# Proposed Amendments to the Penal Code: AWARE's submissions to the Government consultation

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## Introduction

The Association of Women for Action and Research (AWARE) welcomes the steps taken to review and update the Singapore Penal Code, and particularly applauds the much awaited repeal of marital immunity for rape and the decriminalisation of suicide. The proposed amendments also go some way to address gaps in the law that pertain to offences against vulnerable persons.

We congratulate MHA for an excellent process which has involved the setting up of an expert Penal Code Reform Committee (PCRC) and resulted in the production of an extremely comprehensive set of recommendations by the PCRC.

Through our Women's Care Centre (WCC) and the Sexual Assault Care Centre (SACC), AWARE has supported thousands of women with experiences of gender-based violence, including sexual violence. Based on our experience, we have participated in earlier consultations on the Protection of Harassment Act and also submitted various papers to the Ministry of Law on Sexual Assault offences, which we understand have been taken into consideration by MHA in this round of Penal Code changes.

Our comments and recommendations on the proposed amendments, build on our earlier papers, and are informed by our experience of working with survivors, as well as secondary research, including into legislation in other jurisdictions.

Overall, we have a few broad concerns:

a) The proposed modernisation and update of the sexual assault offences in the Penal Code is laudable but does not go far enough. In particular, it does not provide a comprehensive definition of "consent" and continues to use out-dated language such as "modesty" instead of more current terminology such as "sexual harassment".
b) Proposed new offences, while greatly welcomed, could potentially be overbroad.
c) Some gaps still exist, including the notable omission of decriminalising Section 377A, which we understand was not part of the Penal Code Review Committee's mandate.

d) There is an over-reliance on harsher penalties (more caning, longer sentences) as a way to deter crime and enhance protection for vulnerable persons.
e) Instead, we recommend that Government work closely with people sector partners to roll out an effective and comprehensive communications and education programme as part of the implementation of the comprehensive changes and to increase reporting of sexual offences.

It is well known that sexual offences are highly under-reported. Our experience with the Sexual Assault Care Centre (SACC) shows that close to 7 in 10 clients do not report their experiences to authorities.

The modernisation of the Penal Code language relating to sexual offences and the proposed provisions to take into account new developments (especially technological developments) in sexual assault offences will go some way to address under-reporting but more needs to be done.

As part of the Government's Penal Code reform effort and its current excellent initiatives to make criminal justice processes more victim-centric and trauma informed, there is a need for a communications and education campaign to:

a) create awareness of sexual assault laws, debunk sexual assault myths, deter violations of these laws, and encourage reporting of all sexual assault offences; and
b) train lay persons and professionals, including social workers, educational and HR professionals, parties in the criminal justice system, to provide victim-centric, gender and trauma informed support to survivors of sexual assault.

Coincidentally, AWARE will be launching its two year #Metoo Action Programme in November 2018. This initiative will include the following programmes:

a) trauma and gender informed training for first responders (both laypersons and professionals);
b) education for parents on how to talk to their children about consent;
c) workplace harassment training for public and SMEs; and
d) public education on sexual offences.

We would be very happy to explore possibilities for collaboration with the Government on how we can support its communications and education objectives in the implementation of the Penal Code changes.

Our submissions comprise of two sections. The first section provides comments and recommendations on the proposed amendments; the second addresses sections of the Penal Code that this review did not cover, which we nonetheless hope would still be considered by the Government.

# Section 1

| Section | AWARE's comments and recommendations |
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| 12: Voyeurism | 1. We welcome the recommendations to criminalise non-consensual voyeurism, though we offer below some comments on how the scope should be defined to avoid overbreadth.<br><br>2. A study by SACC found that one in five cases seen by them in 2016 involved a component of technology. In almost half such cases, image-based sexual abuse or harassment was involved, including: non-consensual distribution of intimate images, sextortion and sexual voyeurism.[1]<br><br>3. The impact of voyeuristic observations and recordings, and non-consensual sharing of intimate images on survivors are just as real compared to physical forms of sexual harassment. In fact, the shame and loss of control can be amplified in such cases because of the unpredictability surrounding the use of such materials and the ensuing aftermath.<br><br><u>On "circumstance where he can reasonably expect privacy" as applies to recommendations 28 and 29</u><br><br>4. We agree that the term should be left open-ended. For the offence of creating and distributing voyeuristic recordings, we recommend that it be made clear either in the Penal Code or Parliamentary Records that breastfeeding in public counts as a circumstance where a person can reasonably expect privacy. Even if they are uncovered, people breastfeeding in public should still have their privacy respected; while they cannot expect to be completely unobserved, they should not be subjected to non-consensual image-taking or recording.<br><br><u>On "reasonable excuse" as applies to recommendation 29</u><br><br>5. In providing examples of what constitutes "reasonable excuse", we recommend including situations where non-consensual recording is for the purposes of documenting and reporting a crime. For example, A witnesses B sexually assaulting C. A records the incident and brings the video to the police station to make a report that a crime has taken place. A should not be charged for making a voyeuristic recording.<br><br>6. We also recommend making it clear either in the Penal Code or |

[1] L. Vitis, A. Joseph, D. Mahadevan.Technology and Sexual Violence: SACC Summary Report. Sexual Assault Care Centre, Association of Women for Action and Research, August 2017. Retrieved from: https://d2t1lspzrjtif2.cloudfront.net/wp-content/uploads/SACC-TFSVH-Report-Final-report.pdf

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| | Parliamentary records that cases of recording domestic workers in their changing rooms or washrooms for the purposes of surveillance by their employers should **not** be a reasonable excuse.<br><br><u>On the use of caning as a penalty</u><br><br>7. Overall, we question the use of caning as a punishment to deter crime. In the context of sexual offences, survivors have in fact been deterred from reporting because of the prospect of harsh punishments (e.g. caning, long prison sentences) - particularly so when the perpetrator is known to them.[2]<br><br>8. Furthermore, violent punishments such as caning may contribute to normalising rather than reducing a culture of violence. They suggest to the public that authority and norms are rightly established through physical domination. Instead of deterring violence, this may tend to normalise it.<br><br>9. We elaborate more in our comments on Section 17: General enhancement of penalties for offences against vulnerable victims.<br><br><u>On recommendation 29</u><br><br>10. Given the time-sensitive nature of the act, victims' primary focus is to have their voyeuristic images and videos removed from the accused's control and from circulation as soon as possible.<br><br>11. We recommend that the offences under this section be made seizable under the Criminal Procedure Code, to empower the police to investigate without waiting for the victim to obtain an order from the Magistrate.<br><br>12. We also recommend that mechanisms be set up for the swift removal of the materials from the accused's control, from other persons that the accused has passed the images to, and from general circulation, even before conviction. This will be the victim's main concern and the idea of the images being in the hands of the accused or other parties, and the possibility of these parties circulating these images, is traumatic. Once the images are circulated, the damage is done, and the successful conviction of the accused will be cold comfort to the victim. |

[2] Based on SACC experience and research elsewhere. See e.g. R. B. Ruback. The Victim-Offender Relationship Does Affect Victims' Decisions to Report Sexual Assaults.Georgia State University, 1993. K. Makin. *How Canada's sex-assault laws violate rape victims*. The Globe and Mail, 2018. Retrieved from: https://www.theglobeandmail.com/news/national/how-canadas-sex-assault-laws-violate-rape-victims/article14705289/

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| | 13. Non-publication orders under POHA are also not a suitable option as they are neither procedurally simple nor affordable for many victims. It is especially difficult for young persons between 16 and 21 years of age who face the additional barrier of getting their parents' co-operation to file civil proceedings. In our experience, making parental disclosure a requirement for persons between 16 and 21 to report their incidents would deter them from reporting.<br><br>14. It is worth studying the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018 in Australia where complaints about one's intimate recording being shared non-consensually can be made to the Commissioner online. The Australian Act empowers the Commissioner to issue removal notices for the end-user or service provider to remove the materials in question within 48 hours.[3] |
| 13: Distributing or threatening to distribute intimate images | 1. Broadly speaking, we welcome the recommendations to criminalise the non-consensual distribution or threat to distribute intimate images. We share below our concerns about the scope and definition of the offence.<br><br>2. As mentioned in the previous section, the effects of having one's intimate images shared without consent can be as traumatic as physical forms of harassment. The law should effectively safeguard survivors' rights in online spaces as well as offline ones.<br><br><u>On the use of caning as a penalty</u><br><br>3. We reiterate our objection to the use of caning as a form of punishment.<br><br><u>On the inclusion of "altered" visual recording in the definition of "intimate image"</u><br><br>4. We agree that images that are altered to mislead viewers into believing that a person has taken part in a sexual activity, or that the person has been photographed in a nude situation, should be included in the definition of "intimate image". In such scenarios, the harm (humiliation, distress etc) to the person depicted is similar to that of a person whose actual images have been non-consensually shared, since viewers would be led to believe that the sexual activity has taken place, or that they are looking at the person's actual nude body. |

[3] Federal Register of Legislation. Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018. Australian Government, 2018. Retrieved from: https://www.legislation.gov.au/Details/C2018A00096

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| | 5. However, we are concerned that the definition could also include other forms of altered images depicted to portray nudity or sexual activity for fictional or political satire purposes where the creator of an image is making a rhetorical point about the relationship between two people, which would not be genuinely understood by any viewer as depicting actual sexual activity which had taken place in fact. Such images may be crude or distasteful and may also in some cases amount to an offence punishable under other laws (e.g. the Protection from Harassment Act). However, the type of harm caused in such cases would be of a distinct kind from the images discussed in paragraph 4 above, and this offence should not apply in those circumstances. For example, the line drawing by Amos Yee of Lee Kuan Yew and Margaret Thatcher was prohibited as an obscene image, but its publication ought not to be treated as the distribution of an intimate image, as no viewer would ever have concluded from the image that the act depicted had taken place.<br><br>6. We therefore urge for a restrictive reading of "altered images", to avoid overbroad criminalisation of cases which do not occasion the type of harm that this offence is intended to target. There could be an Explanation Note to say that the meaning of altered visual recording does not include those which are clearly fictional, so that no viewer would conclude that they were observing the person's actual nude body or actual sexual activity.<br><br><u>Other recommendations</u><br><br>7. In addition to the points above, we reiterate our recommendations for the offences here to be made seizable and for provision to be made for the swift removal of the materials in question as made in section 12, paragraphs 10-14. |
| 14: Sexual exposure | <u>On recommendation 31 (Create a new offence relating to sexual exposure)</u><br><br>1. We caution against an overbroad application of this new offence. The mere fact of intentional nudity in a socially inappropriate setting should not be taken in and of itself to demonstrate knowledge that the exposure is "likely to cause the victim fear, alarm or distress".<br><br>2. The exclusion of breastfeeding mothers from the scope of this offence is much welcome. This should be clearly reflected in the final wording of the offence or in an Explanation Note to the offence<br><br><u>On the use of caning as a penalty</u><br><br>3. We reiterate our objection to the use of caning as a form of punishment. |
| 15: Repeal of | 1. We fully support the recommendation for a *full, unqualified* repeal of |

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| immunity for marital rape | marital immunity for rape. We have strongly advocated for this over more than ten years, most recently in a joint coalition report with 13 local NGOs to the UN CEDAW Committee.[4] The recommendation of our report was echoed in the Concluding Observations of the Committee.[5] We further note that since the announcement of the PCRC's recommendation, over 20 women's and social sector groups have released a joint statement in support of full and unqualified repeal.[6]<br><br>2. All women, regardless of marital status and identity of the perpetrator, should be protected against violence. Majority of sexual violence against women is committed by perpetrators known to them, including partners. The repeal is a powerful signal that violence against women is not condoned under any circumstances.<br><br>3. In fully repealing marital immunity, we are also taking a strong stand against the idea of implied consent - that marriage somehow grants automatic access to a spouse's body. Sexual activity requires full and free consent at every point, and marriage should not and does not change this.<br><br>4. In considering penalties for rape cases, a marital relationship between victim and offender should not be taken as automatically amounting to either a mitigating or an aggravating factor. This is consistent with the existing case law on the treatment of prior or subsequent consensual sex in rape cases, which holds that such a consensual relationship should not automatically be treated as a mitigating or aggravating factor, but rather that every case must be considered on its own facts.[7]<br><br>5. Moving forward, a repeal of marital rape immunity will not be enough on its own to dismantle the barriers that prevent women from reporting sexual assault. It will also be necessary to provide widespread public education on consent and gender roles, especially in pre-marriage workshops, so that we can change the gendered expectations around spousal sexual relations. We also urge the relevant Ministries to conduct gender-sensitisation courses for professionals on the ground who come across survivors of marital rape in their work e.g. social workers, doctors, police officers to not perpetuate the myth of implied consent in their interactions |

[4] Coalition of National NGOs. *Report on CEDAW and the Republic of Singapore:"Many Voices, One Movement" Coalition Report of National NGOs*. 2017. Retrieved from : https://sgcedawcoalition.files.wordpress.com/2017/10/many-voices-one-movement-coalition-report-of-national-ngos-on-singapore.pdf

[5] The United Nations. *CEDAW Committee concluding observations for Singapore*. 21 November 2017.

[6] Association of Women for Action and Research. *Statement of support for proposed removal of marital immunity for rape.* 25th September 2018. Retrieved from: http://www.aware.org.sg/2018/09/statement-of-support-for-proposed-removal-of-marital-immunity-for-rape

[7] See e.g. Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik [2007] SCGA 48.

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| | with survivors. This is consistent with the UN CEDAW Committee's Concluding Observations, which highlighted sensitisation to gender-based violence as an urgent priority. |
| 16.1: General principles on sexual offences against minors | <u>On recommendations 33 and 34 (Retain 16 as age of consent, and 14 as age below which sexual activity with minors will be regarded as a statutory aggravating factor)</u><br><br>1. We welcome the Committee's statement that there is no consent to sexual activity for those below 16 years of age ("girls below 16 years of age are, due to their inexperience and presumed lack of sexual and emotional maturity… incapable of giving informed consent" page 98). No act of sexual activity between a minor under the age of 16 and an adult should be described as "consensual", even if the minor does not resist or even appears to agree or to actively participate. This is because of the relative differences between minors and adults in age, development, and social status - minors are in a position of dependence and vulnerability. This means that any sexual activity between a minor and an adult is inherently non-consensual and exploitative.<br><br>2. We also welcome the Committee's statement that the age of 14 is the age below which sexual activity with minors will be regarded as a statutory aggravating factor. We would urge the Government to make clear in the Explanation Note to the offence the significance of the age of 16 (as the age of consent) and the age of 14 (as the age for statutory aggravating factor).<br><br>3. This helps clarify the confusion we found elsewhere in the discussion of the conceptual bases for criminalisation of sexual activity with minors and the treatment of age for younger minors (under 14) as an aggravating factor. For example, in a statement by the AGC on the Joshua Robinson case in 2017, sexual activity between Robinson and two 15 year-olds was said to be "consensual".[8]<br><br><u>On close-in-age exemptions</u><br><br>4. The law does not clarify the position of minors and other young people who breach the letter of this law but are close in age, e.g. a 16-year-old who engages in sexual activity with a 15-year-old in a situation of mutual attraction and without any coercion or exploitation. If we understand the basis of Section 376A to be non-consent arising from age and status differences, it follows that a young person who is sexually experimenting with another young |

[8] Attorney-General's Chambers. PP v Joshua Robinson. Singapore Government, 2017. Retrieved from: https://www.agc.gov.sg/docs/default-source/newsroom-doucments/media-releases/2017/agc-press-release-jr-8-mar-17bd1400354dcc63e28975ff00001533c2.pdf?sfvrsn=0

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| | person in a relatively equal relationship should not automatically be presumed to have committed an offence of sexual violence. It would be inappropriate to treat them as perpetrators under Section 376A, which (as discussed above) is an offence of sexual violence.<br><br>5. Moreover, the threat of criminalisation may deter help-seeking by minors and young people who find themselves pregnant or with a sexually transmitted infection, out of fear that they or their partners may be prosecuted under the law for having sex with a minor.<br><br>6. In some states in Australia and the United States, there are close-in-age exemptions (not more than two years older in the cases of Victoria and Australian Capital Territory) granted to minors who engage in sexual activities consensually. A case can be made for close-in-age exemptions since the power imbalance that would be significant between adults and minors is substantially diminished between two minors. However, we recognise that there could still be exploitation involved in such pairings. Thus, it is important that any considerations for close-in-age exemptions also take into account the possibilities of coercion and exploitation (without automatically and irrebuttably presuming those dynamics to be in play, as in the case of adult-minor situations).<br><br>7. We urge the Government to clarify the position of minors and other young people who engage in sexual activity but are close in age, and for the authorities to have different considerations for this group. Even if no black-letter legal exemption is made, it would be helpful for the Government to make clear that as a matter of policy, Section 376A is not intended to criminalise minors and young people who are very little older than minors in non-exploitative relationships. This is particularly helpful to social workers on the ground who are unable to give any level of assurance to young clients coming forward to seek medical help or emotional support. |
| 16:4: Exploitative penetrative activity | 1. Per our comments in section 16:1, we re-emphasise here that any sexual activity between an adult (above 18 years old) and a minor (under 16 years old) *cannot* be said to have been consensual. The quality of any agreement in such relationships is fatally compromised given the significant imbalance of power that exists unavoidably between an adult and a minor.<br><br><u>On recommendation 39 (Create a new offence of "exploitative penetrative sexual activity with minors between 16 to 18 years of age")</u><br><br>2. We agree that there is a lacuna when it comes to exploitative situations between adults and young people between the age of 16 and 18. We support the creation of this offence and the application of a test for exploitativeness involving the factors set out in the PCRC report (age of the minor, age difference, nature of the |

relationship and degree of control). We also agree with the creation of a list of specified relationships which set up a presumption of exploitativeness. We urge in particular that where the relationships involve some degree of institutional authority (e.g. teacher/student, coach/trainee, employer/employee, police officer/civilian, staff/resident (of an institution)), the presumption of exploitativeness should be extremely strong - if not absolute, it should be rebuttable only by exceptionally compelling evidence, e.g. coercion by the young person of the adult.

<u>On recommendation 40 (Clarify that s 376A (sexual penetration of minor) does not cover non-consensual sexual activity for minors below 16 years of age, and provide for enhanced penalties where the minor has been exploited by the offender)</u>

3. For the reasons stated earlier, we disagree with the analysis underlying this recommendation (and therefore the recommendation). Section 376A cannot be said to fail to cover non-consensual sexual activity for minors below 16 years of age, because consent to sexual activity with an adult is automatically precluded when it comes to such minors, and that non-consent is the whole basis for section 376A existing to begin with.

4. Similarly, when it comes to sentencing, whether there was consent or no consent should not be a consideration because it should already be taken that *there was no consent*. It may be that a perpetrator, in overcoming active resistance, engaged in additional forms of violence or brutality or threat which could be considered aggravating factors, but that is distinct from suggesting that "consent" is or can be present when there is no resistance. The only situation in relation to minors where there can be meaningful discussion of whether there is consent is where both parties are minors and/or close in age.

5. However, we agree that the factors listed in the test for exploitative situations can also be used as aggravating factors in sentencing an offender under Section 376A, because they potentially speak to the severity of the harm done as well as the culpability of the offender in (for example) abusing a position of authority.

<u>On punishments</u>

6. It follows from an understanding of Section 376A as inherently an offence of sexual violence (rooted in non-consent) that the punishments should be consistent with other offences of sexual violence. The same is true of the proposed new offence of exploitative sexual activity with a young person aged 16-18. We therefore agree that the maximum punishments for both these offences should be aligned with those for Section 375, on the grounds that they are all sexual violence offences pertaining to non-

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| | consent. However, we do not recommend that the minimum penalties be made equal, especially in view of the ambiguous situations concerning minor-minor relationships or others where the age difference is very small.<br><br>7. While agreeing with this for the sake of consistency across offences, we reiterate our concern that more attention be given to process and support for survivors, rather than caning and punishment, in addressing sexual violence.<br><br><u>On recommendation 42 (Amend s 376G (incest) to exclude non-consensual sexual penetration and sexual penetration of minors below 16years of age)</u><br><br>8. We recommend expanding s 376G (Incest) to include same-sex activity, by making the offence gender-neutral to say, "any person" rather than "any man...any woman". The inherent exploitativeness of incestuous relationships would be present as much in same-sex activity as in the cases currently covered by the law. |
| 16:5 Dealing with predatory offenders | <u>On the threshold age for offenders</u><br><br>1. The PCRC questions whether the age threshold for predatory behaviour criminalised by Section 376E should be 18 or 21 years old. We support lowering the threshold age for offenders from 21 years old to 18 years old, on the grounds that the differences, in age, social status and life experience would be substantial even in the smallest age gap (e.g. between an 18-year-old offender and 15-year-old victim, there is still a three-year difference, where the offender is most likely to be in National Service, tertiary education or employment whereas the victim would probably be in secondary school).<br><br><u>On the criminalisation of sexual relations between young couples</u><br><br>2. At the same time, we agree with the humane and pragmatic remarks by the PCRC in which they acknowledge that Section 376E should not target "experimenting teenagers or those who are not predators". In our view, setting the age threshold at 18 would still prevent the undue criminalisation of, for example, a 17 year old and a 15 year old in a non-coercive relationship.<br><br>3. However, we are concerned about the PCRC's additional comment that "where the sexual interaction between a young couple escalates beyond sexting to penetrative physical intimacy, other offences like sexual penetration of a minor under 16 years old will become applicable". In our view, Section 376A should also not punish non-coercive experimentation or activity between minors or a minor and a very young person where the age difference is small (e.g. a 16 or 17 year old). |

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| | <u>On recommendation 44 (Introduce a new offence of "Sexual communication with a minor below 18 years of age")</u><br><br>4. We are concerned about the scope of "sexual communication" under this recommendation. The broad nature of this term could potentially criminalise adults who give information about sex to a minor for non-exploitative and non-abusive purposes. For example, it could potentially criminalise a parent or a grandparent explaining sexual matters to a child in a factual and non-exploitative way. If Sexuality Education trainers conduct a sex education workshop for adolescents and show images of different genitals as part of the class, solely for the purpose of education and discussion, this could conceivably come under this offence as the communications may be deemed sexual in nature.<br><br>5. In other jurisdictions, legislation criminalising similar offences of sexual communications with minors are limited by the intent behind such communication. For example, under the Sexual Offences (Scotland) Act 2009, Section 24 criminalises indecent communication with a young child etc if the purposes of sending sexual communications is for the purpose of (a) obtaining sexual gratification, or (b) humiliating, distressing or alarming the recipient. We note that this element is also included in the recommended offence of engaging in sexual activity before a minor or causing a minor to look at a sexual image.<br><br>6. We therefore recommend that any such offence of sexual communication with a minor be limited to communications that are made "for the purpose of (a) obtaining sexual gratification, or (b) humiliating, distressing or alarming the recipient."<br><br><u>On recommendation 45 (Introduce a new offence of "engaging in sexual activity before a minor under 18 years of age, or causing a minor under 18 years of age to look at a sexual image")</u><br><br>7. In principle, we agree with this recommendation. However, we have some concerns about its scope. Persons may publish sexualised material for their own gratification but without the intention that it be accessed specifically be minors. For instance, they may upload it to a publicly accessible website intending to share it with other adults. It is possible that they may be caught under the law if minors access such materials out of their own volition and even when such materials are not targeted at them. This has implications for freedom of expression and may unduly label as "child sex offenders" people who had no intentions of engaging minors.<br><br>8. We therefore recommend excluding the publication of materials that are not specifically targeted at or intended for minors, even if minors might access them. |

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| 16:6: Child abuse material | <u>On the definition of "child abuse materials"</u><br><br>1. We agree strongly in principle that it is necessary to disrupt the market for child abuse material. We can see that this recommendation is intended to target the real and unacceptable phenomenon of people abusing children, or documenting their abuse of children, to obtain personal gratification and in some cases for commercial benefit. For this reason, we are broadly in support of this recommendation, especially as it pertains to real - and not fictional - child abuse material. However, we have some concerns about the potential overbreadth of the definition of such material.<br><br>2. For both real and fictional material, there may be cases where the letter of the law will catch material which should not be criminalised under such a section. For instance, plain reading of the definition would cover materials such as depictions of child abuse or suffering in wartime (e.g. a photograph of a child in a concentration camp, or the famous photograph of the child Phan Thị Kim Phúc in the Vietnamese war). It could also cover fictional depictions of abuse created by abuse survivors themselves in order to process their thoughts, feelings and responses to their experiences. While such material could be disturbing and may even in some cases seem to external eyes to be unduly titillating, it would be highly inappropriate for a response to personal trauma to be treated in the same way as an act of exploiting another child.<br><br>3. In the above cases, it may be that the PCRC's proposed defence of a "legitimate purpose" would suffice to prevent undue criminalisation. It can be argued that such depictions could be for the purposes of education and historical documentation, or for personal recovery. This points, however, to the importance of a robust and flexible reading of the concept of "legitimate purpose".<br><br>4. However, there are also potential scenarios involving fictional material that would arguably not fall under a "legitimate purpose" defence, but which nevertheless ought not to be criminalised under such an offence because they do not amount to the kind of exploitation of children that is intended to be targeted by this. For example, a group of minors or young people may create and share among themselves, for their own amusement, outlandish animations of cartoon children being killed. These materials might be tasteless or even repugnant, but given the wholly fictitious nature of the depictions and the absence of exploitation in the scenario, it is questionable whether they should be criminalised in the manner proposed.<br><br>5. We therefore recommend that the scope of "child abuse materials" be limited so that it is only criminalised if the overall intention and purpose of the work is for sexual gratification of the consumer. This can work in tandem with the "legitimate purpose" defence to prevent |

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| | the undue criminalisation of trivial cases, where they may be no legitimate purpose but also no exploitative harm of the kind envisaged by the offence.<br><br><u>On the "legitimate purpose" defences</u><br><br>1. As discussed, the "legitimate purpose" defence should be particularly broadly read when it comes to historical and fictional materials.<br><br>2. Here, we highlight other situations that should also be included in the reading of this defence:<br><br>a. The "artistic" defence should be understood widely to avoid criminalising works intended for serious discussion of themes of sexual violence, abuse etc. even if they may be targeted at children or involve children. An example would be "Five Easy Pieces", a play about pedophilia with a cast of children. Its creator worked with child psychologists to ensure the wellbeing of the child actors.<br>b. Work that is intended to promote public understanding of child abuse and/or assist survivors in their recovery must not be criminalised. In particular, there may be many people who have experienced abuse themselves who may create art depicting abuse in response to their own lives, as is our experience working with survivors of sexual violence. This may be an important part of their recovery and it should not be treated as criminal.<br>c. Work that depicts war, violent conflicts, and other historical events. For example, pictures of children in a concentration camp. |
| 17: General enhancement of penalties for offences knowingly committed against vulnerable groups | <u>On enhancement of penalties</u><br><br>1. We agree that it is particularly important that the victimisation of vulnerable people be taken seriously and addressed. However, we continue to have concerns about an approach focused on harsher penalties, as expressed in earlier sections on this document. Research has shown that longer sentences and harsher punishments do not reduce the rates of sexual crimes.[9] Instead, the reverse may be observed, where longer sentences increased recidivism due to a lack of repentance for the initial crime.[10] |

[9] P. Smith, C. Goggin, P. Gendreau.The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences. *Solicitor General of Canada*, 2002. Retrieved from: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ffcts-prsn-sntncs/index-en.aspx

[10] J. Travis, B. Western, S. Redburn, editors, Committee on Law and Justice, Division of Behavioral and Social Sciences and Education.The Growth of Incarceration in the United States: Exploring Causes and Consequences. *The National Academies Press*, 2014. Retrieved from: https://doi.org/10.17226/18613

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| | 2. Moreover, the prospect of harsher punishments may deter survivors of sexual offences to report the crime. Instead, increasing victim support and making the reporting and prosecution process more victim-friendly would go a long way in ensuring that survivors will come forward and sustain their involvement all the way to conviction. Improving the chances of securing convictions will do more to promote deterrence than imposing harsh penalties. This is a point recognised by the UN CEDAW Committee, who recommended that Singapore prioritise gender sensitisation training in the criminal justice system, not increasing punishments, as a way to strengthen protection for women against gender-based violence.[11] We also urge the Government to consider and look into the deterrence effects of other measures like community service and restorative justice measures such as restitutionary agreements.<br><br>3. We also call for more attention to be paid to structural conditions that puts groups like domestic workers in positions of vulnerability in the first place. In the discussion on enhancing penalties for offences against domestic workers, it is already recognised that domestic workers are especially vulnerable because they are confined to their employers' home all day and isolated. Instead of increasing penalties, we urge for more interventions that tackle such structural conditions. For example, victims who make a police report are not allowed to work freely in any other place of employment. They are given a Special Pass to continue to stay in the country until the case is concluded, which can take up one to two years. However, potential employers do not prefer to hire workers on a Special Pass. One of the biggest barriers for domestic workers to report is the fear of losing their income. They often have debts to pay and/or have to send money back to their families, who depend on the victim's income. Provisions to support their financial employment and support from employment agencies can greatly increase their confidence to report and deter perpetrators to continue to commit crimes.<br><br>4. Finally, there are other vulnerable groups that are not covered here such as persons in institutionalised settings (social care homes for people with disability, elderly, hospitals, etc), LGBTQ persons and sex workers, who face extra barriers in reporting offences against them.<br><br>5. In relation to sex workers, it is worth noting that sex workers rarely report offences committed against them to the police, as they fear being arrested themselves.[12] |

[11] The United Nations. CEDAW Committee concluding observations for Singapore. 21 November 2017.

[12] L. Ja'affar, V. Ho, M. Lee, S. Sherqueshaa. CEDAW 68th Session Stakeholders Report by Sex Workers in Singapore: We just want equality. Project X, 2017.

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| | To better protect all women and girls, we urge adopting the CEDAW Committee's recommendation to provide mandatory and recurring capacity-building programmes to members of the judiciary, lawyers and law enforcement officers equip them to apply relevant criminal law provisions strictly in cases of gender-based violence against women and to treat victims in a gender-sensitive manner.[13] It is also important that in carrying out training, that the Government collaborate with groups who work directly with vulnerable persons like sex workers. |
| 18: Dealing with abuse of vulnerable victims leading to death or other forms of grievous hurt | <u>On recommendation 49 (Introduce a new offence of "causing or allowing a vulnerable victim to die")</u><br><br>1. Broadly speaking, we understand the rationale for this offence and agree with the need to ensure that abusers do not escape accountability through the loophole discussed.<br><br>2. However, we are concerned about the potential impact of the proposed new offence of "allowing a vulnerable victim to die" on survivors of domestic abuse, and therefore urge attention to the specific circumstances and vulnerabilities of domestic abuse survivors in the approach to this proposed offence<br><br>3. Where an abuser (A) has been violent toward both the deceased victim (V) and another caregiver who may be liable under the proposed offence (B), it is important to have reasonable and compassionate expectations as regards B, who is a survivor of domestic violence. Such violence can seriously erode social and psychological well-being, making it difficult and potentially dangerous for B to actively resist A; it can also disempower and discourage B from taking step to seek help from external agencies. While B may nevertheless be said to have a duty of care towards V, it is important that the expectations placed on B are not unduly high. Notably, the UK Home Office guidance on the offence on which this is modelled specifically highlights the situation of domestic violence survivors:<br><br>"... in cases where the defendant has also been the victim of violence, there may be limited steps which they could reasonably have taken in order to protect themselves, and even more limited steps which it would be reasonable for them to take to protect the child or vulnerable person who was at risk from violence."[14]<br><br>4. Currently, liability is only found if the defendant "failed to take such steps as he could reasonably have been expected to take to protect |

[13] The United Nations. CEDAW Committee concluding observations for Singapore. 21 November 2017.

[14] National Offender Management Service, Criminal Law Policy Unit. The Domestic Violence, Crime and Victims Act 2004. March 2004.Retrieved from: https://www.gov.uk/government/publications/the-domestic-violence-crime-and-victims-act-2004

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| | the victim from the risk". We recommend an insertion to make clear that assessments of "reasonableness" must take into account the defendant's own experiences of abuse and victimisation by abuser A.<br><br><u>On "reasonable steps" as applied in recommendations 49 and 51(a)</u><br><br>5. For the reasons discussed above, we recommend for "reasonable steps" to be expansively understood. This is especially so when the defendant is also a survivor of abuse. Reasonable steps could include:[15]<br>a. Reporting to the police<br>b. Contacting social services<br>c. Calling public helplines<br>d. Contacting relatives or another responsible adult member of the family<br>e. Explaining concerns to a doctor<br><br>6. Furthermore, what "reasonable steps" are must be understood in the context people's awareness of the avenues for spotting abuse. A duty imposed on people to prevent harm must be accompanied by extensive government efforts to make people aware of such avenues and resources. Otherwise, criminalising people for not having the knowledge or resources to take "reasonable steps" in spotting abuse and supporting survivors would not be fair.<br><br>7. The duty imposed by recommendations 49 and 51(a) may disproportionately impact women who tend to be the main caregivers to vulnerable persons e.g. children. Already, there are calls for legal action to be taken against non-offending parents who fail to report child sexual abuse.[16]<br><br>8. In our experience, disclosing abuse not only impacts children but mothers too, many of whom experience secondary traumatic stress. Many mothers SACC has supported struggle with the decision of reporting due to concerns about what will happen to their child and the psychological trauma that the child may endure going through the legal system. Legal action against the non-offending parent may even deter children from speaking up as they contend with the guilt of said parent being punished.<br><br>9. Assessments about whether "reasonable steps" were taken should therefore also take such psychological and practical complexities into account. |

[15] Adapted from: National Offender Management Service, Criminal Law Policy Unit. The Domestic Violence, Crime and Victims Act 2004. March 2004. Retrieved from: https://www.gov.uk/government/publications/the-domestic-violence-crime-and-victims-act-2004

[16] J. Tai. *When home is where the sex abuse is*. The Straits Times, 26th August 2018. Retrieved from: https://www.straitstimes.com/singapore/when-home-is-where-the-sex-abuse-is-for-kids

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| | <u>On "reasonable steps" as applies to service providers</u><br><br>10. The duty imposed in recommendation 51(a) could apply to service providers supporting persons suffering from family violence. While we note that the committee does not recommend introducing a further mandatory reporting requirement for this offence, on top of what already exists in s 424 of the CPC, we nonetheless wish to highlight the constraints such service providers may face when it comes to reporting.<br><br>11. In our experience, clients are often reluctant or hesitant to engage with the police. After the traumatic and disempowering experience of sexual assault, it is important to them to recover a sense of autonomy, especially over how their case is handled. Confidentiality is a major concern for many; losing control over disclosures of sensitive information would threaten their psychological safety. In some cases, there is the risk that it would lead to self-harm, including potentially fatal self-harm. In a minority of cases, the client faces a risk of prospective danger, and the need to address this risk may outweigh the considerations above. In these cases, it is our policy to contact the police or other authorities.<br><br>12. As such, in contextualising what "reasonable steps" could be for service providers, we recommend taking into account decisions made based on the provider's assessment of whether (i) it was necessary to maintain client trust and confidentiality in respect of the information that would otherwise trigger a reporting duty, so as to effectively provide that support and assistance and whether (ii) the risk of prospective danger to the client or another person was sufficiently clear or significant as to outweigh the need for trust and confidentiality. The fact that an assailant has not been identified or apprehended should not by itself be taken to establish such risk.<br><br><u>Other recommendations</u><br><br>13. To avoid an overbroad application of the offence proposed in recommendation 51(a), we recommend amending "risk of a child or young person being ill-treated" to "significant risk…". This brings the level risk in line with the offence proposed in recommendation 49. It is also the same level of risk found in the United Kingdom's version of this offence. |
| 23.5: Minimum age of criminal responsibility (MACR) | <u>On recommendation 83 (Raise the MACR from 7 to 10 years)</u><br><br>1. We welcome raising the minimum age of criminal responsibility and believe that it should be raised further to 12 years as 12 is the age recommended by UN Committee on the Convention on the Rights of the Child, to which Singapore is party. |

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| 23.6: Consent | <u>On the need for a statutory definition of "consent"</u><br><br>1. Our experience with sexual assault survivors and interactions with medical practitioners, social workers and the police show that there is a need for a clear, statutory definition of "consent". In explaining its decision to not push for a positive definition of "consent", the Committee cited the general lack of difficulty in application in court as a reason. However, what we have experienced is that the poor understanding on the ground of what consent is - due in part to its negative definition - has prevented survivors from reporting the abuse in the first place. What takes place in the courtroom, therefore, does not reflect the whole impact of the legal definition of consent.<br><br>2. Furthermore, the definition of consent as developed by case law is not easily accessible to all. Professionals (social workers, counsellors, the police etc) and survivors themselves usually only refer to the Penal Code. How "consent" is worded in the Penal Code therefore has a huge impact on work on the ground.<br><br>3. We have seen several cases where the police seemed to believe that a survivor who did not use physical force to resist the perpetrator must have consented to the penetration. The investigating officers either were not aware or did not make it clear to the survivor, that physical submission does not in itself amount to consent. Although this is recognised in case law,[17] it is not immediately apparent in s 90 of the Penal Code.<br><br>4. Therefore, to create better understanding on the ground of what "consent" is and to include the particularities of consent as it pertains to sexual offences, we recommend that a statutory, positive definition of "consent" be added specifically for sexual activities. Currently, s 90 is dislocated from the section on sexual offences, where the lay reader would expect to find such information. Further, the current definition of "consent" under the Penal Code involves cross references to many other provisions (ss 43, 44 and 339) rendering it extremely unfriendly and inaccessible to non-legally trained persons.<br><br>5. For ease of reference, the proposed specific definition of consent for sexual activity should be created under "Sexual offences" of Chapter XVI in the Code.<br><br>6. We propose the following as a definition:<br><br>"Consent is the free, informed and voluntary participation in the sexual activity in question. Lack of resistance and submission to sexual activity, in itself, is not consent as a matter of law." |

[17] See e.g. PP v Victor Rajoo [1995].

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| | The above definition is adapted from Ratanlal & Dhirajlal's definition of consent,[18] which was referred to in Pram Nair v PP (2017).[19] It encompasses the elements of "free exercise of choice" ["free"], "voluntary participation" ["voluntary participation"] and the exercise of choice "based on the knowledge of the significance and moral quality of the act" ["informed"].<br><br>That the lack of resistance and submission to sexual activity does not by itself qualify as consent is already recognised in case law. We propose that it be codified and spelt out clearly in the definition of consent.<br><br>7. In addition, we propose a subsection to set out specific situations where either there is no consent in law, or no consent is obtained. These situations should include:<br>a. Where the consent to participate is expressed under fear of injury or wrongful restraint to the person, or to some other person including the accused;<br>b. Where the consent to participate is expressed under a misconception of fact; and the accused knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;<br>c. Where the consent is given by a person who, from unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance, is unable to understand the nature and consequence of that to which he gives his consent;<br>d. Where the consent is given by a person who is under 16 years of age;<br>e. Where the accused causes or induces the complainant to participate in the activity by abusing a position of trust, power or authority;<br>f. Where the consent is expressed or implied by the words or conduct of a person other than the complainant; or<br>g. Where a person says or does something to show that they are not willing to continue an activity that has started. |

[18] "[c]onsent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and the moral quality of the act, but after having freely exercised a choice between resistance and assent… Consent implies the exercise of free and untrammelled right to forbid or withhold what is being consented to; it is always a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former." R. Ranchhoddas, D.Keshavlal. Ratanlal & Dhirajlal's law of crimes : a commentary on the Indian Penal Code, 1860 vol 2 (CK Thakker & M C Thakker eds). *Bharat Law House*, 2007.

[19] Pram Nair v Public Prosecutor [2017] SGCA 56. 2017. Retrieved from: http://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/[2017]%20SGCA%2056.pdf

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| | 8. Scenarios (a) to (d) are based on the existing negative definition of consent in the current Penal Code, modified to complement the wording of our proposed positive definition.<br><br>In scenario (a), we added "including the accused" to account for situations (which we have come across on a few occasions) where the accused threatens to harm himself if the complainant does not comply with his demands to have sexual intercourse.<br><br>In scenario (d), for the purposes of defining consent in the context of sexual offences, the age of consent (16) to sexual activity should be used, instead of 12.<br><br>9. Scenarios (e) and (h) are adapted from existing legislation in other jurisdictions that have positive definitions of consent, and which, in our view, provide greater clarity, and are in line with the definition of consent as used in local cases.[20]<br><br>10. Scenario in (e): That sexual activity can result from an abuse of a position of trust, power or authority - and should be an offence - is already recognised in recommendation 39 on exploitative penetrative sexual activity. Though that was with reference to an offence against minors, we believe that the same principles can be applied to those above 18 years of age, as older persons could also be coerced into sexual activity due to exploitation. For example, a superior coercing his subordinate at the workplace into sexual activity.<br><br>11. An application of scenario in (f) is: C's consent should not be assumed if A tells B that C is ok to have sex with B. B needs to seek C's consent directly. For example, a wife's consent should not be assumed, if her husband told another man that he can have sex with her. We have come across such situations in practice.<br><br>12. Scenario in (g): We have seen cases where the victim told the other party to stop when the perpetrator became aggressive or was causing her hurt, but the perpetrator refused to stop.<br><br>13. Furthermore, in the spirit of setting out a comprehensive definition of consent, we recommending stating clearly in the Consent provision that it is not a defence to sexual offence charges that the accused believed that the complainant consented to the activity unless he had exercised due care and attention to ascertain that the complainant was consenting [Section 79 and 52 of the Penal Code; Pram Nair v PP [2017] SGCA 56]. |

[20] See e.g. Canada: Department of Justice. *A definition of Consent to Sexual Activity*. Government of Canada, 2015. Retrieved from: http://www.justice.gc.ca/eng/cj-jp/victims-victimes/def.html

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| | 14. It would also be useful to have illustrations that the consent must be to the sexual activity in question and not to some other activity which is different in nature. For example, we have come across cases where one party consented to touching but not penetration, or to vaginal sex but not anal sex, but the other party proceeded with the non-consensual activity, despite protests. In such cases, the non-consenting party is often confused about whether the law treats her original consent as including consent to the offending act that she did not want.<br><br>15. In addition, we wish to flag a few scenarios for the Government of conditional consent (but not limited to these scenarios) to review as to how consent should be determined:<br><br>a. We have come across cases where a woman agrees to have sex only if the man wears a condom. However, he removes the condom half-way through the act. Here, a case can be made that the nature of the act a woman is consenting to has been altered and should thus amount to non-consent. This was discussed in the Julian Assange case, where the UK High Court ruled that there was no consent since the complainant only consented to sexual intercourse with a condom, but he had penetrated her when she was asleep and not wearing a condom:<br><br>"It is quite clear that the gravamen of the offence described is that Mr Assange had sexual intercourse with her without a condom and that she had only been prepared to consent to sexual intercourse with a condom. The description of the conduct makes clear that he consummated sexual intercourse when she was asleep and that she had insisted upon him wearing a condom… it is difficult to see how a person could reasonably have believed in consent if the complaint alleges a state of sleep or half sleep, and secondly it avers that consent would not have been given without a condom. There is nothing in the statement from which it could be inferred that he reasonably expected that she would have consented to sex without a condom."[21]<br><br>b. A woman agrees to have sex in exchange for money. However, the client fails to pay. Here, it is also arguable that the nature of the act she consented to has changed, since what she consented to was specifically, sexual intercourse in exchange for money. |

[21] The Guardian. *Julian Assange loses extradition rape appeal - full judgement*. 2nd November 2011. Retrieved from : https://www.theguardian.com/media/interactive/2011/nov/02/julian-assange-extradition-full-judgment

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| | 16. Finally, we strongly agree with the Committee that public education including formal sex education in schools is important in improving the public's understanding of consent. Whether or not the Government accepts the Committee's recommendation on consent in the Penal Code, it will be important to review current sex education programmes to ensure that they explicitly discuss the meaning of consent and what it means in practice. |
| 25:1: Grave and sudden provocation | <u>On recommendation 104 (Clarify that cumulative provocation over a period of time may amount to grave provocation)</u><br><br>1. We welcome the clarification that cumulative provocation over a period of time may amount to grave provocation. This more clearly includes the actions of abuse survivors, typically women.<br><br>2. As pointed out by the Committee, there have been criticisms of this partial defence as it tends to favour the typical male reaction to sudden provocation and excludes the reactions of abuse survivors. Feminist critics have also pointed out how the defence excuses men's "equality-denying violence"[22] by "claiming to have lost self-control", and has been used in some cases to defend jealous men who killed their intimate partners.[23]<br><br>3. The Committee suggested that pure "slow burn" cases (where there is no sudden "final straw") be treated under the partial defence of diminished responsibility instead. However, the use diminished responsibility as a defence to murder by battered women has received some criticism for instance, in further "pigeonholing" and perpetuating the stereotype of women as "'bad or partially mad… irrational and emotional". It also diverts attention away from the abuser and his actions, and instead focuses on the "abnormality" of the woman's mind.[24]<br><br>4. How the "final straw" or provocation is defined for the purposes of this defence should therefore not be too restrictive. It should include conduct, words and gesture that are typical of the pattern of abuse that the accused has suffered i.e. the conduct, words or gesture do not necessarily have to be exceptional to qualify as the "final straw". |
| 25:4: Sudden fight | <u>On recommendation 114 (Insert new *Illustrations* to exemplify situations where the partial defence of sudden fight is not available)</u> |

[22] This phrase was used by Ramsey (2010) to describe violence which perpetuates gender inequality. C.B. Ramsey. Provoking Change: Comparative Insights on Feminist Homicide Law. Journal of Criminal Law and Criminology, 2010. Retrieved from https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7345&context=jclc

[23] Ibid.

[24] K. Medarametla. Battered women: The gendered notion of defences available. *Socio-Legal Review,* 2017. Retrieved from: http://docs.manupatra.in/newsline/articles/Upload/F1D66902-8FAE-4580-BDB1-479D1768B695.pdf

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| | 1. We welcome the insertion of the illustrations to clarify where the partial defence of sudden fight is not available. In particular, we commend the second illustration in showing that a violent reaction to sexual rejection is not a valid partial defence for murder. |
| 25:6: Infanticide | <u>On recommendation 117 (Retain Exception 6 (Infanticide) as it currently appears)</u><br><br>1. We agree that infanticide should be retained as a partial defence to murder. This recognises the tremendous stress that mothers can experience in the postpartum period, which may impair their mental capacity.<br><br>2. There needs to be wider awareness and understanding of postpartum depression, and societal support readily available for mothers affected by mental health difficulties or struggling with childcare responsibilities. Professionals should actively provide women with resources like helplines, referrals to mental health experts or counselling services, and support groups. Receiving empathetic responses, and knowing that her difficulties are recognised, can greatly help in a mother's recovery. |
| 26: Updating sexual offences | <u>On recommendation 120 (Expand "rape" in s 375 to include penile-anal penetration)</u><br><br>1. We welcome the expansion of "rape" in s 375 to include non-consensual penile-anal penetration, regardless of the gender of the victim. In our view, the expansion should go further to include all forms of non-consensual penetration involving the penis.<br><br>2. The Committee based the expansion of "rape" to include penile-anal penetration on two points:<br>a. That such penetration carries with it the dangers of forced transmission of sexually transmitted diseases;<br>b. That being able to prosecute a man if he engaged in non-consensual anal sex with another person is consistent with the practice in jurisdictions that have expanded the scope of rape.<br><br>3. In our view, this logic is equally applicable to non-consensual penile-oral penetration. The risks of the transmission of infection are similar to those of penile-vaginal and penile-anal penetrations.[25] Second, the United Kingdom and most states in Australia include the penile penetration of the vagina, anus and mouth in their definitions of rape too. |

[25] Centres of Disease Control and Prevention. Sexually Transmitted Diseases. *STD Risk and Oral Sex - CDC Fact Sheet*. 2017. Retrieved from: https://www.cdc.gov/std/healthcomm/stdfact-stdriskandoralsex.htm

4. Any form of forced penetration can be traumatic to the victim. In our experience, survivors who experienced non-consensual penile-oral penetration can be just as traumatised as those who experienced non-consensual penile-vaginal penetration. If, as recommended, penile-anal penetration be moved under s 376 as "rape", the only penile penetration left under the definition of "Sexual assault penetration" is that of penile-oral, which is an odd distinction that is hard to justify. The Committee has offered the lack of public consensus on the gravity of non-consensual penile-oral penetration as a reason to keep it out of the definition of rape, but for reasons stated above, the gravity - in terms of health risks and trauma to survivors - are in fact comparable to that of other forms of non-consensual penile penetration. We recommend that experiences and opinions of professionals in therapeutic relationships with the victim who are informed of trauma and its impact on victims be given more weightage than public opinion in this matter.

<u>On recommendation 121 (Expand "Sexual assault by penetration" in s 376 to include situations where a woman forces a man to penetrate her vagina, anus or mouth)</u>

1. We welcome the expansion of s376 to include cases where women force men to penetrate them with their penis. This recognises that men can be forced into sexual penetration against their will. Together with the removal of marital immunity for rape, it also ensures that all kinds of non-consensual penetration, regardless of the nature of the penetration or the gender of the perpetrator/victim, are treated by the law with equal gravity. This is an important step toward universal protection against sexual violence and the upholding of the value of bodily autonomy.

2. Furthermore, we recommend making s 376(2)(b) gender neutral to cover scenarios where A causes B a woman to penetrate or be penetrated by another person C, without B's consent.

<u>On recommendation 122 (Amend s 509 (insult of modesty) to be gender-neutral)</u>

1. We welcome moving s 509 to be sited under the title "Sexual offences" instead of "criminal intimidation, insult and annoyance"; and the amendment to make the offence gender-neutral.

2. We further recommend updating and amending the language of "insult of modesty". "Modesty" is an outdated concept and in the sexual context, irretrievably associated with regressive notions of women's chastity and should be done away with.

3. This section, is in effect, intended meant to deal with what is commonly known as "sexual harassment", and we would

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| | recommend that this language be used, to supplement the provisions under the Protection from Harassment Act 2014 (POHA)<br><br>It is noted that POHA deals with "harassment' but does not have an explicit definition of "harassment" and while its illustrations include examples of sexual harassment, it does not specifically include an offence of "sexual harassment". Thus, it would be useful to replace "Insult of Modesty" with "Sexual Harassment" in the Penal Code.<br><br>There are many international precedents for the definition of "sexual harassment". We would be happy to discuss this further with the Government if it is keen to explore this proposed change.<br><br>4. <u>Other recommendations - s 354</u><br><br>5. The language of s 354 ("outrage of modesty") is inappropriate and confusing in characterising the nature of the offence. Our experience indicates that this phrasing impedes the ability of the police to effectively communicate with victims regarding such crimes. In particular, survivors have stated that police officers asked questions such as "Were you outraged or insulted?" to determine whether an offence had been committed. They were thus given the false impression that the offence was dependent on their subjective sense of outrage/insult, rather than the nature of and intention/knowledge behind the act.<br><br>6. The Penal Code should be updated to reflect the prevailing understanding of non-consensual sexual conduct as a violation of an individual's right to control what is done to their body, instead of as an "outrage" of an abstract quality called "modesty". We therefore recommend that the more appropriate term "sexual assault" be used instead. This follows the language in other jurisdictions such as the United Kingdom where "sexual assault" is defined as the intentional touching of a sexual nature of another person without that person's consent, and if he does not reasonably believe that the person consents.[26] If necessary, to ensure a smooth transition to the more modern and appropriate language, the Explanatory Notes can provide that this is an update of the old language and that the previous cases will still be relevant as a guide to interpretation of this provision.<br><br>7. The offence should also be redrafted to state that "Sexual assault" has been committed if the perpetrator does not reasonably believe that the victim was consenting to the touching. In its current wording, the requirement of intention or knowledge means that there may be a possibility that even a wholly unreasonable belief that the victim |

[26] Department of Culture, Media and Sport. *Sexual Offences Act*, 2003. The National Archives, 2018. Retrieved from: https://www.legislation.gov.uk/ukpga/2003/42/section/3

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| | was consenting would negate the *mens rea* of the crime. This interpretation, if accepted, would afford insufficient protection to victims and be too lenient to offenders who carelessly assume that there was consent.<br><br>8. The renamed "Sexual assault" offence should then be moved under the category of "Sexual offences", away from "Criminal force and assault".<br><br>9. Finally, there is a gap in the law that the sexual acts, physical or non-physical (not amounting to penetration) of someone under 16 years old by an adult is not an offence if it was "consensual". However, the principle behind the age of consent is that those under 16 cannot be said to have "consented" to sexual activity with an adult. Therefore, the age of consent should also apply to s345 as well as to all sexual offences where it is not covered currently including but not limited to Insult of Modesty, Sexual Exposure, POHA, etc. |
| 27: Updating archaic language | <u>On recommendation 123 (Amend s 294 (Obscene songs) to "obscene acts")</u><br><br>1. We question the need to criminalise obscene acts committed to the annoyance of others under s 294. Currently, most - if not all - offences convicted under this section generally relate to "flashing" and public masturbation.[27] The Committee has already recommended for a new offence of "Sexual exposure" to deal with such acts, so it is unclear what else the renamed s 294 would be meant to capture.<br><br>2. Furthermore, the current wording of "annoyance" seems overly broad and on its plain reading, does not convey a sense of gravity in impact amounting to the criminal. If an obscene act harms someone specifically it would probably count as harassment, which is already criminalised.<br><br><u>On recommendation 124 (Amend s 312 (causing miscarriage) to define "quick with child" as a situation where the pregnancy is of more than 16 weeks' duration)</u><br><br>3. We welcome replacing the term "quick with child" with a specification of 16 weeks. However, the Committee's explanation that 16 weeks is the latest point in a pregnancy where the State allows authorised and qualified medical practitioners to carry out abortions (Paragraph |

[27] For example: Public Prosecutor v Lee Yong Zhi (2017); Public Prosecutor v Aung Myo Thet (2015); Public Prosecutor v Puspanathan a/l Supramaniam (2014); Public Prosecutor v Saravanan s/o Velasamy (2003); Ong Tiauw Tjun @ Rudy Haryono v Public Prosecutor (2001); Ramakrishnan s/o Ramayan v Public Prosecutor (1998).

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| | 11 on page 335) is inconsistent with what the Termination of Pregnancy Act says. Under the Act, abortions carried out by authorised and qualified medical practitioners are allowed if the pregnancy is of more than 16 weeks duration but less than 24 weeks duration.<br><br>4. We are of the view that the use of the 16 weeks threshold can nevertheless be justified in this offence because the pregnancy is sufficiently physiologically advanced at this stage to present physical risks to the pregnant person if a miscarriage is induced (a fact which is reflected in the differential legal requirements for legal terminations before and after 16 weeks). Moreover, it also reflects a stage of pregnancy when spontaneous miscarriages are less common. |
| 28: Decriminalisation of suicide | 1. Our comments and recommendations for this section are found in a joint submission with Silver Ribbon. |

# Section 2

Recommendation: Repeal s 377A

1. We strongly call for s 377A of the Penal Code to be repealed. To be a truly inclusive and humane society that respects the human rights of all its people, Singapore must repeal a law that discriminates a group of persons based on their sexual orientation.

2. The Government's current position is that it will keep but not enforce s 377A makes a mockery of the rule of law concept that is fundamental to Singapore's approach to law and order.

3. Although it is unenforced, s 377A is used to embed norms and values that are discriminatory against groups of persons, and we have come across this on a regular basis. Discrimination against sexual minorities can be observed in the workplace, schools, and in the media where positive portrayals of same-sex relationships are routinely censored.

4. Singapore is a secular, pluralistic society that should protect the interests of all. To keep a law because its repeal is opposed by certain religious groups goes against our values.

5. Finally, keeping s 377A leads to perverse outcomes, including stopping men from reporting sexual abuse, which we have observed through SACC. The men fear that in describing the sexual assault or their interactions with their attackers or other individuals, they will reveal that they have, themselves, violated s 377A, and thus be subject to police investigation. For some, s 377A adds the fear that the authorities will treat them not as the victim of a crime, but as a perpetrator. Even if it is not "actively enforced", 377A has chilling effects on sexual minorities, and ends up punishing, stigmatising and silencing them further. We attach in Appendix A, an account of one of SACC's male clients about how 377A has prevented him from reporting.

6. In its Concluding Observations for Singapore, the Committee for CEDAW recommends that the State party ensure that LGBTI persons are effectively protected against all forms of discrimination in law and in practice. On the back of the Indian Supreme Court's latest ruling to strike down against 377A of the Indian Penal Code, we urge the government to seize this opportunity to truly ensure that all are equally protected under our law, and repeal 377A.

Appendix A

**M's story**

I am sharing this story to inform the existence of a horrific experience – the cunning unification of impersonation of authority, installation of fear with blackmailing and outdated legislation, and sexual assault through false correction programme to satisfy this perpetrator's ruthless and dark sexual fantasies on a vulnerable and helpless 16-years-old boy. #MeToo. I am also hoping that victims in similar predicaments could courageously come forward and put these perpetrators to task.

It has been several years now. It has profoundly changed me how I perceive myself, my sexual orientation, people with authority, and my ability to establish meaningful intimate relationships with a tonne of pessimism. However, I had never imagined a day that this story would come to light more appropriate than now when Singapore is struck with a question of repealing or keeping Penal Code 377A. In fact, there were occasions when I might have been lost in an alternate dimension/universe. So today, I am thankful that you get to read my story.

A few years ago, a curious 16-year-old me explored the gay community discreetly in the midst of preparing for my O Levels. I had more fulfilling interactions with the gay guys there as I often get ostracised in my school. Then, I was happily conversing with a guy of my age, Jerald (pseudo-name), on an instant messenger. Jerald and I talked for several weeks, ranging from topics of school life, homosexuality and even sexual stuff. He was particularly interested in the guys I interacted and met. That was also the period when I had the first boyfriend as well. His name was Nicholas (false name too). Surprisingly, Jerald knew Nicholas beforehand. This mark the end of calm before the calamity.

One fateful night, Jerald started the conversation by stating that he had something to confess about Nicholas. I was worried but cued Jerald to continue. Jerald revealed his true identity (let's refer him as Jerald). He was actually an undercover for (the now called) Ministry of Social and Family Development to track down homosexual guys and work with the police to charge them with legal actions. He threatened that he would charge me for exhibiting gay behaviour and inform my parents about it. I literally broke into cold sweat and trembled with fear. I really wanted to block him and throw my laptop away, but it was too late. As a government official, Jerald could easily hunt me down with my actual name and photo. Jerald also warned me not to leave the conversation, or he would proceed to charge me. It was wiser for me to co-operate.

"So, your boyfriend, Nicholas, is part of our probation programme, and talking to him is a breach of his probation contracts," Jerald confessed. Little did Jerald know, I went to ask Nicholas the legitimacy of this in the midst of this fiasco. Yes, Nicholas was under Jerald's probation programme. It was a terrible moment. Nicholas claimed that it was for my good and that marked the end of our relationship – in thin air. Traumatised and lost, I promised Nicholas back then that I will not pursue my gay tendencies (an indirect reference to present day Truelove.is).

Still, I was so scared that I might be thrown to jail. Jerald toned down and added that if I agree to his year-long probation programme – meeting him and his team weekly, not to converse or meet any other gay guys during the time period, and not to tell anyone about the probation programme, he would not put me to any legal actions nor make a police report. The conversation ended with me surrendering my instant messaging account to Jerald that contained email contacts to all other guys and arranging our first probation session.

I recalled the first meet up with Jerald. Turns out, Jerald was actually a lot older than me, at least 2-3 decades apart, heavily moustached and plumb. In his office – a room in his flat, Jerald explained that as a secret agent, his operations are done in his flat with pen and paper. He then showed me several documents, including laminated news articles about HIV/AIDS/STD, warning me that having sex will expose me to all these, on top of it being a jailable offence (little did I know that he was referring to penal code 377A back then). I was so terrified that I could not find myself at ease until Jerald went easy on me. My emotions were manipulated by him.

It was then Jerald introduced the mysterious “sexual therapy”. It was part of the probation programme to correct my craving for guys that made me want to have sex with them. He refused to give more details about the therapy, nor did I have a choice to reject the “therapy”. He began to blindfold me and removed my school uniform, and his mouth was at my crotch… That’s it, I was sexually violated – in silence.

“See, I am a lot better than other guys, right? Why do you need to find them for sex?” Jerald assured. Mission accomplished – Jerald devoured another boy. ☹

Today, homosexuals are highly ostracised in Singapore – with no societal safety nets, and the presence of discriminatory legislation and homophobic people. We are incredibly vulnerable. In fact, we are often attacked by religious organisations as being sinful and un-humanly. Jerald is a cunning criminal. His success hinged on the decades-long myth that being homosexual is wrong and needs to be reformed/corrected with homosexual therapy. In fact, he had a reliable source to back him up: Penal Code 377A. To a young gay boy that knows little, this gay boy would be easily convinced that Jerald is legitimate. In fact, for years I thought that the Ministry of Social and Family Development did such things.

Yet, we still see myopic keyboard warriors lashing harsh and irresponsible remarks to a particular minority of people in a country supposedly known to be harmonious – the homosexuals. I wish I could date a girl and avoid all these traumas that happened to me. Unfortunately, I can’t choose my sexual orientation. I am a Singapore gay son trying to gain acceptance from my family, friends and the society.