



JOINT STATEMENT

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SINGAPORE: REPEAL SECTION 377A OF THE SINGAPORE PENAL CODE AND UPHOLD THE HUMAN RIGHTS OF LGBTQ+ INDIVIDUALS

Following the recent court ruling Amnesty International, ILGA Asia, the International Commission of Jurists and Human Rights Watch call on the Singapore Parliament to repeal Section 377A and uphold the human rights of lesbian, gay, bisexual, transgender, queer and intersex individuals.

On February 28, 2022, in the case of *Tan Seng Kee v Attorney General*, the Singapore Court of Appeal ruled that Section 377A of the Penal Code, which criminalises consensual sexual conduct between males, cannot be used to prosecute consenting partners engaged in private sexual activity. However, the court fell short of declaring Section 377A unconstitutional. The law, a relic of British colonialism, is archaic, discriminatory and inconsistent with human rights, including to non-discrimination, privacy and freedom from arbitrary arrest and detention.

While the judgment is significant in that it stipulates that the existing law cannot be implemented, the Attorney-General could change this prosecutorial policy at any time, leaving gay men (or those perceived to be) in perpetual uncertainty. In a public statement, Singapore LGBTQ+ activists expressed disappointment, noting, “While this is a small step in the right direction, this simply does not go far enough to provide real protection to the LGBTQ+ community, who continue to be impacted by the cascading effects of Section 377A.”

The Court of Appeal held that the appellants lacked standing to mount the constitutional challenge against Section 377A, based on the assurance that it is unenforceable in its entirety, and that the appellants, therefore “cannot be said to face any real and credible threat of prosecution under [Section 377A] at this time” (at [153]). For this reason, the Court did not make a determination on the constitutionality of Section 377A.

This position is inconsistent with international human rights law and standards, which hold, unequivocally, that laws criminalising consensual same-sex sexual conduct, even if unenforced, violate human rights, including the rights to non-discrimination and

privacy. The predicament of LGBTQ+ people is compounded by the fact that the present policy of non-prosecution could be changed by the Attorney General or others at a later stage. In addition, individuals may still be subject to investigations by the police, even if not prosecuted under the law. In its judgement, the Court of Appeal acknowledged the possibility of future enforcement and police investigations and yet – through an overly narrow conception of standing and harm – concluded that the appellants lacked standing.

In 2018, in a landmark judgment, the Indian Supreme Court, read down and effectively abolished Section 377 of the Indian Penal Code, noting that sodomy laws have a ‘chilling effect’ on individual freedom and that LGBTQ+ individuals “deserve to live a life unshackled from the shadow of being unapprehended felons.”

We note with disappointment the Singapore Court’s observation that Section 377A “does not in and of itself generate a chilling effect that stifles advocacy of the prohibited cause or activity”, and that the difficulties faced by LGBTQ+ activists “stem in large part from general societal attitudes, as opposed to the continued retention of [Section 377A] in particular” (at [296] and [297]). The retention of Section 377A and general societal attitudes are inextricably intertwined. The continued criminalisation of consensual male same-sex sexual activity fuels stigma and marginalisation of LGBTQ+ people that has contributed to the impermissible barriers faced by LGBTQ+ activists in expressing themselves both in offline and online spaces.

Thus, the retention of Section 377A in the Penal Code essentially means that LGBTQ+ individuals in Singapore will continue to experience discrimination while seeking to exercise their civil and political as well as economic, social and cultural rights, as LGBTQ+ groups and activists in Singapore have documented.

Moreover, Singapore’s retention of Section 377A lags significantly behind other countries in the Asia-Pacific region, including, for example, Thailand, Vietnam and Cambodia and India, where consensual same-sex relations are not criminalised.

In view of the disappointing ruling of the Court of Appeal, we urge the Singapore Parliament to repeal Section 377A as a first step towards protecting and promoting the human rights of LGBTQ+ individuals in Singapore. Until there is a full repeal of Section 377A, the Singapore authorities should ensure that no investigations are carried out by any law enforcement authorities into private consensual same-sex sexual activity between men. We further call on lawmakers to ensure that their public statements in support of protecting LGBTQ+ persons are translated into concrete action by enacting comprehensive anti-discrimination laws that protect individuals from discrimination based on sexual orientation or gender identity.

Background

Section 377A of the Penal Code criminalises acts of “gross indecency” between men, or the procurement or attempted procurement thereof, with a penalty of up to two years’ imprisonment.

There have been several rounds of constitutional challenges against Section 377A before the courts. Prior to the present round of litigation, in 2014, the Singapore Court of Appeal dismissed two constitutional challenges against Section 377A on the basis that the law did not violate the right to life and personal liberty (article 9) and the right to equal protection (article 12) under the Singapore Constitution.

In October 2018, the Attorney-General, Lucien Wong, SC published a press release indicating that the prosecuting authorities would not take action on the basis of Section 377A “where the conduct in question was between two consenting adults in a private place”, as “prosecution would not be in the public interest”. In the press release, he clarified that the police would still investigate reported offences under Section 377A if the surrounding circumstances so warranted.

This position formed the basis of the Court of Appeal’s present ruling that the appellants “do not face any real and credible threat of prosecution under [Section 377A] at this time” unless and until the Attorney-General “signals a change in prosecutorial policy” (at [153]). The Attorney-General’s stated position has effectively engendered a substantive legitimate expectation that the prosecuting authorities would not prosecute consensual private same-sex adult sexual activity.