

## MEMORANDUM TO THE MINISTRY OF HOME AFFAIRS ON ITS CONSULTATION PAPER ON THE PROPOSED PENAL CODE AMENDMENTS

We advocate the following:

- I. The decriminalization of consensual sex between all adults capable of giving consent, regardless of their sexual orientation or preference; and
- II. Total abolition of the marital immunity currently awarded to man who engages in non-consensual sex with his wife.

Our positions are that:

1. The decriminalization of anal and oral sex for heterosexuals but not homosexuals infringes the latter's constitutional and human rights. It is not only discriminatory but also breaches their right of freedom of expression. It is also not reflective of the moral values of today's Singapore. Respect and tolerance of differences is a founding value of Singapore that is still relevant, if not more, today.
2. The partial abolition to marital immunity tabled is inadequate and will not protect those married women who most need it.

### **I. Decriminalization of consensual sex between adults**

Our opinion is that consensual sex between adults should be decriminalized regardless of sexual orientation. In putting forward our position, we examine the matter in the following sequence:

1. Current Law on Homosexual Sex, the Relevant Proposed Amendments and Ministry of Home Affairs published policies
2. Infringement of 2 Constitutional Rights
3. Regional and Global Developments in this area of law
4. The Obligations of the Government to Protect its Entire Population and the Rule of Law
5. Our True Values and Reasons
6. Complete Repeal of s377A

#### 1. Current Law on Homosexual Sex, the Relevant Proposed Amendments and Ministry of Home Affairs published policies

The draft Penal Code (Amendment) Bill proposes to repeal the current s377 but not s377A.

The draft bill proposes to introduce 2 new sections. One is to replace the current s377 and the other is s377B.

S377A was introduced in 1938 when Singapore was part of the Straits Settlement. When 2 men commit an act of “gross indecency” in private or public, the offence is punishable by imprisonment of not more than 2 years. S377A applies only to men. There are no offences when 2 lesbian women have sex.

The repeal of s377 abolishes the crime of anal and oral sex when carried out by heterosexuals in private. That such acts will be legal is further supported by the new s376(6) and s376A(4).

The new s377 introduces the crime of necrophilia i.e. sex with a corpse. S377B makes it specific that bestiality is a crime i.e. sex with an animal. S377A, acts of gross indecency between 2 men nestles between the offence of necrophilia and bestiality, under the same rubric of “unnatural offences”.

The total effect is that consensual anal and oral sex between heterosexuals in private will be legal. However, consensual sex between 2 men, in private and in public, will still be illegal and is as unnatural as necrophilia and bestiality.

The Consultative Paper expressly profess the intent of the proposed amendments is to decriminalise anal and oral sex between heterosexuals above the age of 16. It is silent on the retention of s377A.

In its 8 Nov 2006 press release, the Ministry of Home Affairs revealed that the approach to amending the Penal Code is, amongst others:

- a. “to update its provisions so that they remain relevant and effective in view of societal and global changes”; and
- b. ensure that it “reflects the values of Singapore society”, such as protection of minors.

## 2. *Infringement of Constitutional Rights*

Inquiries about constitutionality of a piece of legislation need to satisfy 2 conditions:

- a. Whether the constitutional or fundamental rights have been infringed?
- b. If yes, can the infringement be justified?

*a. Infringement*

By the retention of s377A, the proposed amendment will discriminate against homosexual men. The proposal respects the right of privacy of heterosexuals and lesbians but not that of homosexual men. The proposal also infringes on homosexual men's right to freely express themselves consensually. These rights are entrenched in Singapore's Constitution as fundamental rights. They are Articles 12(1) and 14(1)

Articles 12(1), the Constitution, states:

“All persons are equal before the law and entitled to the equal protection of the law”

It is strange that the same act of anal or oral sex between heterosexuals will be legal but not when between 2 men. The removal of Section 377 but not Section 377A clearly results in an act of discrimination that is not sanctioned by the Constitution.

On freedom of expression, Article 14(1)(a) states that:

“every citizen of Singapore has the right to freedom of speech and expression”.

The offence created by s377A hinders a gay man from expressing his feelings and intimacy with a person of his choice. Sex is the ultimate expression between 2 individuals their love and affection for each other. To retain s377A, especially with the repeal of s377 is to deprive homosexual men this ability. Further, the crime does not apply to 2 lesbians or heterosexuals doing the same act. Other than sex, s377A prevents a homosexual man from freely admitting that he has a partner for fear that his neighbours may complain against him.

S377A, thus, hangs as a Damocles sword excluding him from a life which heterosexuals and lesbians have by right. It is beyond doubt that the retention of s377A infringes the constitution.

*b. Justification*

Justification for the infringement will have to pass the proportionality test. An infringement is justified only if:

- (a) it is rationally connected to a legitimate purpose; and
- (b) the means used to restrict that right must be no more than is necessary to accomplish the legitimate purpose in question.

Therefore, we need to first identify the goals for the proposed retention of s377A. There are no identifiable statements from the government on why s377A is being retained.

Though it discussed the repeal of s377, the Consultation Paper is silent on the retention of s377A. Likewise, the press statement issued by the Ministry of Home Affairs on 8 November 2006.

There is no rational basis for keeping s377A.

Taking the overall intention for the proposed amendments i.e.:

- a. ensuring relevance in view of societal and global changes; and
- b. reflecting Singapore society's values,

it may be implied that the government is keeping s377A because it considers Singapore to be a conservative society. In a released statement on 7 Nov 06, the MHA explained that the majority of Singaporeans do not tolerate homosexual acts and consider such acts abhorrent and deviant. And that many religious groups also do not condone homosexual acts.

S377A is a disproportionate response to such intolerance, should this be the case. The imprisonment of individuals is not a proportionate response to prejudices.

### 3. Regional and Global Developments in this Area of Law

In Hong Kong, similar provisions in its Penal Code have been struck down by the Court of Appeal as being unconstitutional in September 2006. These cases are:

- a. Leung TC, William Roy v Secretary for Justice, CACV317/2005
- b. Secretary for Justice v Yau Yuk Lung, Zigo and Lee Kam Chuen, HCMA107/2006

Further the People's Republic of China, Taiwan, Korea and Japan do not criminalise homosexual behavior. In India the Indian Supreme Court is reconsidering the constitutionality of the equivalent of Section 377A.

The reality is that societally and globally, homosexuality is not longer viewed as unnatural by most legislatures except those that (i) have carried over the Christian ethos of the British Empire or (ii) are theocracies. Almost every secular legislature in the world no longer criminalizes homosexual acts between consenting adults.

### 4. The Obligation of the Government to Protect Its Entire Population and the Rule of Law

The proposed amendments to the Penal Code are to be lauded because they honour various constitutional or human rights principles, including:

- a. the right to life; and
- b. the freedom of expression.

It is also protecting minors and the weak.

With the introduction of the crime against genocide, the government is acknowledging a person's right to live. The spectre of genocide is definitely not evident in Singapore. The freedom of expression is endorsed by the recognition of a gender re-assigned female in the crime of rape. Minors who are non-Singaporeans and not residing on our soil are being protected with s376C and s376D.

If the government is reaffirming a value, the retention of s377A is undermining this affirmation.

Like all minorities, the gay community is in a weaker position. To retain s377A is to fail to protect this class of persons. The government should recognize its duties towards this community as much as towards others in a weaker position.

The government's stance that it will not enforce s377A makes a mockery of the law. It avoids taking a stance on what it knows to be the true values and believes this nation is founded on and still lives by today.

##### 5. *Our True Values and Reasons*

We believe Singapore's values to be that of respect and tolerance for differences, part of the founding principles of Singapore. As long as no harm is caused by an individual's action, an individual should not be imprisoned or incarcerated.

Singaporeans should be open-minded and treat others with love and respect. Not only do prejudices affect others' self-esteem, self-love, growth and ability to integrate with society, it marginalizes them and impacts our society's ability to be a vibrant and creative society.

Therefore, s377A should be abolished so that such negativism is not encouraged in our society. At a time when some religions are declaring wars on others, we need to examine all our actions to ensure that unhealthy behaviour or prejudices are not promoted. Tolerance and positive attitude should permeate every aspect of our lives.

In the words of Sachs J, in *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and Others* (1998) 6 BHRC 127 at 163:-

“Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general

and conceptual level, it concerns the nature of the open, democratic and pluralistic society ...”

Even at the most technical level, the retention of s377A is unconstitutional. Further, we do not consider homosexuality to be in the same category as necrophilia and bestiality, as the sandwiching of s377A with the new s377 and s377B suggests.

The Penal Code should not contribute towards negative thoughts, behavioural patterns or attitudes of the society, if any. The continued existence of s377A will encourage labeling, stereotyping and stigmatizing different classes of persons in society. At a larger scale, such negativism leads to marginalization and sectoral strife.

Singapore is built on the principles of acceptance and understanding of the differences of our neighbours, be it race, culture or religion. The mark of democracy is one of plurality and diversity. Homosexuality has been accepted by sociologists as a sub-culture. A cosmopolitan and international city like Singapore should no longer legislate against what consenting men do in private.

Singapore is an open economy. We encourage immigration. The cultivation of negative minds will not build a pluralistic and diverse community of the future. The lion city is proud that it is founded on immigrants; that it has created a pluralistic and diverse society which we are benefiting from and should not be encouraging otherwise.

The retention of s377A, introduced in 1938 when Singapore was part of the Straits Settlement, is never a part of independent Singapore, founded on the principles of respect for differences, people with differences living in harmony. This relic of the last century is definitely not reflective of modern Singapore. To keep s377A is to keep a set of colonial and Christian based values in a secular state. If the Penal Code is to reflect our nation’s values, it is the value of respect for differences, diversity and pluralism. For this alone, s377A should be abolished together.

The government’s excuse that s377A needs to be retained because it reflects the majority of the public’s moral values lacks consideration. It is taking the easy way out. An individual’s freedom takes precedence over collective prejudices, if any. Positive attitude and behaviour should be promoted, rather than reinforcing closed mindedness and intolerance. This is the foundation of Singapore’s pluralistic society. To preserve s377A will be to lay our fundamental principles at the doorstep of bigotry.

## 6. Complete Repeal

Section 377A should be abolished in its entirety. Other statutes have provisions on public sex or acts of indecency. They include:

1. s20, Miscellaneous Offences (Public Order and Nuisance) Act; and
2. s7, Children and Young Persons Act.

s377A is not necessary for prosecution of public sex by homosexuals, as such acts are adequately covered by the abovementioned statutes.

## **II. Marital Rape**

Our opinion is that the immunity on marital rape should be totally abolished. We endorse the position of The Association of Women for Action and Research (AWARE) on this, and summarise our position as follows:

1. The partial elimination of immunity for marital rape in the proposed Penal Code (Amendment) Bill is inadequate to protect the most vulnerable i.e. women living with their husbands. These women may for various reasons not be separated from their husbands. Further, not all separated couples obtain a judicial separation order. It is often done by a deed of separation.
2. Rape is a form of torture, cruel or inhuman and degrading treatment. Such violation of a person's inherent dignity should not be differentiated in the form proposed.
3. The deterrent effect of the law should be considered. A man will be deterred from raping his wife if such a law is in place. In Malaysia, the Joint Action Group Against Violence Against Women reported that statistics gathered by All Women's Action Society for the years 2000 – 2002 shows the chances of recurrence for marital rape are very high, often 20 times or more.
4. Marital rape survivors suffer far greater severe and long-term psychological damage than rape victims of strangers. In this aspect, the government is urged to study the position of s375A of Malaysian Penal Code amendments.
5. Singapore acceded to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in October 1995 and should further its commitments towards women's rights in all ways.

Free Community Church  
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