

Mr Hri Kumar on the debate on amendments to the Penal Code.

I rise to support the Bill. A major overhaul of the Penal Code was timely and the Ministry of Home Affairs has obviously put in much effort and thought to the amendments. I particularly commend the new laws to protect minors from sexual predators whether here or abroad and I support the amendments fully.

Let me touch briefly on the issue of Section 377A. As Professor Ho Peng Kee pointed out, this is one debate which will not see people switching sides easily. Both proponents and opponents of the law have deeply entrenched views on the subject and that is unlikely to change for some time.

I have personally asked many people, both young and old what they think of this issue. And the almost common consensus is that they do not want this law to be repealed. And that is consistent with the feedback the Government has received.

So I do not wish to engage in a moral debate and certainly not a long one, and I have no rousing speech to deliver. What I wish to do is to approach it from a lawyer's point of view and how I see Parliament and Parliament's role in making laws.

As a lawyer, the power of Parliament to make law is of particular interest to me. When judges and lawyers interpret laws, they are in certain instances permitted to refer to Hansard to determine the intention behind any word, phrase or provision in a piece of legislation.

Parliamentary debates therefore play an important role not just in the passing of laws but in how they would be understood by those who later apply them.

What we say here or do must be consistent with the law we promulgate and also make sense to those who scrutinise our words perhaps years from now.

In my submission, laws must meet the 3 Cs - be clear, be consistent and be concrete - meaning that it must be substantive, effective and make sense.

What I find difficult about this issue before us is that while the majority do not wish a repeal for good reason, intellectually Section 377A does, in some respect, fall short of what a good law is or should be.

First, it's unclear what the current legal position is.

In a statement on 7 Nov 2006, the Ministry of Home Affairs said that, with respect to Section 377A, it will not be proactive in enforcing the section against adult males engaging in consensual sex with each other in private.

But what does that mean? Does it mean that the police will not act on complaints? Or that suspects may be investigated but ultimately not arrested or prosecuted? Or is it the case of the Attorney-General, who has prosecutorial discretion, (and who) may prosecute some but not all offenders?

That puts the Attorney-General in a difficult position because selective prosecution will give rise to more issues.

But if the intention is not to do anything at all, then what is the purpose of having the law?

Does it not hurt our credibility that we have laws that are toothless? The Penal Code is an important piece of legislation. And in the long run, making some conduct criminal under our Penal Code whilst stating that the law will not be enforced simply invites attacks on the integrity of the Code.

Second, we are not being consistent.

The retention of 377A is often justified as being consistent with the importance society places on family values.

But society has done away with criminalising a whole host of other conduct which is far more damaging to family values, such as adultery which carries a more direct threat to the integrity of the family. And adultery was one of the original Ten Commandments.

Further, it is not always true that laws always reflect society's or the moral position.

Marital rape is a good example. I cannot imagine any member of this House believing that it is acceptable for a man to force himself on a woman under any circumstances regardless of whether they are married. But we do not completely outlaw marital rape.

The Bill here certainly protects a woman more by prescribing circumstances under which a husband can be charged with rape. But the protection is not absolute for wives.

Why? Well, over and above the reasons that have been given – and in this respect, I share Nominated MP Eunice Olsen's criticisms of those reasons.

But more importantly, the law knows its own limits and it's practically impossible to properly enforce a law by giving wide absolute protection. So likewise, if we do not accept that the Penal Code is not... we also accept that the Penal Code is not the appropriate tool to legislate or regulate the private heterosexual behaviour of consenting adults. Indeed, it is almost impossible to effectively do so.

And in addition, the question arises also why 377A does not deal with lesbianism. Over and above the legal basis for discriminating between men and women, where is the consistency?

Thirdly, Sir, through a 15-year period – 1988 to 2003 – there were only 8 convictions under Section 377A involving 7 incidents. Two convictions were for the same incident.

Moreover, it has not been evoked in respect of consensual sex since 1993. So this law is rarely applied. Or if applied, it applies to minors or applies to acts in public.

Does that mean that private consensual homosexual acts do not happen in Singapore? To believe that would be naive. The truth is that it is virtually impossible to enforce this law. Now that the Ministry of Home Affairs has said they will not actively pursue offenders, we are not likely to see any prosecutions in the future, certainly not many.

Sir, I accept that even if a law is difficult to enforce, it can still serve a legitimate purpose in its underlying message. And 377A sends the message that those who engage in homosexual activities are criminals.

But at the same time, we have been saying that our society will not reject those with alternative lifestyles. We have even said that such individuals have a place in our civil service. It has also recently been said that homosexuality may be genetic and the debate on this issue is still raging on.

Now the Ministry of Home Affairs says they will not prosecute offenders. So what is the message we are sending? Are we for or against it? What do we stand for?

While this may be an uncomfortable issue, we should at least make our position clear.

And just to cite an example by Mr Chris de Souza. He says messaging is important because – and he cites the example of suicides – if we remove, if we do not make it an offence to commit

suicide, we are sending the message that suicide is acceptable. But there is no inconsistent messaging for suicide. So it is not such a clear issue.

Sir, my second issue is with the arguments put forward by the opposing camp.

The opponents of the repeal have expressed concern that any repeal may be construed as an endorsement by the Government in favour of alternative lifestyles and that is a fair point.

However, likewise, I hope that any decision not to repeal will not be regarded as an endorsement for some of the reasons that have been advanced to oppose it. And what are some of these reasons?

First, the argument advanced by some religious groups that 377A should be retained because homosexuality is an abomination. I respect their right to express their views and I do not think this is the appropriate place or time for me to discuss it.

But we must remind ourselves that we are a secular state where everyone is equal in the eyes of the law and it is important to assure all citizens of Singapore that decisions will always be made on secular grounds.

Second is the notion that 377A reflects our Asian values. But 377A is not even Asian in origin. 377 was originally based on an English criminal law which sought to prohibit sodomy and was incorporated into the Indian Penal Code in the late 1862. It was also adapted for the Straits Settlement's Penal Code in 1871.

Section 377A was later added under the sub-title Unnatural Offences in 1938. Both sections were absorbed unchanged into the Singapore Penal Code when the latter was passed by Singapore's Legislative Council on Jan 28, 1955.

In short, we inherited this from the British. There is nothing distinctly Asian about it. Third is the argument that repealing 377A will lead to a rampant increase in homosexuality and thereby increase HIV rates.

First, having or repealing the law can make no difference because offenders have already been told that they will not be prosecuted. Second, Sir, it is stretching logic to suggest that the repeal will lead to a sudden proliferation of homosexual activity. Thirdly, making something illegal only forces it underground. That will restrict the ability of the Government to respond to the HIV threat

through promotion and education when Government agencies feel that they cannot engage with the gay community in any way except a condemnatory one.

Finally, Sir, the argument that the repeal is a slippery slope, that it will herald the end of the family unit.

As I have said earlier, there is no consistency in our laws to support this argument. Further, while society may frown on homosexuality, that, by itself, does not justify criminalising it. A number of speakers – at least one of them – have raised or highlighted the surveys in The Straits Times, where the public was polled and 70 per cent were said to frown on homosexuality.

Well, I can understand that, 70 per cent frown on it, but how many actually said that we are willing to criminalise it? That question was not even asked. And that is a serious question because that is the issue we face today.

Some members have mentioned the possibility of same sex marriages occurring here. That, no doubt, will be an issue which gay activists will push further down the road. But that involves the Government actively endorsing and passing legislation to recognise same sex marriages. Sir, the arguments here do not apply.

Sir, can I end by putting the question in another way and I say there's another way to test the issue.

Assume we are here debating whether to include 377A into our Penal Code, would we do it? I'm not sure we would because we would hesitate about passing laws to deal with private acts in the bedroom. But because it is already there, we are comfortable leaving it there.

Sir, it may well be that our society today is not ready to debate this issue and I hope that it will not be too long before we feel ready to do so, because I think that's a sign of our growing maturity. But when we do debate this issue, I hope that the debate will be calm and measured as that typifies the way we do things in Singapore. Certainly we do not wish to see any proliferation of hate messages, of mails and other things which Professor Thio Li Ann has talked about. That is certainly not the way we do things in Singapore and long may that continue.

Ultimately laws should be passed and repealed not only because the majority wants it that way but because it makes sense and ultimately it's in the interest of Singapore as a whole and that includes the interest of all minority groups.

Thank you.