covenant on Economic Social and Cultural Rights* (ICESCR), to which it acceded on January 5, 1973. Among other rights, the ICESCR guarantees:

- Article 7: The right to just and favourable conditions of work, including safe and healthy working conditions and equal promotion opportunities;³⁹⁵

³⁹³ UN Human Rights Committee, *Concluding observations on the initial periodic report of Malawi*, CCPR/C/MWI/CO/1/Add.1 (19 August 2014), para 10.

³⁹⁴ UN Human Rights Committee, *Concluding Observations on the fourth periodic report of Jamaica*, CCPR/C/JAM/CO/4 (22 November 2016), paras 15-16.

³⁹⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Article 7 [hereinafter ICESCR].

- Article 10: The “widest possible” protection for the family and special measures which will protect children and young persons from “any discrimination for reasons of parentage or other conditions”;³⁹⁶ and
- Article 12: The right to the enjoyment of the “highest attainable standard of physical and mental health,” which imposes *inter alia* an obligation on State Parties to take steps to prevent, treat, and control epidemics.³⁹⁷

Furthermore, Article 2(2) of the ICESCR obliges Barbados to take positive steps to achieve the realization of these rights:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**. [emphasis added]

The UN Committee on Economic, Social and Cultural Rights, which monitors implementation of the ICESCR, has confirmed that the term “other status” as found in Article 2(2) — which is similar to the term “any other social condition” found in Article 1(1) of the American Convention — must be interpreted broadly:

The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in Article 2(2). These additional grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation.³⁹⁸

Moreover, the Committee has confirmed that “other status” as recognized in Article 2(2) includes sexual orientation and gender identity.³⁹⁹

The Petitioners submit that on the basis of the information provided by the Petitioners, violations of Articles 7, 10, and 12 have been made out.

- Contrary to **Article 7**, Petitioners Hoffmann and S.A. have both experienced difficulties obtaining employment as a result of their sexual orientation and gender expression.⁴⁰⁰

³⁹⁶ ICESCR, Article 10.

³⁹⁷ ICESCR, Article 12.

³⁹⁸ Committee on Economic, Social and Cultural Rights, *General comment No. 20*, E/C.12/GC/20 (Jun. 10, 2009) at para 27.

³⁹⁹ See Committee on Economic, Social and Cultural Rights, *General comment No. 20*, E/C.12/GC/20 (Jun. 10, 2009) at para 32 and Committee on Economic, Social and Cultural Rights, *General comment No. 14*, E/C.12/2000/4 (Aug. 11, 2000) at para 18 and Committee on Economic, Social and Cultural Rights, *General comment No. 15*, E/C.12/2002/11 (Jan. 20, 2003) at para 13.

The job security of Petitioner S.A.'s wife has also been threatened because she attended an LGBT event.⁴⁰¹ Both are a result of discrimination against LGBT individuals maintained by sections 9 and 12 of the SOA.

- All three Petitioners are worried that they are not able to start a family in Barbados, with Petitioner S.A. specifically expressing additional concerns about the stigma her children would face if it was known that their parents are gay.⁴⁰² This is in direct violation of **Article 10**. Moreover, by criminalising same-sex conduct, there is a significant impact on LGBT individuals' familial relationships, including those of the Petitioners. Each Petitioner has difficult relationships with their families, stemming from the homophobia and transphobia that criminalisation of their sexuality engenders.⁴⁰³
- Petitioners Hoffmann and S.A. both suffer from depression and anxiety.⁴⁰⁴ Petitioner S.A. is suicidal.⁴⁰⁵ The discrimination they face as a result of their sexual orientation and/or gender identity has contributed significantly to harms to their mental health. Promoting this discrimination by maintaining sections 9 and 12 of the SOA contravenes **Article 12's** obligation to respect, protect and fulfill the right to the highest attainable standard of health. In addition, the criminalisation of consensual same-sex sexual activity undermines the sexual health of gay men, other men who have sex with men, and trans women, particularly in relation to HIV prevention, care, treatment and support,⁴⁰⁶ also contrary to Article 12.

The Committee on Economic Social and Cultural Rights has issued concluding observations to several states condemning laws criminalising consensual same-sex sexual activity similar to those of Barbados. Again, two instances of former British colonies with the same basic history of inheriting such criminal prohibitions are worth noting.

During its 2015 review of **Guyana**, a Caribbean neighbour of Barbados with similar anti-sodomy laws, the Committee observed:

The Committee is concerned that the same-sex relations between consenting adults and cross-gender dressing are criminalized in the State party under sections 351 to 353 of the Criminal Law Offences Act (art. 2 (2)).

⁴⁰⁰ Declaration of Petitioner Hoffmann at para 58; Declaration of Petitioner S.A. at para 20.

⁴⁰¹ Declaration of Petitioner S.A. at para 36.

⁴⁰² Declaration of Petitioner S.A. at para 37.

⁴⁰³ Declaration of Petitioner Hoffmann at paras 8, 21, 26-32; Declaration of Petitioner S.A. at paras 7-8, 10-19; Declaration of Petitioner D.H. at para 12.

⁴⁰⁴ Declaration of Petitioner Hoffmann, at paras 14, 23; Declaration of Petitioner S.A. at paras 7,12, 40.

⁴⁰⁵ Declaration of Petitioner S.A. at paras 8, 14.

⁴⁰⁶ Affidavit of Chris Beyrer at paras 9, 19-20.

The Committee recommends that the State party repeal the criminalization of same-sex relations between consenting adults and cross-gender dressing. It also recommends that the State party provide effective protection for lesbian, gay, bisexual, transgender and intersex persons against any form of discrimination on the ground of their sexual orientation.⁴⁰⁷

And during its 2016 review of **Kenya**, the Committee found that the state's anti-sodomy laws contributed to the denial of critical social services such as health care:

The Committee is concerned that sexual relations between consenting adults of the same sex are criminalized in the Penal Code and that lesbian, gay, bisexual, transgender and intersex persons are stigmatized and socially excluded, as well as discriminated in gaining access to social services, particularly health-care services (art. 2 (2)).

The Committee calls upon the State party to decriminalize sexual relations between consenting adults of the same sex. It also recommends that the State party take the steps necessary to put an end to the social stigmatization of homosexuality and ensure that no one is discriminated in accessing health care and other social services owing to their sexual orientation or gender identity.⁴⁰⁸

4. *Convention on the Elimination of All Forms of Discrimination against Women*

Barbados has been a party to the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) since 1980. Under Article 2 of CEDAW, Barbados is obliged to take steps to eliminate discrimination against women.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

⁴⁰⁷ UN Committee on Economic, Social and Cultural Rights, [Concluding observations on the combined second to fourth periodic reports of Guyana](#), E/C.12/GUY/CO/2 (28 October 2015), paras. 24-25.

⁴⁰⁸ UN Committee on Economic, Social and Cultural Rights, [Concluding observations on the combined second to fifth periodic reports of Kenya](#), E/C.12/KEN/CO/2-5 (6 April 2016), paras. 21-22.

- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.⁴⁰⁹

The UN Committee on the Elimination of Discrimination against Women has stated that the discrimination women face based on their sex and gender can intersect with other forms of discrimination, including sexual orientation and gender identity, and recommended that “State parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.”⁴¹⁰ For example, lesbian, bisexual and transgender women face discrimination based not only on their sex, but also on sexual orientation and gender identity. By criminalising consensual same-sex intimacy through sections 9 and 12 of the SOA, Barbados maintains discrimination against lesbian, bisexual and transgender women in violation of Article 2 of CEDAW.

The Committee has also condemned the impact of anti-sodomy laws on the rights of women in concluding observations to its review of other states. In reviewing the **Gambia**, a former British colony, in 2015, the Committee recommended the repeal of the country’s law against “aggravated homosexuality,” which criminalizes consensual same-sex sexual activity and, like Barbados’ prohibition on buggery, carries a maximum penalty of life imprisonment:

The Committee notes that homosexual acts are criminalized in the State party and that “aggravated homosexuality” carries sentences of up to life imprisonment. It also notes with concern acts of incitement to hatred against lesbian, bisexual and transgender women in the State party and the arbitrary detention of women perceived to be lesbian.

The Committee urges the State party to repeal the provisions of the Criminal Code on “unnatural offences” and “aggravated homosexuality” end the arbitrary detention of lesbians and provide them with effective protection from violence and discrimination and provide appropriate training to law enforcement officials.⁴¹¹

⁴⁰⁹ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13, Article 2.

⁴¹⁰ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28*, CEDAW/C/2010/47/GC.2 (Oct. 19, 2010) at para 18.

⁴¹¹ UN Committee on the Elimination of Discrimination Against Women, [Concluding observations on the combined fourth and fifth periodic reports of the Gambia](#), CEDAW/C/GMB/CO/4-5 (28 July 2015), paras. 44-45.

5. *Convention on the Rights of the Child*

Barbados is also a party to the UN *Convention on the Rights of the Child* (CRC), which includes the following relevant Articles:

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.⁴¹²

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.⁴¹³

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.⁴¹⁴

The UN Committee on the Rights of the Child, which monitors States' compliance with provisions of the CRC, issued a General Comment in 2003 explaining that under the non-discrimination provision of Article 2, prohibited grounds of discrimination include "adolescents' sexual orientation."⁴¹⁵ This was later reinforced by the Committee on the Rights of the Child in its Concluding Observations on Chile, in which the Committee noted the presence of a provision

⁴¹² UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Article 2 [hereinafter CRC].

⁴¹³ CRC, Article 19.

⁴¹⁴ CRC, Article 24.

⁴¹⁵ Committee on the Rights of the Child, *General comment No. 3*, CRC/GC/2003/3 (Mar. 17, 2003) at paras 8-9.

in Chilean law which criminalised homosexual relations, including those between adolescents, and stated this indicated discrimination on the basis of sexual orientation.⁴¹⁶

The Committee's General Comment 3 on HIV/AIDS and the rights of the child further confirms that discrimination based on sexual orientation is a violation of Article 2 of the CRC, which increases children's vulnerability to HIV and AIDS, and confirms that Article 19 imposes an obligation on states "to protect children from all forms of violence and abuse, whether at home, in school or other institutions, or in the community."⁴¹⁷

The consequences for children of the stigmatization sanctioned by laws such as sections 9 and 12 of the SOA are well documented and negative. A report by the United Nations Children's Fund ("UNICEF") noted:

This lack of respect for the rights of LGBT children can manifest itself in numerous ways. These include, but are certainly not limited to, isolation from peers at school, at home, or in the community; marginalization and exclusion from such essential services as education and health care; abandonment by family and community; bullying and intimidation; physical and sexual violence, and at the extreme, corrective rape — an abhorrent practice in which an individual is raped to supposedly 'cure' his or her of sexual orientation or gender identity. The effects of this discrimination, exclusion and violence can extend throughout childhood and into adulthood, with lifelong consequences. For example, there is robust evidence to suggest that LGBT children and youth exposed to discrimination are more likely to consider or attempt suicide than their peers.⁴¹⁸

When these negative effects are facilitated by Barbados in the form of criminal sanctions, they violate Articles 2, 19 and 24 of the CRC.

The Committee on the Rights of the Child has also found anti-sodomy laws similar to Barbados' to be in violation of the CRC. During its 2015 review of **Eritrea**, the CRC said:

The Committee notes as positive the efforts made by the State party to eliminate discrimination, in particular those aimed at reducing regional disparities in access to social services. The Committee is concerned, however, that: (...)

(c) The criminalization of consensual same-sex conduct under the transitional penal code encourages the stigmatization of and discrimination against lesbian, gay, bisexual

⁴¹⁶ Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child, Chile*, CRC/C/CHL/CO/3 (Apr. 23, 2007) at para 29.

⁴¹⁷ Committee on the Rights of the Child, *General comment No. 3*, CRC/GC/2003/3 (Mar. 17, 2003) at paras. 8-9 and para 37.

⁴¹⁸ UNICEF, *Eliminating Discrimination Against Children and Parents based on Sexual Orientation and/or Gender Identity*, UNICEF Current Issues No. 9 (Nov. 2014) at 3, available at https://www.unicef.org/esaro/Current_Issues_Paper- Sexual_Identification_Gender_Identity.pdf.

and transsexual persons, including children, as well as the stigmatization of and discrimination against children from families formed by such persons.

The Committee recommends that the State party continue its efforts to eliminate all forms of discrimination against all children, both in law and in practice. The Committee also recommends that the State party: (...)

(d) Repeal the legal provisions criminalizing homosexuality and, by raising public awareness of equality and non-discrimination on the basis of sexual orientation, ensure that children who belong to groups of lesbian, gay, bisexual and transsexual persons or children from families formed by such persons are not subject to any form of discrimination.⁴¹⁹

6. Barbados is Out of Step with Other Countries in the Region

The continued existence of sections 9 and 12 of the SOA by Barbados is contrary to the recent legal developments in the Americas relating to LGBT individuals. For example, in 2016, section 53 of the Criminal Code of Belize, analogous to section 9 of the SOA, was ordered by the Supreme Court of Belize to be read down to exclude consensual private sexual acts between adults.⁴²⁰ In 2018, a trial court in Trinidad and Tobago struck down that country's criminal prohibitions on buggery and serious indecency as unconstitutional.⁴²¹ A large majority of states in the hemisphere have no criminal prohibition against consensual same-sex activity.

Beyond decriminalizing consensual sex between persons of the same sex, a number of Latin American states, including Bolivia, Chile, Ecuador, Mexico, and Uruguay, have also implemented non-discrimination policies and anti-bias legislation, providing greater protection to LGBT individuals.⁴²² Argentina, Brazil, Colombia, and Uruguay have approved same-sex marriage, while El Salvador and Peru have passed hate-crime laws.⁴²³ Both Canada, and more recently, the United States recognize same-sex marriage. In Canada, the federal constitution and anti-discrimination statutes in every jurisdiction prohibit discrimination based on sexual orientation and it is firmly established that discrimination based on gender identity also contravenes the law, while federal criminal law recognises crimes motivated by hatred based on sexual orientation and gender identity. In short, Barbados is out of step with the large majority of other countries in the hemisphere by maintaining sections 9 and 12 of the SOA.

⁴¹⁹ UN Committee on the Rights of the Child, [Concluding observations on the fourth periodic report of Eritrea](#), CRC/C/ERI/CO/4 (2 July 2015), at paras. 24-25.

⁴²⁰ *Orozco v. Attorney General of Belize* (10 August 2016), Claim No. 668 of 2010 (Supreme Court of Belize) at para 99.

⁴²¹ *Jones v. Attorney General of Trinidad and Tobago* (12 April 2018), Claim No. CV2017-00720 (High Court of Justice, Republic of Trinidad and Tobago).

⁴²² Human Rights Watch, *"I have to Leave to Be Me": Discriminatory Laws against LGBT People in the Eastern Caribbean* (Mar. 2018) at 2.

⁴²³ Human Rights Watch, *"I have to Leave to Be Me": Discriminatory Laws against LGBT People in the Eastern Caribbean* (Mar. 2018) at 14.

VIII. RELIEF REQUESTED

1. In light of the real and immediate threats to the lives and well-being of Petitioners, the Petitioners ask the Commission to hear the merits of this Petition at its next sitting.
2. The Petitioners also ask the Commission to recommend that the Government of Barbados repeal sections 9 and 12 of the SOA in their entirety, so as to decriminalise consensual sexual activity between those above the legal age of consent.
3. Finally, the Petitioners also ask the Commission to recommend the following, in keeping with Barbados' obligations under the Convention and other international human rights treaties to which it is a party:
 - a) The Government of Barbados must condemn and monitor serious human rights violations, including discrimination and hate speech, as well as incitement to violence and hatred, on the grounds of sexual orientation and gender identity in accordance with its international commitments, including the Convention;
 - b) The Government of Barbados must ensure that all allegations of excessive use of force and other human rights violations by law enforcement officials based on real or perceived sexual orientation and gender identity or expression are investigated promptly and thoroughly;
 - c) The Government of Barbados must train all law enforcement and criminal justice officials on international human rights standards and non-discrimination, including on the grounds of sexual orientation and gender identity;
 - d) The Government of Barbados must conduct awareness-raising programs, especially through the education system, to address social stigma and exclusion of individuals and communities on grounds of their sexual orientation and gender identity and expression, and respect for the human rights of all Barbadians, including the obligation not to discriminate against LGBT people;
 - e) The Government of Barbados must facilitate access to social services, and especially health services, regardless of the individual's sexual orientation, gender identity and expression, and/or HIV status; and
 - f) The Government of Barbados must enact legislation that specifically prohibits discrimination based on sexual orientation and gender identity, in keeping with its obligations under Article 1 of the Convention.