

Michaelmas Term
[2026] UKPC 38
Privy Council Appeal No 0095 of 2025

JUDGMENT

The Attorney General of Trinidad and Tobago and others (Respondents) *v* Jason Jones (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Sales
Lord Briggs
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
10 November 2026

Heard on 8 July 2026

Appellant – Jason Jones
Anand Ramlogan SC
Amanda Clift-Matthews
Peter Laverack
Ganesh Saroop
Kate Temple-Mabe
(Instructed by Travers Smith LLP)

Respondent – The Attorney General of Trinidad and Tobago
Peter Knox KC
Robert Strang
(Instructed by Charles Russell Speechlys LLP)

Interveners – Colours Caribbean, The Silver Lining Foundation, OUTBermuda, United Belize Advocacy Movement, ILGA-NAC
(written submission only)
Adam Goldenberg
Anna Hoffmann
Grace McDonell
The LGBTQ+ Advocacy Clinic at Harvard Law School
(Instructed by Enyo Law LLP)

LORD SALES AND LORD BURROWS:

1. Introduction

1. The central focus of this appeal concerns the rights of gay men in Trinidad and Tobago. The underlying question is whether sections 13 and 16 of the Sexual Offences Act 1986 ("SOA 1986") are unconstitutional because they infringe the right to private and family life protected by sections 4 and 5 of the Constitution of the Republic of Trinidad and Tobago Act 1976 as amended ("the Constitution").

2. In general terms, sections 13 and 16 of the SOA 1986 criminalise private, consensual sexual relations between same-sex couples. More specifically, section 13 criminalises "buggery" defined to mean "sexual intercourse per anum by a male person with a male person or by a male person with a female person"; and section 16 criminalises "serious indecency" except where committed in private between a male person and a female person over the age of 16 both of whom consent to the commission of the act.

3. Jason Jones, who is the appellant on this appeal to the Board, is a citizen of Trinidad and Tobago, born on 5 September 1964 and raised in Port of Spain. He has been openly gay since the age of 16. After experiencing harassment and discrimination by reason of his sexual orientation, he relocated to England in 1996. Mr Jones returned to reside in Trinidad from 2010 to 2014 before relocating again to England. Between 1996 and 2010 and since 2015, Mr Jones has regularly visited his home country.

4. In an affidavit (dated 23 February 2017) filed for the purposes of the proceedings in the High Court, Mr Jones described some of the details of his experience of being gay in Trinidad and Tobago. The Attorney General for Trinidad and Tobago, who is the respondent in this appeal, put forward no evidence so the affidavit was unchallenged. Mr Jones was harassed and verbally abused on an almost daily basis while out in public; and he had to avoid taking public transport out of fear for his safety. His performances as a singer led to him on several occasions being attacked with rocks, glass bottles and pieces of wood. The police failed to protect him. He was constantly anxious and afraid that he would be arrested, questioned, charged and brought before the courts and severely punished because of his sexual orientation.

5. It is convenient to mention at this point that the Board has been assisted by a short written case on behalf of the interveners, supporting Mr Jones' appeal. The interveners, who explain that they are "all leading LGBTQ+ advocacy groups", are Colours Caribbean, The Silver Lining Foundation, OUTBermuda, United Belize Advocacy Movement, and ILGA-North America and The Caribbean. The Board would like to thank counsel for the interveners who were all acting pro bono.

2. The issues in this appeal

6. There are two central issues raised in this appeal. The first, which can be referred to as the "saved existing law (section 6) issue", involves deciding what is meant by "existing law" in section 6 of the Constitution and how it applies in this case. That requires a comparison between sections 13 and 16 of the SOA 1986 and sections 60–62 of the Offences Against the Person Act 1925 ("OAPA 1925"), which were originally enacted in 1925 under what was then called an Ordinance, rather than an Act (but was renamed subsequently), with amendments in 1939 and 1940. The focus for this issue has been on sections 13 and 16 of the SOA 1986 in the form they were in when enacted in 1986 (but see paras 82–84 below dealing with what has been termed "the appellant's new argument").

7. The second central issue, which can be referred to as the "reasonably justifiable (section 13) issue" is whether, even if sections 13 and 16 of the SOA 1986 are not saved by section 6 as existing law, they are saved by the use made of section 13 of the Constitution in the passing of the SOA 1986. That turns on the "reasonably justifiable" proviso in section 13 of the Constitution. This second central issue is raised as a cross-appeal by the Attorney General, arguing that the order made by the Court of Appeal should be upheld on different grounds.

8. There are two further issues that the Board will need to consider. The first is the appellant's application for permission to raise a new argument on this appeal to the Board. The second concerns the appropriate remedy or order.

9. At the outset, it is helpful to set out, or summarise, all the relevant statutory provisions on sexual offences and provisions of the Constitution. The Board anticipates that, in order to understand its reasoning, the reader will need to refer back constantly to these provisions.

3. The relevant statutory provisions on sexual offences

10. On the "saved existing law (section 6) issue" the Board must compare sections 13 and 16 of the SOA 1986 and sections 60–62 of the OAPA 1925 (as in force in 1976 when the Constitution came into effect).

(1) The OAPA 1925 (as amended in 1939 and 1940)

11. This was the version of the OAPA 1925 in force at the time that the Constitution came into effect in 1976:

"UNNATURAL OFFENCES

60. Sodomy

Whoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for five years.

61. Attempt to commit an infamous crime

Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour and liable to be imprisoned for five years.

62. Gross indecency

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 misdemeanour and liable to be imprisoned for two years."

(2) The Offences against the Person (Amendment) Act 1979

12. This Act made an amendment to section 60 of the OAPA 1925 by adding that "a person convicted of buggery with a person under the age of fourteen years shall be liable to imprisonment for life or for a term of years."

(3) The Offences against the Person Act 1980

13. This Act made very minor amendments to sections 60–62 of the OAPA 1925. This included changing the numbering of the sections to 59–61, changing the heading of what was section 60 from "Sodomy" to "Buggery", and removing the references to "misdemeanours".

(4) The Sexual Offences Act 1986, long title and sections 13 and 16

14. As has been made clear in para 6 above, these are the provisions that, in respect of the "saved existing law (section 6) issue", need to be compared with sections 60–62 of the OAPA 1925. It is important to note that the long title uses the words "to repeal and replace":

> **"**AN ACT to repeal and replace the laws of Trinidad and Tobago relating to sexual crimes, to the procuration, abduction and prostitution of persons and to kindred offences.
>
> …
>
> **13. Buggery**
>
> (1) A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment—
>
> (a) if committed by an adult on a minor, for life;
>
> (b) if committed by an adult on another adult, for ten years;
>
> (c) if committed by a minor, for five years.
>
> (2) In this section 'buggery' means sexual intercourse per anum by a male person with a male person or by a male person with a female person.
>
> …
>
> **16. Serious indecency**
>
> (1) A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to imprisonment—

(a) if committed on or towards a minor under sixteen years of age for ten years;

(b) if committed on or towards a person sixteen years of age or more for five years.

(2) Subsection (1) does not apply to an act of serious indecency committed in private between—

(a) a husband and his wife; or

(b) a male person and a female person each of whom is sixteen years of age or more, both of whom consent to the commission of the act.

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

(5) The Sexual Offences (Amendment) Act 2000 and the Children Act 2012

15. These Acts made some further amendments to sections 13 and 16 of the SOA 1986. For example, by the Children Act 2012, the maximum punishment for buggery was, in all cases, laid down to be imprisonment for 25 years; and a further subsection (c) was added to the exclusions in section 16(2) (to exclude acts between children inter se) as follows:

"or (c) persons to whom section 20(1) and (2) and (3) of the Children Act, 2012 apply."

4. The relevant provisions in the Constitution

16. The Preamble to the Constitution includes the following:

"Whereas the People of Trinidad and Tobago—

(a) have affirmed that the Nation of Trinidad and Tobago is founded upon principles that acknowledge the supremacy of God, faith in fundamental human rights and freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator;

…

(e) desire that their Constitution should enshrine the above-mentioned principles and beliefs and make provision for ensuring the protection in Trinidad and Tobago of fundamental human rights and freedoms."

17. The relevant parts of sections 2–6 and 13–14 of the Constitution will now be set out. Of particular importance to what the Board has to decide are sections 6 and 13. Section 6 saves existing law from constitutional challenge. Section 13 provides a route, by express declaration and a supermajority, for Parliament to enact legislation which infringes fundamental rights unless the Act is shown not to be "reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual" (we will refer to this as the proviso to section 13). The section 13 route was used for the passing of the SOA 1986.

"**PRELIMINARY**

…

2. The Supreme Law

This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency.

3. Interpretation

…

'law' includes any enactment, and any Act or statutory instrument of the United Kingdom that before the commencement of this Constitution had effect as part of the law of Trinidad and Tobago, having the force of law and any unwritten rule of law;

…

CHAPTER 1

THE RECOGNITION AND PROTECTION OF

FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

PART I

RIGHTS ENSHRINED

4. Recognition and declaration of rights and freedoms

It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

…

(b) the right of the individual to equality before the law and the protection of the law;

(c) the right of the individual to respect for his private and family life;

…

(i) freedom of thought and expression;

…

5. Protection of rights and freedoms

(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

…

PART II

EXCEPTIONS FOR EXISTING LAW

6. Savings for existing law

(1) Nothing in sections 4 and 5 shall invalidate—

(a) an existing law;

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

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(2) Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to

an extent to which the existing law did not previously derogate from that right.

(3) In this section—

'alters' in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;

'existing law' means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1);

'right' includes freedom.

…

PART IV

EXCEPTIONS FOR CERTAIN LEGISLATION

13. Acts inconsistent with sections 4 and 5

(1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

(2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House.

…

PART V

GENERAL

14. Enforcement of the protective provisions

(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

(2) The High Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of subsection (1);

…

and may … make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled."

18. Although it is unnecessary to set it out, section 54 (referred to in sections 5 and 6(2) above), sets out the supermajorities needed for alterations to the Constitution.

5. The judgments in the lower courts

(1) Rampersad J

19. On 23 February 2017, Mr Jones filed a claim in the High Court of Trinidad and Tobago pursuant to section 14 of the Constitution, seeking declarations that sections 13 and 16 of the SOA 1986 infringed his fundamental rights guaranteed by sections 4 and 5 of the Constitution.

20. On 12 April 2018, Rampersad J delivered his judgment: Claim No CV2017-00720. Having charted the history of the offence of buggery and its religious origins, the judge held that sections 13 and 16 of the SOA 1986 were not saved as existing law under section 6 of the Constitution; that they breached a number of Mr Jones' fundamental rights and freedoms, especially his right to respect for his private and family life; and that sections 13 and 16 were not "reasonably justifiable" under the proviso set out in section 13 of the Constitution. To give more detail, his essential reasoning was as follows:

(i) As regards the saved existing law issue under section 6 of the Constitution, the judge considered that the plain wording in the long title of the SOA 1986 indicated that sections 13 and 16 did not "re-enact" the offences in sections 60–62 of the OAPA 1925. Parliament could have used the words "repeal and re-enact" to express the statute's purpose but instead the words "repeal and replace" were used. "Replacing" and "re-enacting" were not the same concepts and had different meanings.

(ii) Rampersad J reasoned that, when enacting the SOA 1986, Parliament initiated the process of consideration, debate and purposeful contemplation of sexual offences in the context of the Constitution. Parliament had taken sexual crimes out of the purview of section 6 of the Constitution and placed them under the remit of section 13 of the Constitution.

(iii) The judge considered that sections 13 and 16 of the SOA 1986 violated various fundamental rights of Mr Jones. First, Mr Jones was unable to live his private life without the possibility of being branded a criminal. The SOA 1986, therefore, impinged on his right to respect for a private and family life. Secondly, those provisions disregarded Mr Jones' human dignity, which included his ability to make autonomous decisions about whom to love; whom to live with; and with whom to make a family. Thirdly, Mr Jones was treated differently under the law from heterosexual citizens because of his sexual orientation. The criminal sanction also justified in the mind of others that his lifestyle was unnatural and that he had a lesser value than heterosexual individuals. Finally, the sanction imposed affected Mr Jones' ability freely to express himself and his thoughts in public. The SOA 1986, therefore, impinged on his right to freedom of thought and expression.

(iv) In relation to whether the infringement was "reasonably justifiable" under section 13 of the Constitution, Rampersad J said this at para 156:

> "maintaining an unenforced law on the statutes makes no logical sense and, instead, seems more vindictive than protective or curative in any manner. As if to hold a 'big stick' over a minority to try to enforce a portion of society's morality

> over it … [I]t remains as a statement by the State against homosexuality since there seems to be no other purpose. The fact that the State proscribes against it quite obviously validates society's feelings against anyone who does call himself a homosexual to the extent that society may possibly feel justified in denouncing the practice forcefully or physically."

(v) Rampersad J decided that Mr Jones had proved on a balance of probabilities that the legislative objectives relied upon by the Attorney General were insufficiently important to justify limiting his rights. He reasoned that there was no doubt that maintaining the traditional family and values that represented society were important concepts, but they had to be adapted to modern times and different types of families. Mr Jones therefore succeeded in relation to section 13 of the Constitution.

(vi) Accordingly, Rampersad J ruled that sections 13 and 16 of the SOA 1986 were unconstitutional, illegal, null, void, invalid and of no effect to the extent that the laws criminalised consensual sexual conduct between adults.

21. After a further hearing as to the appropriate remedy, Rampersad J decided, in a judgment dated 20 September 2018, that, in order to bring sections 13 and 16 of the SOA 1986 into compliance with the Constitution, their wording should be modified as follows (with alterations in bold):

> "13. (1) A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment for five years.
>
> (2) In this section 'buggery' means sexual intercourse **without consent** per anum by a male person with a male person or by a male person with a female person.
>
> …
>
> 16. (1) A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to imprisonment for five years.
>
> (2) Subsection (1) does not apply to an act of serious indecency committed in private between—

(a) a husband and his wife; or

(b) ~~**a male person and a female**~~ person**s** each of whom is sixteen years of age or more, both of whom consent to the commission of the act;

(c) or persons to whom sections 20 and 21 and 22 of the Children Act apply.

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

(2) The Court of Appeal

22. The Court of Appeal by a majority (Bereaux and Pemberton JJA, Kokaram JA dissenting) allowed the Attorney General's appeal as regards the application of section 6(1) of the Constitution but upheld Rampersad J's conclusion that the requirement of reasonable justification in section 13 was not met: Civil Appeal No P337 of 2018, judgment delivered on 25 March 2025. The leading judgment for the majority was given by Bereaux JA, with whom, in a concurring judgment, Pemberton JA agreed. Bereaux JA's essential reasoning was as follows:

(i) Sections 13 and 16 of the SOA 1986 repealed and re-enacted with modifications the existing law. The argument that, as set out in the long title of the SOA 1986, those provisions repealed and replaced the existing law was incorrect because what mattered was the substance and not the form. Bereaux JA said at para 36:

"The crime of buggery remained intact and there is little difference between gross and serious indecency except serious indecency is now clearly defined and includes women. The [SOA 1986] re-enacted the same basic offences."

(ii) Sections 13 and 16 of the SOA 1986 fell within section 6(2) of the Constitution because the stiffer penalties and the targeting of homosexual men and lesbian women meant that those provisions constituted a greater derogation from the fundamental rights than under the OAPA 1925.

(iii) This meant that, unless section 13 of the Constitution applied, the OAPA 1925, albeit as amended in 1980, had to be substituted for sections 13 and 16 of the SOA 1986.

(iv) Section 13 of the Constitution did not save sections 13 and 16 of the SOA 1986 because, applying *Suraj v Attorney General of Trinidad and Tobago* [2022] UKPC 26; [2023] AC 337 ("*Suraj*"), those provisions were not "reasonably justifiable" in a society that has a proper respect for an individual's rights and freedoms. The substitution required by section 6(2) of the Constitution therefore applied.

(v) The substitution exercise required by section 6(2) resulted in the following order (at para 83):

> "The term of imprisonment of twenty-five years for buggery is struck from section 13(1) of the [SOA 1986 as amended in 2012] and a term of imprisonment of five years is substituted. In so far as they apply to consenting adults whether husband and wife, consenting men and women over sixteen years of age or any other adult, section 16(1) and section 16(2)(a) and (b) are disapplied. The provisions of section 61 of the [OAPA 1925 (as amended in 1980)] are reinstated in place of sections 16(1) and (2)(a) and (b). The provisions of section 16(1) and 2(c) of the Act shall continue to apply to persons to whom section 20(1) and (2) and (3) of the Children Act [2012] apply."

23. In his dissenting judgment, Kokaram JA held that Rampersad J had not been (plainly) wrong to declare sections 13 and 16 of the SOA 1986 unconstitutional "and to have modified those laws within the remit of an appropriate constitutional remedy to target the area of criminal sexual activity which is non-consensual sexual conduct" (para 110). His judgment endorsed the essential reasoning of Rampersad J as summarised above.

24. Kokaram JA also made two sets of observations, which the Board considers to be of considerable importance. First, in favouring the view that sections 13 and 16 of the SOA 1986 were re-enacting and replacing the existing law under section 6 of the Constitution, he said at para 207 (and repeated at para 310):

> "This was new legislation that the Parliament was proud to have enacted as seen in the Hansard reports. It represented a Parliamentarian choice of deliberately breaking from the past

> and modernising our sexual offences within the mores of the existing values prevailing at that time."

25. Secondly, at para 295, Kokaram JA explained why it was important not to give section 6 of the Constitution (as a savings clause) a wide interpretation:

> "Rather than a mechanism of transition [the savings clause] has become a troubling comfort zone of stultifying the development of our social order. Unless it is made clear by Parliament that it is breaking away from the past, the social values of our history, inconsistent with fundamental rights, will unnecessarily be foisted in the future. It is clear from *Suraj* however that a strict interpretation of section 6 means that its reach should not exceed its grasp. I am attracted to the restrictive approach to interpreting the legislative act of Parliament in conducting its legislative exercise of modernising existing law. It should be strictly confined to exactly what is defined as an existing law and ambiguity must be resolved in favour of giving life to the intrinsic constitutional values and principles …"

6. The Board's reasoning on the "saved existing law (section 6) issue"

(1) Section 6(1) of the Constitution

26. Section 6(1) of the Constitution saves "existing law" from a fundamental rights challenge, ie a challenge that the rights protected by sections 4 and 5 of the Constitution are infringed by the law (whether legislation or common law). It is commonly referred to as a "savings provision".

27. Sections 60–62 of the OAPA 1925 were plainly "existing law" at the time that the Constitution came into force in 1976. It is therefore not in dispute that, by reason of section 6(1)(a) of the Constitution, sections 60–62 were saved from a fundamental rights challenge.

28. Although there were amendments to sections 60–62 of the OAPA 1925 in 1979 and 1980, they were of a limited kind. Section 6(1)(c) of the Constitution includes as saved existing law a statute that does alter the existing law but where the alteration does not derogate from fundamental rights to any greater extent than (or in any different way from) the existing law. It is not in dispute that sections 60–62, as amended in 1979 and

1980, were "existing law" under section 6(1)(c) and were, therefore, also immune from a fundamental rights challenge.

29. In contrast, it is clear, and is also not in dispute, that sections 13 and 16 of the SOA 1986 do not fall within the meaning of existing law set out in section 6(1). That is because, applying section 6(1)(c), the alteration to the existing law made by those provisions was a further derogation from fundamental rights than under the existing law. More specifically, that is because, for example, sections 13 and 16 of the SOA 1986 imposed in general terms more severe sentences than under sections 60–62 of the OAPA 1925 for buggery and for "serious indecency"; and serious indecency was extended to females (whereas in section 62 of OAPA 1925 the offence in question was confined to males) and was statutorily defined, in contrast to "gross indecency" in section 62 of the OAPA 1925 which was not defined.

30. As section 6(1) does not apply to save as existing law sections 13 and 16 of the SOA 1986, one must move on to consider whether those provisions are saved as existing law by section 6(2) of the Constitution.

(2) Section 6(2) of the Constitution

31. Section 6(2) appears to be a unique constitutional provision. Certainly, neither counsel was able to point to any precisely comparable provision in the constitution of any other jurisdiction. It was referred to by Anand Ramlogan SC, counsel for Mr Jones, as a "snap-back" or "boomerang" provision because, where it applies, there is a mandatory reversal back to the provisions of the existing law. That is, the existing law must be substituted for the later infringing enactment.

32. The two essential requirements for the application of section 6(2) can be set out as follows:

(i) The enactment in question must be one that "repeals and re-enacts with modifications" an existing law.

(ii) The enactment must constitute a further derogation from fundamental rights than under the existing law.

(iii) (It should not be forgotten that, even if the enactment in question does not qualify as existing law for the purposes of section 6(2), it may be saved by section 13 of the Constitution: the application of section 13 is the second central issue considered at paras 52–81 below.)

33. In this case, it is not in dispute that requirement (ii) is satisfied, for the reasons set out at para 29 above in relation to section 6(1)(c). The application of section 6(2) therefore turns on requirement (i). The crucial question is as follows: do sections 13 and 16 of the SOA 1986 repeal and re-enact with modifications existing law or do they go beyond that and constitute what can, for shorthand, be referred to (albeit loosely) as "new law"?

34. Peter Knox KC, counsel for the Attorney General, submitted that, in line with what the majority of the Court of Appeal decided, sections 13 and 16 of the SOA 1986 in substance repealed and re-enacted with modifications the existing law, which had been preserved as such down to that time. He argued that there was a re-enactment within the meaning of section 6(2) of the Constitution if one could reasonably trace the same substantive effect of the law from the old provisions to the new provisions.

35. The Board rejects those submissions and considers that the majority of the Court of Appeal made an error of law in deciding that sections 13 and 16 of the SOA 1986 repealed and re-enacted with modifications the existing law. In the Board's view, sections 13 and 16 of the SOA 1986 went beyond repealing and re-enacting with modifications the existing law. Rather they constituted new law. This is for the following reasons.

36. First, sections 13 and 16 of the SOA 1986 were presented as a fresh overall package, following a Law Commission report, to modernise the law on sexual offences (see para 24 above). It would be odd, in the light of that context, to treat the new package as merely re-enacting with modifications the old law rather than representing new law. The fact that sections 13 and 16 of the SOA 1986 have some similarities with the preceding law does not in itself indicate that it was intended to re-enact that old law rather than create new law. Given the scope for various forms of harm to arise in relation to sexual conduct in the field of sexual offences, there was bound to be a continuing need for legal regulation under the criminal law, often with similar effects. For example, the notion of rape as a serious wrong has been a continuous theme of the criminal law from the earliest times. But this does not mean that Parliament may not choose to enact a modern law of rape.

37. The context in the present case shows that the Government considered that the time had come for a fresh look at the law on sexual offences in Trinidad and Tobago taking account of social circumstances as they existed in the mid-1980s. The Law Commission was asked to consider what law was appropriate to lay down in statute at that time as a proposed scheme for a complete regime to regulate this area. And the Government then proposed to Parliament that it should follow the Law Commission recommendations to put the law on a modern footing suitable for the society of Trinidad and Tobago at that time. This was an approach designed to review and modernise the law in the area of sexual offences, taking account of the fundamental rights in sections 4 and 5 of the Constitution, and not leave that area to be regulated by the law which had existed in the colonial era and down to the adoption of the Constitution in 1976. Had Parliament

wished to ensure the continuation of the old law as existing law immune from any possibility of challenge on constitutional grounds, the obvious choice would have been to make use of the existing law provision in section 6(1) of the Constitution.

38. An important indication that Mr Knox's attempt to give an objective traceability meaning to the concept of re-enactment with modifications in section 6(2) of the Constitution is unsustainable, is that it would undermine the legislative authority of Parliament under the Constitution. The Constitution confirms that Trinidad and Tobago is a parliamentary democracy and section 53 confers wide legislative power on Parliament to make laws for the peace, order and good government of Trinidad and Tobago. It is inherent in that wide power that Parliament is able to make choices about the extent to which newly enacted laws (either passed as ordinary legislation or pursuant to the supermajority procedure in section 13 of the Constitution) should be immunised from constitutional challenges, either by reference to section 6 or section 13. But the application of an objective traceability approach to the interpretation of section 6(2) would prevent Parliament from being able to make such a choice where the newly enacted law and the existing law had a similar substantive effect, as may often be the case (see para 36 above).

39. Secondly, section 6(3) of the Constitution defines "alters", in relation to an existing law, as including "repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it". It follows that a distinction is being drawn between, on the one hand (which we refer to as the "first category"), repealing and re-enacting the existing law with modifications (which falls within, and is the precise wording of, section 6(2)) and, on the other hand (which we refer to as the "second category") making different provisions in place of the existing law or (which we refer to as the "third category") modifying the existing law. The word "alters" is used in section 6(1)(c) to include all three categories. But under the scheme of section 6, it is only if a change in the law falls within the first of these three categories that section 6(2) applies. If the change falls within the second category ("making different provisions in place of it") or the third category ("modifying it"), it falls outside section 6(2). Moreover, this feature of section 6(3) is again incompatible with Mr Knox's attempt to give an objective traceability meaning to the concept of re-enactment with modifications, because such an interpretation would have the effect of blurring to a substantial and inappropriate degree the differences between the three distinct categories for which section 6(3) provides.

40. The differences between the categories are differences of quality and degree. The more the context indicates that Parliament chose to make new law rather than simply re-enact an already existing law, the more likely it is that the new provisions fall into the second or third categories rather than the first. Similarly, the greater the changes in the text or the substantive effect of the new provisions, the more likely it is that they fall into the second or third categories, rather than the first.

41. The majority in the Court of Appeal erred at para 53 by eliding the three categories and treating them all as covered by section 6(2). In fact, the majority's own assessment of how the changes in sections 13 and 16 of the SOA 1986 should be categorised indicates that they fall within either the second or third category, not the first. Bereaux JA said (para 53):

> "The changes in the Act to which I have referred are modifications made to the existing law. To the extent that offences were abolished and new offences created by the Act, the amendments fall within the phrase 'making different provisions in place of it or modifying it' in section 6(3) of the Constitution. To the extent that sentences were increased, these could only be modifications."

42. This is the assessment by the Board as well. Applying the threefold categorisation, it is clear that sections 13 and 16 of the SOA 1986 fall within the latter two categories rather than the first category.

43. Thirdly, the long title of the SOA 1986 (para 14 above) supports the same view because it refers to the SOA 1986 as being an Act to repeal *and replace* the existing law. This was a point stressed by Rampersad J and by Kokaram JA in his dissenting judgment in the Court of Appeal. The long title reflects the context referred to in para 37 above, and since this appears in the text of the statute itself it carries particular weight.

44. Fourthly, in so far as there is any doubt as to the correct interpretation, it is well-established that one should give a savings provision in a constitution, such as section 6, a narrow rather than a wide interpretation. Lord Rodger in *R v Hughes* [2002] UKPC 12; [2002] 2 AC 259 at para 35 expressed the point as follows dealing with the Constitution of St Lucia:

> "Since paragraph 10 introduces these exceptions to the rights and protection which people would otherwise have under the Constitution, it must be construed like any other derogation from constitutional guarantees. In *State v Petrus* [1985] LRC (Const) 699, 720D–F in the Court of Appeal of Botswana, Aguda JA referred to *Corey v Knight* (1957) 150 Cal App 2d 671 and observed that 'it is another well known principle of construction that exceptions contained in Constitutions are ordinarily to be given strict and narrow, rather than broad, constructions'. In case of doubt paragraph 10 should therefore be given a strict and narrow, rather than a broad, construction."

45. The same point was forcibly made by Kokaram JA in his dissenting judgment at para 295 (see para 25 above). The reason for taking a narrow interpretation of such savings provisions is obvious. A wide interpretation would tend to undermine a central purpose of a constitution which is to protect fundamental rights.

46. The fifth reason, closely linked to the previous point, is that, focusing specifically on the wording of the Constitution of Trinidad and Tobago, large swathes of existing law would be protected despite wholesale revision and repeal because almost any reform could be said to "repeal and re-enact with modifications" if one took a wide interpretation of those words. Moreover, a wide interpretation would serve to freeze the existing law as something immune from scrutiny by the courts, according to the standards of the fundamental rights protected by sections 4 and 5 of the Constitution, thereby stymying attempts to modernise the law in line with those standards and subject it to such scrutiny, which is what the Constitution contemplates should happen. Parliament may consider in particular circumstances that the responsible thing to do, in light of the values to which the Constitution gives expression, is to pass a new law dealing with the same substantive issue as an existing law in a way which allows that law to be scrutinised by the courts for its compatibility with those fundamental rights, and the Constitution should be interpreted in a way that does not preclude this.

47. As the Board observed in *Chandler v State of Trinidad and Tobago* [2022] UKPC 19; [2023] AC 285 ("*Chandler*"), para 69, it was by choosing to include the savings provision in section 6 of the Constitution that "the legislature reserved to itself the responsibility for updating the laws of Trinidad and Tobago to reflect developing appreciation of fundamental rights and freedoms and changes in social values". In the Board's view, Parliament has undertaken to fulfil that responsibility by undertaking a fresh review of the law of sexual offences in the light of the Law Commission's report, by way of the SOA 1986.

48. Sixthly, the purpose served by the savings clause in section 6 of the Constitution is to avoid the immediate substantial legal uncertainty which would otherwise have been associated with the adoption of a constitution which subjected existing law to a new test of validity by reference to fundamental rights set out in the constitutional instrument: *Chandler*, paras 72–73. Where, as in the present case, Parliament has reviewed afresh the existing law as part of a legislative exercise, that purpose has been largely fulfilled. Therefore, to give a wide interpretation to the concept of re-enactment with modifications in section 6(2) so as to cover such a case would be to give it an effect going well beyond its purpose. Parliament did not utilise the facility available to it to preserve the effect of existing law pursuant to section 6(1) of the Constitution. Section 6(2) is a narrower provision which is drafted in much more restrictive terms, and considerations of both purpose and wording indicate that it does not apply in the present case.

49. Seventhly, when one looks at what the Court of Appeal ordered in applying section 6(2) (see para 22(v) above) one can see the problems that would ensue by taking a wide interpretation of section 6(2). The mandatory reversal to the previous law was not at all a straightforward matter. The law that was substituted for sections 13 and 16 of the SOA 1986 was not in fact the law prior to 1976 but rather was an odd hybrid of that law with amendments that had subsequently been made in 1979 and 1980.

50. Finally, although a weaker indicator, the very fact that Parliament used the express declaration and supermajority procedure in section 13 of the Constitution for enacting the SOA 1986 is an indication that the SOA 1986 was not regarded as falling within existing law. Had it been existing law, there would have been no need to use the supermajority procedure because the SOA 1986 would have been saved in any event. The reason this is a comparatively weak indicator is because, taken in isolation, it might be said that section 13 was used out of an abundance of caution rather than as indicating a firm parliamentary view as to the status of the SOA 1986. Nonetheless, in the context explained above, the Board considers that this factor tends to confirm the overall inference that Parliament was creating new law when it enacted the SOA 1986.

(3) Conclusion on the "saved existing law (section 6) issue"

51. The Board therefore concludes that sections 13 and 16 of the SOA 1986 are not saved as existing law by section 6. For the reasons we have given in paras 36–50 above, those provisions repealed and replaced sections 60–62 of the OAPA 1925. They did not repeal and re-enact sections 60–62 with modifications. The majority of the Court of Appeal was mistaken in law in deciding to the contrary and in overturning the decision on this issue of Rampersad J.

7. The Board's reasoning on the "reasonably justifiable (section 13) issue"

52. Section 13 of the Constitution provides that legislation which sets out a declaration that it is to have effect even though it is inconsistent with sections 4 and 5 and which is passed by a supermajority shall be valid and have effect accordingly, "unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual" (to which the Board is referring as the proviso). The meaning and effect of the proviso was the subject of detailed consideration by the Board in *Suraj*, at paras 51 and 90–95.

53. The SOA 1986 was passed into law using the section 13 procedure. It carried the required statement on its face and was passed by a supermajority as required. Mr Jones challenges the validity of sections 13 and 16 of that Act, relying on the proviso. He claims that the retention of both those provisions of the SOA 1986 on the statute book is not reasonably justifiable in a democratic society which has proper respect for the rights and

freedoms of the individual. The Attorney General, on the other hand, submits that, if those provisions are not immunised against invalidity by virtue of section 6(2) of the Constitution, they are valid legislative provisions (to the extent they were not struck down and reformulated by the Court of Appeal) by virtue of section 13. The Attorney General does not seek to uphold the validity of sections 13 and 16 of the SOA 1986 under section 13 of the Constitution to the extent that they derogated further from the fundamental rights in sections 4 and 5 of the Constitution than the previous existing law (paras 11–13 above), but does argue that the fact that they were enacted using the supermajority procedure in section 13 of the Constitution saves them to the extent that they simply repeated and went no further than that existing law, even if they are not saved from challenge by section 6 of the Constitution. He contends that Mr Jones has not shown that the proviso to section 13 is applicable.

54. In *Suraj*, at paras 51 and 90–95, the Board explained that the proviso requires the application of a standard proportionality analysis, but one in which the margin of appreciation allowed to the state may be wider than would be the case in a standard proportionality analysis under sections 4 and 5, by reason of the enhanced democratic credentials of legislation passed by a supermajority. Nonetheless, as is obvious, it is inherent in the proviso that legislation passed using the supermajority procedure in section 13 may still be found to be disproportionate to any legitimate purpose it serves and therefore invalid by reference to the fundamental constitutional rights set out in sections 4 and 5. It has to be asked in relation to the legislation in question "(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community" (*Suraj*, para 51).

55. It has been explained (see paras 20(iv) and (v), 22(iv) and 23 above) that all the judges below considered that Mr Jones succeeded in relation to the "reasonably justifiable" proviso in section 13 of the Constitution. Against a background where all the judges in the local courts gave judgments holding that sections 13 and 16 of the SOA 1986 are not reasonably justifiable for the purposes of the proviso to section 13 of the Constitution, and where the Attorney General has adduced no evidence to support a case that they are justifiable, the Attorney General has an uphill task on his cross-appeal to the Board to show that the proviso is not applicable. Nonetheless, the Attorney General submits that the cross-appeal should be allowed and that the order made by the majority in the Court of Appeal should be upheld on that basis.

(1) The time for assessment under the proviso to section 13 of the Constitution

56. Before the Board (but not before the local courts) the Attorney General raised an important point on the application of section 13. Mr Knox for the Attorney General

submits that the question whether the relevant provisions of the SOA 1986 are reasonably justifiable in a democratic society has to be addressed as at the time when they were enacted, namely 1986. By contrast, the argument in the courts below proceeded on the footing that the compatibility of the provisions with the Constitution fell to be tested at the time of the proceedings. Mr Jones' challenge to their compatibility with the Constitution, and the judgments in the courts below, were directed to that point in time. Mr Knox submits that social mores have changed a great deal in the 40 years since the SOA 1986 was enacted and it cannot be assumed that a conclusion on proportionality under section 13 of the Constitution reached by reference to the standards of today must hold good for 1986. Mr Knox contends that Mr Jones has failed to discharge the burden on him under the proviso to section 13 (see *Suraj*, para 93) to show that sections 13 and 16 of the SOA 1986 were incompatible with the Constitution in 1986 and also invites the Board to conclude positively that they were compatible with the Constitution when assessed as at that time.

57. The Board rejects Mr Knox's submission that the relevant time for assessing whether sections 13 and 16 of the SOA 1986 are justifiable in a democratic society within the meaning of the proviso to section 13 of the Constitution is 1986. The relevant time for that assessment is when the question of justifiability is before the court. (It is not suggested that there is any material change in the position regarding the question of the justifiability of sections 13 and 16 of the SOA 1986 between the time of the proceedings before Rampersad J and the time of the hearings before the Court of Appeal and before the Board, so it is not necessary to consider whether a distinction would need to be drawn between them for present purposes if there had been such a change.) This is the position under section 13 for a number of reasons.

58. First, in the Board's view the wording of section 13 of the Constitution is clear on this point. The proviso applies if the relevant Act "is shown not to be reasonably justifiable in a society" with the stated characteristics. It therefore imposes an onus on a claimant to show that a particular state of affairs exists in the present ("shown not *to be* justifiable": emphasis supplied). This interpretation of the language of the proviso is reinforced by the further reasons which follow.

59. Secondly, as explained in *Suraj*, the proviso in section 13 of the Constitution mandates the application of a modified form of the standard proportionality test. It is well established in constitutional litigation where a proportionality test falls to be applied in relation to a claim that fundamental rights have been violated that the proportionality of a law or administrative measure is assessed at the time when the law or measure is applied in relation to the particular individual who brings the claim, since it is at that time that they contend that their constitutional rights are being violated: see, eg, in relation to the (UK) Human Rights Act 1998, *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40; [2004] 1 AC 816, para 62 per Lord Nicholls ("It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force") and para 144 per Lord Hobhouse ("Those who are seeking to justify the use of the

statutory provision have to do so as at the time of that use"). It is the individual's claim of the violation of their rights at the time of the proceedings that the court has to assess, which points naturally to the time of assessment being when that claim is before the court.

60. The point can be illustrated further in this way. Mr Jones was born in 1964, but many gay men who are affected by sections 13 and 16 of the SOA 1986 will not even have been born when that statute was enacted. Any of them would have been entitled to bring the same claim as Mr Jones has brought, but their constitutional rights could not have been infringed in 1986 before they were born. If they brought a complaint, it would necessarily be a complaint regarding violation of their constitutional rights now, not in 1986. The position is no different for Mr Jones. Indeed, his complaint, as regards the "reasonably justifiable (section 13) issue", is not about the application of the SOA 1986 as it was passed in 1986, but as it stands now after further amendments in 2000 and 2012 (see para 15 above).

61. Thirdly, as the Attorney General's argument recognises, social mores and the practical effect of the fundamental rights in the Constitution may change over time. The Constitution is a living instrument and the fundamental rights set out in it are to be given a broad and purposive interpretation in the light of current conditions in society: *Suraj*, para 80. The constitutional project set out in the Preamble to the Constitution recognises that individuals' fundamental rights should be continuously respected through time. Since the fundamental rights in sections 4 and 5 are to be given an interpretation which changes and is updated over time, and the Constitution requires that it is those rights as so interpreted which are respected, it makes no sense to apply a test for compatibility of a law with the Constitution which is frozen at a point in the past (save in relation to the operation of the savings provision in section 6, which by contrast is fixed and determinate in its effect: *Suraj*, para 80, referring to *Chandler*, paras 22, 28, 32(vi) and 73).

62. Fourthly, the principal reason in favour of according a wide margin of appreciation to the legislature in relation to an Act passed with a supermajority pursuant to section 13 of the Constitution is because of the enhanced democratic credentials which such legislation has: *Suraj*, paras 91–92. That is a factor which affects each stage of the proportionality analysis, including in particular the fair balance to be struck between the rights of the individual and the interest of the community at stage (iv). But the force of those democratic credentials may be reduced over time, since the longer the period that elapses the less confidence one can have that the decision of the legislature constituted as it was at the time of enactment represents the democratic view of society in the present day. In the present case the SOA 1986 was enacted four decades ago, when the electorate represented in Parliament was substantially different. In that time, many have come onto the electoral roll and many have died and left it. Also, the more the understanding of the rights in sections 4 and 5 may have changed as time passes, the less the weight which can be attached to the declaration which an Act passed pursuant to section 13 has to contain that it is to take effect "even though inconsistent with sections 4 and 5". Parliament in

1986 cannot be said to have squarely confronted any inconsistency which might exist with sections 4 and 5 as they fall to be interpreted at the present time.

63. The third and fourth reasons referred to above operate in combination. For the purposes of making an assessment under the proviso to section 13 whether a fair balance has been struck between individual rights and the interest of the community, as democratically expressed, to reach a legal conclusion regarding the constitutional validity and enforceability of an Act at the present time, it would be incoherent to freeze the assessment and look at the position as it stood in the past, when the Act was promulgated. The weight to be given to both the elements which have to be balanced may have changed considerably since the passage of the Act in question: the force associated with an individual fundamental right may have increased, and the force associated with the expression of democratic will by a supermajority may have decreased.

64. Fifthly, the constitutional rights in sections 4 and 5 are to be interpreted in a way which makes them practical and effective rather than theoretical and illusory. This means practical and effective in the present day, not in the past.

65. Sixthly, the Constitution should be interpreted in a way which is practical and involves a minimum of complexity. When applying the rights in sections 4 and 5 alongside the proviso in section 13 which regulates their operation, the obvious practical approach is to apply these provisions in relation to the law as it stands in the present and as it is applied to the individual claimant in the present. That means looking at the law as it has been amended and features on the statute book now, rather than conducting an historical exercise to trace through the operation of sections 4, 5 and 13 in relation to successive items of legislation, including amendments. In this way, for the application of those provisions in combination, there is only one exercise of interpretation and assessment which is required, rather than a series of such exercises in relation to successive laws.

66. For these reasons, the Board is satisfied that in the courts below the parties and the judges were correct to assess the application of the section 13 proviso by reference to the circumstances when the claim was before the court rather than by reference to 1986.

(2) Application of the proviso to section 13 of the Constitution

67. Once the point about the time of assessment is clarified, Mr Knox had no significant criticism to make about the assessment of the courts below in relation to whether it is reasonably justifiable for the State to maintain sections 13 and 16 of the SOA 1986 on the statute book. The Attorney General filed no evidence in support of a case that it was reasonably justifiable at the present time to maintain those provisions on the statute book, so it is difficult for him to sustain an argument that any, let alone all, of the aspects

of the proportionality test set out at para 54 above have been satisfied. While the Board accepts that the "reasonably justifiable (section 13) issue" should in this case be regarded as a question of law that the Board must determine, it sees no reason to set aside the assessment made by all the judges in this case that sections 13 and 16 of the SOA 1986 are not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

68. Mr Knox rightly emphasised that where the supermajority procedure under section 13 of the Constitution has been employed, that is a factor which tends to widen the margin of appreciation for the State. However, in this case there is a strong countervailing factor which tends to narrow that margin. The margin of appreciation will tend to be narrowed where a particularly important facet of an individual's existence or identity is at stake, as may particularly occur in appropriate circumstances in cases involving the right of an individual to respect for his private and family life (section 4(c) of the Constitution, and see article 8 of the European Convention on Human Rights): see, on the application of article 8, *Evans v United Kingdom* (2007) 46 EHRR 34, Grand Chamber, para 77; *Dickson v United Kingdom* (2007) 46 EHRR 41, Grand Chamber, para 78; and *Hämäläinen v Finland* (2014) 37 BHRC 55; Reports of Judgments and Decisions 2014-IV, p 369, Grand Chamber, paras 66–67.

69. The aspect of Mr Jones' right under section 4(c) of the Constitution which is in issue in these proceedings is at the core of that right, since it is at the core of his existence as a human being and of his identity as a gay man. The ability to form a deep connection with another person through an intimate and loving relationship is a vital interest for all human beings. Paragraph (a) of the Preamble to the Constitution emphasises the central importance of these considerations in the constitutional order of Trinidad and Tobago, because it affirms "the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator". Paragraph (a) also affirms the importance of Mr Jones' right to respect for his family life as a central value under the Constitution, by focusing on and affirming "the position of the family in a society of free men and free institutions". In so far as Mr Jones is in a loving relationship with another man, Mr Jones clearly has a family life which engages the protection of the Constitution. Mr Knox did not seek to contend otherwise.

70. By contrast, the case presented by the Attorney General to justify sections 13 and 16 of the SOA 1986 was very weak. Mr Knox submits that those provisions simply re-enacted earlier laws "which were traditional laws of long standing" and should be regarded as reasonably justifiable simply for that reason. He made it clear (see para 53 above) that the Attorney General does not seek to uphold those provisions, and their later amendments, under section 13 of the Constitution to the extent that they derogated further from the fundamental rights and freedoms in sections 4 and 5 than the existing law (ie sections 60–62 of the OAPA 1925, as amended in 1979 and 1980: see paras 11–13 above). He therefore submitted that, applying section 6(2) of the Constitution, the Board should

uphold the order made by the majority of the Court of Appeal at para 83 (set out at para 22(v) above).

71. This latter aspect of the Attorney General's position is revealing and serves to emphasise his reliance on a supposed legitimate aim of maintaining laws in place simply because they are "traditional" and happen to have a very long pedigree. But from the perspective of section 13 of the Constitution, it is happenstance that the majority in the Court of Appeal upheld the validity of provisions partially reflecting sections 13 and 16 of the SOA 1986 under section 6(2) of the Constitution as "existing law". The application of section 6(2), looking to the past, cannot in itself provide a ground for the reasonable justifiability of laws assessed under the proviso to section 13 in terms of constitutional rights and values as they apply in the present day.

72. Trinidad and Tobago is a republic which emerged from its status as a colony long ago and in both 1962 and again in 1976, when the Constitution was adopted, it was looking to the future to build a constitutional democracy in which fundamental human rights and freedoms would be respected. It was a feature of this process that there were many previous laws reflecting the colonial era and its values (which in large part meant the values of the United Kingdom from long ago, rather than values derived from local society) which the new republic would wish to leave behind. The mere fact that a repressive law has survived from colonial times so as to be "traditional" in that sense plainly could not furnish a legitimate objective for the purposes of a proportionality analysis under the Constitution. Furthermore, the Attorney General's submission ignores the point that the rights in sections 4 and 5 of the Constitution develop over time, since the Constitution is a living instrument capable of reflecting contemporaneous understandings of constitutional values (see *Suraj*, para 80, and para 61 above). The longer the passage of time, the more likely it is that those values will have developed in modern society and the more likely it is that the Constitution has to be interpreted accordingly.

73. The Board does not rule out the possibility that seeking to maintain in place a law which is traditional in a different sense, namely one which reflects social traditions in the form of established and valued ways of doing things in society, could constitute a relevant legitimate objective. But if a case of that sort is to be made out, evidence would be required to explain the strength of the tradition (ie how widely it continues to be accepted and observed) and whether it remains consistent with the prevailing values in society. The Attorney General has not adduced any evidence to support a case of this kind in relation to sections 13 and 16 of the SOA 1986.

74. Therefore the Attorney General's submission that those provisions are reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual (under the proviso to section 13 of the Constitution) fails at the first stage of the proportionality analysis set out at para 54 above, in that he has not identified any

objective in maintaining sections 13 and 16 of the SOA 1986 in force which is sufficiently important to justify the limitation of a fundamental right. In the absence of any such objective, it follows that the State also fails at the second, third and fourth stages of the analysis as well.

75. Even if the Attorney General could show that there is a legitimate objective to be promoted by maintaining sections 13 and 16 of the SOA 1986 in force (or sections 60–62 of the OAPA 1925, as amended in 1979 and 1980, as upheld by the majority in the Court of Appeal) as reflecting traditional values, the Board considers, in agreement with the courts below, that Mr Jones still succeeds in showing that those provisions are not reasonably justifiable within the meaning of the proviso to section 13 of the Constitution. Having regard to the way in which the statutory provisions interfere with the core of Mr Jones' right under section 4(c) of the Constitution, in relation to the most intimate and private aspects of that right, they fail to strike a fair balance between the rights of the individual and the interests of the community.

76. In that regard, the Board finds the judgment of the European Court of Human Rights in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 ("*Dudgeon*") persuasive. It is relevant to refer to a judgment of the European Court on a closely similar issue involving similar rights in the European Convention on Human Rights to those set out in the Constitution, as Rampersad J and Kokaram JA did in the courts below (see paras 144–145 and 272–273 of their respective judgments). The rights are drafted in a similar way and apply in a similar manner according to a proportionality analysis, and within liberal democracies "it would be surprising if instruments designed to protect fundamental human rights were intended to operate in very different ways or with widely divergent effect": *Williams v The Supervisory Authority* [2020] UKPC 15 (a case involving reference to judgments of the European Court for the purposes of interpreting the constitution of Antigua and Barbuda), para 73, and *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32; [2012] 1 AC 1, paras 20–25 (referring to judgments of the European Court for the purpose of interpreting the Constitution). As the Board observed in *Lendore v Attorney General of Trinidad and Tobago* [2017] UKPC 25; [2017] 1 WLR 3369, para 61, the decisions of the European Court "may bear valuable persuasive authority on the general principles underlying the protection of particular rights".

77. In view of the Board's observations at para 61 above, it is relevant to note that the judgment in *Dudgeon* was delivered as long ago as 1981. It concerned statutory provisions in the law of Northern Ireland which criminalised acts of buggery and acts of gross indecency between men in the same way as sections 13 and 16 of the SOA 1986. As in the present case, no prosecutions had been brought for many years. The European Court held the United Kingdom had breached the rights of the applicant under article 8 of the European Convention (right to respect for family and private life). Maintaining such provisions on the statute book in Northern Ireland interfered with the applicant's rights under article 8 in a serious way and was disproportionate to the legitimate aim relied on

by the state. Unlike the Attorney General in the present appeal, in *Dudgeon* the United Kingdom had presented evidence in a reasoned case that relaxation of the criminal law might erode moral standards in Northern Irish society, and the European Court accepted that preventing this was a legitimate aim (paras 55–57 and 60–61).

78. At para 52 in *Dudgeon* the European Court observed that the case concerned "a most intimate aspect of private life", so that the margin of appreciation for the state was narrowed; accordingly, there had to exist "particularly serious reasons" advanced by the state before interferences on the part of the public authorities with the applicant's right to respect for his private life could be found to be proportionate to the legitimate aim pursued, under article 8(2). The European Court noted (para 53) that the hallmarks of a democratic society are tolerance and broadmindedness; the Board likewise regards these as hallmarks of the democratic society established by the Constitution. The European Court also noted (para 54) that it was not concerned with making any value-judgment as to the morality of homosexual relations between adult males, and the Board follows the same approach. The Board is simply concerned with the legal questions which arise under the Constitution regarding the meaning and effect of sections 4, 5, 6 and 13.

79. It is relevant to quote from paras 60 and 61 of the judgment in *Dudgeon*, since the Board considers that the reasoning set out there is applicable in the present case—in fact it applies with even greater force, in view of the developments in society's attitudes to and acceptance of homosexuality and homosexual relationships in liberal democracies around the world in the decades since 1981:

> "60. The Convention right affected by the impugned legislation [ie article 8] protects an essentially private manifestation of the human personality …
>
> 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 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. 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.

61. Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. 'Decriminalisation' does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.

To sum up, the restriction imposed on Mr Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved."

80. That social attitudes to homosexuality and homosexual relationships have developed further in favour of acceptance and non-criminalisation in liberal democracies since *Dudgeon* in 1981 is supported by a range of cases from around the world to which

the Board was referred, including the further judgments of the European Court in *Norris v Republic of Ireland* (1988) 13 EHRR 186 and *Modinos v Cyprus* (1993) 16 EHRR 485 and, in Belize (part of the Caribbean Community, CARICOM) and Caribbean jurisdictions, *Orozco v Attorney General of Belize* (2016) 90 WIR 161, *Orden David v Attorney General of Antigua and Barbuda*, Claim No ANUHCV2021/0042 (5 July 2022), *Jamal Jeffers v Attorney General of St Christopher and Nevis*, Claim No SKBHCV2021/0013 (29 August 2022), *Holder-McClean-Ramirez v Attorney General of Barbados* (2023) 102 WIR 113, *BG v Attorney General of the Commonwealth of Dominica*, Claim No DOMHCV2019/0149 (22 April 2024) and *Randall Theodule v Attorney General of Saint Lucia*, Claim No SLUHCV2021/0457 (29 July 2025). For the purposes of this judgment it is not necessary to examine these authorities in detail, as the trend is clear.

(3) Conclusion on the "reasonably justifiable (section 13) issue"

81. The Board's conclusion is that sections 13 and 16 of the SOA 1986 are not saved by the supermajority procedure used for the passing of the SOA 1986 because Mr Jones has established that the proviso in section 13 of the Constitution applies. Sections 13 and 16 of the SOA 1986 have been shown by Mr Jones "not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual". The Board therefore agrees with the lower courts on this issue and the Attorney General's cross-appeal fails.

8. The appellant's new argument

82. Although the focus on the "saved existing law (section 6) issue" has been on sections 13 and 16 of the SOA 1986 in the form they were in when enacted in 1986, the appellant sought permission to make a new argument not addressed by the Court of Appeal. That new argument is that, even if sections 13 and 16 of the SOA 1986 can be said to have fallen within section 6(2) of the Constitution at the time they were enacted in 1986 (which, of course, the appellant denies), any such protection they may have enjoyed has since been lost because of the subsequent amendments to sections 13 and 16 by the Sexual Offences (Amendment) Act 2000 and the Children Act 2012. For those subsequent amendments, see para 15 above.

83. In the light of the Board's decision that sections 13 and 16 of the SOA 1986 were not saved as existing law under section 6 of the Constitution in the form they were in in 1986, it is unnecessary for the Board to address this new argument.

84. That is not to deny that, when the Board comes to consider the appropriate remedy, it will be necessary to look at the present version of sections 13 and 16, as amended in 2000 and 2012. It is to the appropriate remedy that the Board now turns.

9. The appropriate remedy

85. Having decided that sections 13 and 16 of the SOA 1986 infringed Mr Jones' fundamental rights, protected by the Constitution, especially his right to respect for personal and family life, Rampersad J had a separate hearing to decide on the appropriate remedy. His remedial order has been set out at para 21 above.

86. Mr Jones did not seek to appeal against that order. However, at the hearing before the Board Mr Ramlogan, for Mr Jones, submitted that if Mr Jones' appeal were allowed, the Board should make a new order to delete sections 13 and 16 of the SOA 1986 (as amended) in their entirety, on the grounds that to the extent that criminalisation of conduct in this area is justified, it is already achieved by other provisions of the criminal law.

87. It is not apparent that this course is open to Mr Ramlogan, in the absence of an appeal by Mr Jones against the order made by the judge. Also, as a preliminary view, it seems to the Board that the judge's order represented an elegant and appropriate resolution in relation to Mr Jones' claim. Rampersad J's order appears to meet precisely what is needed while adhering to a principle of doing the minimum necessary to ensure that fundamental rights are upheld. In particular, it makes clear that there is no criminality where the parties are consenting adults. The Board would also like to make clear that it is for the legislature not the judiciary to consolidate or revise the statute book of Trinidad and Tobago if there is an overlap between different crimes (eg buggery and rape).

88. However, the Board indicated that it would permit Mr Ramlogan to make submissions, in support of his contention that the Board should make a different order from that made by Rampersad J, if Mr Jones' appeal were allowed. Obviously, Mr Knox must also have an opportunity to respond to those submissions. The Board will give directions for such further submissions to be made in writing.

10. Overall conclusion

89. For all these reasons, Mr Jones' appeal is allowed and the Attorney General's cross-appeal is dismissed. Sections 13 and 16 of the SOA 1986 infringe Mr Jones' fundamental rights and must be interpreted subject to the Constitution so as to make it clear that they do not apply to criminalise private, consensual sexual relations between adults of the same sex. As to the order to be made in relation to sections 13 and 16, the Board's provisional view is that Rampersad J's remedial decision should be upheld but the Board will give Mr Ramlogan the opportunity to make submissions on this should he so wish (with the opportunity for a reply by Mr Knox).