**ANNEX 6**

## SUMMARY OF PANEL DISCUSSION ON *TAN SENG KEE V AG* AND SECTION 377A OF THE PENAL CODE

A forum and panel discussion was organised by the Singapore Law Academy and the Law Society of Singapore, at the Treasury on 26 September 2022, on *Tan Seng Kee v AG* on the constitutionality of s 377A of the Penal Code. The forum and discussion can be watched at https://www.channelnewsasia.com/watch/section-377a-a-discussion-with-minister-shanmugam-and-the-law-fraternity-2977106.

The panel comprised:

| **Moderator** | |
|---|---|
| Professor Lee Pey Woan | Dean, SMU Faculty of Law |
| **Panelists (on stage)** | |
| 1. Mr K Shanmugam | Minister for Home Affairs and Minister for Law |
| 2. Mr Adrian Tan | President, Law Society<br>Partner, TSMP |
| 3. Professor Leslie Chew | Dean, SUSS School of Law |
| 4. Professor Jaclyn Neo | Associate Professor, NUS Faculty of Law |
| 5. Professor Michael Hor | Professor of Law, Faculty of Law, University of Hong Kong |

The event was attended by approximately 88 attendees, mainly consisting of private lawyers, senior law academics and others.

### Address by Minister for Home Affairs and Law

Mr K Shanmugam, Minister for Home Affairs and Law, opened the session with a short address. A summary of his remarks is as follows:

- In the *Tan Seng Kee* judgment, the Court of Appeal has strongly suggested that s 377A may be unconstitutional.

- The Court of Appeal dismissed the challenges on the grounds of Art. 9 and Art. 14, but on Art. 12, left it to be decided on a suitable occasion in the future. It discussed two possible approaches to the "reasonable classification" test (namely, the *Lim Meng Suang* approach and the *Syed Suhail* approach), and went on to say that if *Syed Suhail* approach was applied, s 377A might be unconstitutional. Since *Tan Seng Kee*, the Court of Appeal has applied the *Syed Suhail* approach to the "reasonable classification" test in two other cases.

- The lack of locus standi is not a complete defence to s 377A being struck down in the future. The Court of Appeal had expressly restricted the locus standi issue to prosecution, but not investigations. It is also possible for the Court of Appeal to change its position in the future on this issue. It is thus still possible to establish locus standi in a future challenge.

- If s 377A is struck down, the definition of marriage will likely be challenged next. The Government is thus moving to ensure that the definition of marriage remains the province of Parliament.

Minister's full opening speech is at Appendix.

**Summary of Panel discussion and Q&A**

The Panel then spoke, followed by an audience Q&A segment, where questions were raised, covering a variety of topics such as how to educate the public on such legal issues, whether the repeal opened the floodgates for litigation on other class rights, and how our stance sat with international companies and organisations. These were addressed by the Panel.

All the panellists agreed that there was a significant risk that s 377A could be struck out as being unconstitutional should there be a future court challenge.

The audience was similarly unanimous. When asked whether anyone disagreed that there was a significant risk that s 377A could be struck down for being unconstitutional. no one disagreed.

The following were the main points raised during the panel discussion and Q&A.

| Speaker | Summary of Views |
|---|---|
| **Panelist**<br>**Adrian Tan**<br>President, *Law Society of Singapore*<br>& Partner, *TSMP Law Corporation* | • Following *Tan Seng Kee*, it is "*obvious*" to lawyers that there is a significant legal risk that s 377A will be struck down under Art. 12 of the Constitution the next time it is challenged i.e. because only male-male and not female-female sex is criminalised. "*[The] judgement raises red flags all the way.*"<br><br>• Question that follows then is, so what? So what if a legal challenge succeeds?<br><br>• That is the bigger lesson of *Tan Seng Kee*. The judgment puts the question to Singaporeans – how do we want to effect change in society – by the courts or through Parliament?<br><br>• It is "*brutal*" and "*very messy*" to change laws through the Courts. Our laws are interconnected. But when the |

| Speaker | Summary of Views |
|---|---|
| | Courts strike down a particular law, the Courts do not consider the consequential effects its judgment has on other laws. It is a zero sum, adversarial, win-lose game. This is undesirable.<br><br>• The political process, on the other hand, is much "neater" as the entire process is transparent and debated, and Parliament can ensure that "everything works in harmony." Unlike the Court process, the political process is a democratic engagement; it seeks to engage and win "hearts and minds." |
| **<u>Panelist</u>**<br>**Professor Leslie Chew, SC**<br>Dean<br>School of Law<br>*Singapore University of Social Sciences* | • Quite "*obvious*" that there is a risk to the constitutionality of s 377A.<br><br>• Against the backdrop of the adversarial legal system and the right to litigate, there remains a risk of constitutional challenge to s 377A. This is dependent on "the matrix of the case" (i.e. how the case is characterised); the apex court can also change their mind and is not bound by its own decisions. Lawyers will know that in every case that is litigated, there is always uncertainty in the outcome.<br><br>• The CA has relied on the locus standi point to not deal with substantive constitutional points in its decision. The issue of locus standi is only a procedural point, and locus standi could be established in other factual scenarios.<br><br>• The constitutionality of s 377A is surrounded by many extra-legal issues, which the Court is not the right forum to decide. |
| **<u>Panelist</u>**<br>**Assoc Prof Jaclyn Neo**<br>Faculty of Law<br>*National University of Singapore* | • <u>First</u>, we must recognise that the Court of Appeal has "*significantly changed*" the "reasonable classification" test (which assesses whether differential treatment breaches the right to equal protection under Art. 12 of the Constitution). The constitutionality of s 377A is "significantly in doubt" now.<br><br>• The Court acknowledged that "reasonableness" plays a role in the test which may lead to the Court engaging in a more substantive evaluation of potentially discriminatory laws. As such, <u>the likelihood of s 377A being struck down is very real</u>. |

| Speaker | Summary of Views |
|---|---|
| | • <u>Second</u>, applying the doctrine of "substantive legitimate expectations" can only be a "*stop gap measure*" and not a "*permanent solution*". It can be overridden by future Attorney-Generals. Moreover, one can argue in a future challenge that by imposing the substantive legitimate expectation, the Court unduly fettered the Public Prosecutor's prosecutorial discretion. |
| **<u>Panelist</u>**<br>**Professor Michael Hor**<br>Professor of Law<br>Faculty of Law<br>*University of Hong Kong* | • Despite the legally binding assurance of non-prosecution, s 377A as a law is only "half dead". There are "zombie bits" (not exactly alive but not dead), e.g.:<br>o Future courts may not agree with the use of the doctrine of substantive legitimate expectations in *Tan Seng Kee*. There are credible voices who have disagreed with the Court of Appeal's use of the doctrine, such as former CJ Chan Sek Keong in a recently published article.<br>o It remains unclear if the current legal position on the non-prosecution of s 377A covers secondary offences involving attempts, abetment and conspiracy.<br>o Beyond the court, s 377A continues to have real effects in society 'by its sheer existence", even if unenforced. We cannot ignore the "societal and psychological damage", in terms of encouraging ill-will against homosexuals, and directly reinforcing the feelings of exclusion and inferiority of those targeted by s 377A.<br><br>• Disagrees that we should amend the Constitution to protect the definition of marriage at the same time as we repeal s 377A.<br>o From his understanding, the reason why we are amending the Constitution is because the exclusion of same sex marriage is potentially unconstitutional.<br>o But if both s 377A and the definition of marriage are both potentially unconstitutional, it is unclear why we are repealing s377A on the one hand, yet protecting the current definition of marriage by amending the Constitution on the other hand.<br>o Contrary to the Government's proposal, the right thing to do would be to leave the Constitution alone, and not amend it to protect the definition of marriage from being challenged in the Courts. |

| Speaker | Summary of Views |
|---|---|
| | <u>Minister's Response</u><br>• Michael Hor's argument is to allow for the definition of marriage to be challenged in the Courts.<br>• If s 377A is a matter for Parliament to decide, marriage is even more of a matter for Parliament to decide on. The Government has been careful about this, because we respect the democratic process – if anyone wants to change the definition of marriage, they will need to include it in their manifesto, and stand for and win elections on this.<br>• The current definition of marriage is something that this Government has clearly said that it is committed to.<br>• Arguments that Michael Hor has made are precisely the arguments that many people are worried about – that there will be an immediate push for total change. We take a live and let live approach. Most Singaporeans prefer that the current definition of marriage is retained and will not want to see a major change in the tone of society overnight. |
| **<u>Moderator</u>**<br>**Professor Lee Pey Woan**<br><br>Dean, SMU Faculty of Law | • What the Government has done on this issue is appreciated – this is a harder path to take, compared to conveniently letting things slide.<br>• Singapore has the opportunity to craft a solution that is uniquely ours.<br>• The hope is that the solution will not be divisive.<br>• Instead, it will be a solution that unites our people and optimises our individual and common space. |
| **<u>Audience</u>**<br>**Thio Shen Yi SC**<br><br>Partner, TSMP | • Repealing s 377a is the right thing to do as it is unconstitutional.<br>• Applauded the Government on its political commitment to act even though the decision to repeal would be unpopular with some sectors of the community.<br>• There is a need to ensure that there is a safe space for both sides to engage on this issue, and for there to be a less divisive debate. |
| **<u>Audience</u>**<br>**Jason Chan SC**<br><br>Vice-President, Law Society | • It is not correct to think that the Government need not do anything because no one has standing to challenge s 377A.<br>• The CA was very careful in the way it dealt with the point of standing. It left open that locus standi could be found on different grounds. |

**APPENDIX**

**PANEL DISCUSSION ON *TAN SENG KEE V AG*,**
**AND SECTION 377A OF THE PENAL CODE**
**OPENING ADDRESS BY MR K SHANMUGAM,**
**MINISTER FOR HOME AFFAIRS AND MINISTER FOR LAW**

Prof Lee Pey Woan,
Panellists,
Ladies & Gentlemen,

1. Good afternoon to all of you.

2. Thank you for being here today.

3. I wish to thank SAL and the LawSoc for organising this Forum on a very important legal issue – with significant implications for our society.

**Introduction**

4. The focus of the discussion today is on the *Tan Seng Kee* Judgment delivered by the Court of Appeal (CA) earlier this year.

5. The point is this – Is there a risk that the Courts could strike down s377A in a future challenge, in the context of the CA's comments in *Tan Seng Kee*?

6. Many of you will know, during the National Day Rally (NDR), PM spoke about s377A. He said it was going to be repealed, and he gave two reasons:

   a. First, repealing s377A is the right thing to do. We should not criminalise what people do in the privacy of their bedrooms. Repealing s377A will provide some relief to gay people.

   b. Second, that the Government has been advised that there is a significant legal risk that s377A could be struck down by the Courts in a future challenge. And he disclosed that the Attorney-General (AG) and I have advised on that.

7. The two points that he mentioned are two independent reasons for the repeal of s377A. The first of the two reasons is in itself a substantive reason. The PM explained during NDR why it was important to do this. As I have said, it is a reason that stands on its own.

8. But I do not propose to go into that reason, because for the Forum today, the focus is on the second point – the legal risks.

9. I will keep my remarks brief, and just focus on two legal points in assessing the risks. First, the constitutionality of s377A itself; and two, the question of locus standi.

10. This topic is going to be discussed extensively in Parliament. So today, I will just summarise my views on the two points.

**Constitutionality of S377A**

11. s377A was challenged in *Tan Seng Kee* on the following grounds:

    a. First, under Art 9 of the Constitution, that it was in breach of Art 9 in terms of protection of Life and Liberty,

    b. Second, it was challenged under Art 14 of the Constitution, which guarantees Freedom of Speech and Expression,

    c. Third, it was challenged under Art 12 of the Constitution, which provides for Equality.

12. What did the CA say?

    a. On Art 9, what you will see is that the Court said that s377A does not violate Art 9(1) of the Constitution.

    b. What did they say on Art 14? We therefore see no merit in the Art 14 Constitutional challenge.

    c. What did they say on Art 12? They said, given our finding [above], that s377A is currently unenforceable in its entirety; itis unnecessary for us to decide… [We] consider that this issue merits further reflection on suitable occasion in the future.

13. So, Art 9 and Art 14 are clear, just dismissed out of hand. But Art 12, I think lawyers would understand what that language means.

14. The CA said more on Art 12.

    a. On interpretation, it said that they will apply the reasonable classification test.

    b. And they said that there were two possible approaches on how the reasonable classification test can apply. One is the approach in *Lim Meng Suang*, which was a 2014 decision. And second, the approach in *Syed Suhail*, which is a more recent 2021 decision.

    c. The CA said that the test to be preferred needed to be considered in the future. So, they set out two tests, the two possible approaches in two different cases, and they said, which is the right test to be applied? They will decide in future.

15. But they went on to say that if the approach in *Syed Suhail* was to be applied, then s377A might be unconstitutional.

16. So, there it is, in black and white. Two possible approaches, and if the approach in *Syed Suhail* is applied, then s377A is probably unconstitutional.

17. When you look at the judgement, it says this:

    "*On the other hand, if one were to cast the legislative objective of s377A more broadly as the expression of societal disapproval of homosexual conduct in general or the safeguarding of public morality generally, that would strengthen the case that s377A falls afoul of the 'reasonable classification' test*."

18. It is there, clear, in black and white:

    "*One could then conclude that the differentia embodied in s377A (namely male-male sex acts) lacks a rational relation to the legislative object of reflecting societal disapproval of homosexual conduct in general or safeguarding public morality generally*."

19. They made it very clear.

20. What has happened since *Tan Seng Kee*?

21. Lawyers might know that the CA has applied the *Syed Suhail* approach to the Reasonable Classification Test in two cases – in May of this year, and in August of this year. It was applied in the case of *Datchinamurthy*, and it was applied in another case, *Xu Yuan Chen*, subsequently.

22. In effect, the CA has already expressed its view:

    a. What they have said is that in *Tan Seng Kee*, if we take the approach that the *Syed Suhail* test is the correct one, then s377A is probably unconstitutional,

    b. And subsequently, in two other cases this year, they have applied the *Syed Suhail* test.

23. So, you put the two together, absent other considerations – s377A could be struck down, likely to be struck down by the Courts, if it is challenged again in the future under Art 12 of the Constitution. The AG advised it; I know a little bit of the law, I advised it. And I can tell this audience that the previous AGs have also advised it, and you know who some of the previous AGs are.

24. That is on the legal point.

25. It is also clear that the CA preferred not to decide the point. It said that highly contentious societal issues like s377A should be resolved through the political process, in Parliament, by Parliament. What has been said:

    a. Politics seems the more obvious choice than litigation for debating and resolving highly contentious societal issues.

    b. The court must refrain from trespassing onto what is properly the territory of Parliament.

    c. Each branch to respect the institutional space and legitimate prerogatives of the others.

    d. Each branch must be allowed to exercise fully and fairly the powers it has been allocated.

26. In effect, dealing with s377A is in the province of Parliament.

27. Some have said the CA has said they do not want to decide this, this should be within the province of Parliament, so it is up to Parliament. Therefore, Parliament does not need to do anything.

28. That is a very wrong approach. I disagree completely. It is both wrong in law, in Constitutional law, and it is wrong in principle.

29. There are three major branches of Government – Parliament, the Executive comprising the Cabinet and civil servants, and the Judiciary. Each has its role. If Parliament fails in its duty to do what is right, then the Courts will have to do what we will not want to do. It is as simple as that. The Courts have said this is within the province of Parliament. That does not mean the Courts are saying that they will not act. What they are saying is that they leave it to Parliament to do what is right. In Singapore, things have worked because each branch does what is right, and what is their duty. If there is a law in the books which is unconstitutional, what is the duty of Parliament? What is the duty of the Executive? To deal with it, or to put on the helmet, go into the bunker and pretend that it does not exist because it is politically too divisive? That is not the way things work in Singapore. You do the right thing. You do not duck. And you do not say, as other Parliaments have said, well, we leave it to the Courts, and hopefully they will deal with it. If Parliament does not do what it has to do, then the Courts will do what they don't want to do.

30. Let me now deal with the second issue. I will go into this in greater detail when I speak about it in Parliament.

**Locus Standi**

31. The second legal issue relates to locus standi.

32. The CA said it did not have to decide on the Art 12 challenge, because the Appellants did not have standing – they did not have locus standi – to pursue the

challenge in the Courts. It looks like a complicated word, but basically, it is whether you have a right that is infringed, which allows you to make a challenge.

33. They pointed to the political compromise by the Government in 2007 not to enforce s377A, which was elaborated upon in 2018 by the AG, as the PP.

34. The CA said this created legitimate expectations that the PP would not prosecute under s377A.

35. And therefore, the Appellants do not face any credible threat of prosecution under s377A, and so they have no standing to challenge s377A.

36. Because of this, some have said there is no risk of s377A being struck down in the future, as long as the PP does not prosecute anyone.

37. The thinking is that the ball is in the Government, or the PP's court; s377A can only be challenged if the Government encourages such a challenge, by prosecuting someone under s377A.

38. These comments, that there is no risk, are based on two premises.

    a. First, that the locus standi point is a complete answer to any legal challenge, and

    b. Second, that the Courts will never change their mind on locus standi.

39. On the first point, whether locus standi is a complete answer: Just because the Appellants in *Tan Seng Kee* did not have locus standi, does not necessarily mean that no one else has locus standi.

40. There are people who might argue that they have standing, not on the grounds of a fear of prosecution, but on the grounds of a fear of enforcement in other ways. In *Tan Seng Kee*, the CA took great pains to carefully restrict its views on locus standi to the context of prosecution only. Look at what they said:

    "*We emphasise again that we are concerned with the enforcement of s377A only in the sense of prosecution and not in any other sense (such as, for example, the conduct of police investigations).*"

41. They expressly excluded Police investigations:

    "*[However] nothing in our holding affects the right of the police to investigate all conduct, including any conduct falling within the Subset and/or amounting to an offence under s377a*."

42. Now there is a broad universe of cases where the Police may have to conduct investigations, because before you conduct investigations, you would not know what the facts are.

43. If any such investigation in some way relates to conduct which the Police did not realise earlier, but which then relates to conduct falling within s377A, someone could argue that they have locus standi, because investigations have been expressly excluded by the CA. Look at it from a commonsense point of view – Do you have locus standi only when you get prosecuted? Or do you have locus standi when somebody investigates you? You will say, why are my rights being infringed by this prosecution?

44. In a 2012 CA judgment, the CA said that "*violations of constitutional rights may occur not only at the point in time when an accused is prosecuted under an allegedly unconstitutional law, but also when a person is arrested and/or detained and/or charged under an allegedly unconstitutional law*". There's nothing to prevent someone from arguing thats377A is unconstitutional – I have been unfairly investigated, my rights have been affected, and I want a declaration. That person will have standing, even on the terms of what the CA said on *Tan Seng Kee*. More to the point, I have deliberately not covered a number of other fairly obvious cases where there will be locus standi.

45. There is the risk that a future Court could find that the possibility of investigation under s377A is sufficient for there to be locus standi. And, investigations can arise in many contexts.

46. The argument of locus standi is not as complete a defence as some may hope.

47. Secondly, as lawyers know, on points like locus standi, the CA can change its mind. The *Tan Seng Kee* judgment itself shows this.

48. *Tan Seng Kee* was the first time, and prior to that, previous cases including *Lim Meng Suang*, they just dismissed all arguments. *Tan Seng Kee* said in Art 12 they may be potentially be violated as a change of mind. And on locus standi, CA recognised in *Tan Seng Kee* the Doctrine of Substantive Legitimate Expectations, when it had previously left the question open on whether this doctrine should be part of Singapore law.

49. The CA could decide, for example, that the Constitution confers prosecutorial discretion solely on the PP, and the doctrine of Substantive Legitimate Expectations should not interfere with that. It could also say the doctrine should not confer a right on people to perform an act that is technically criminal.

50. So, we cannot rule out that the CA could change its mind, and say that even if there is no prosecution, the fact that a man technically commits a crime in law, each time he has sex with another man, might be sufficient for locus standi.

51. In summary, my views on the two issues:

    a. First, that the CA has strongly suggested that s377A is unconstitutional. It is in breach of Art 12, and,

    b. Second, the locus standi point is anything but complete.

52. What are the possible consequences if s377A is struck down? Then the definition of marriage as it stands today will almost certainly be challenged by someone. That is why the Government is moving to keep the current definition of marriage within the province of Parliament, amending the Constitution to prevent any challenge in the court. Because in our view, that has to be decided in Parliament, not anywhere else.

53. Some have said, why doesn't the Government instead amend the Constitution to protect s377A from court challenges?

54. It has also been suggested – why don't you amend the Constitution to protect the definition of marriage, and leave s377A alone? If the CA strikes it down in the future, then so be it?

55. I will deal with these suggestions when we debate the repeal of s377A in Parliament.

56. They are wrong in principle. They require Parliament to do not the right thing, but the wrong thing. And that, I don't think, is what we want to do. But I will explain that when we deal with this in Parliament.

57. I have shared my views.

58. I look forward to a fruitful discussion.

59. Thank you.