

Fraudulent Sex Criminalisation in Singapore: An Accidental Success*

A Report on a Research Seminar by Associate Professor Chen Jianlin of the Melbourne Law School (20 January 2020)

The Criminal Law Reform Act 2019,¹ which introduced new regulation relating to fraudulent sex, came into effect on 1 January 2020.² These amendments are meant to ensure that the law keeps pace with recent developments on sexual consent, and provide some clarity in that respect. The question is: are they enough?

In a thought-provoking seminar,³ Associate Professor Chen Jianlin posited that these amendments in the Penal Code⁴ were an accidental success. He examined two provisions:

1. Section 376H,⁵ which criminalises the procurement of sexual activity by deception or false representation; and
2. Section 377CB,⁶ which invalidates consent given under a misconception of fact.

He argued that these two provisions reduce the scope of fraudulent sex criminalization covered by the statute. However, he argued that this reduction may be mitigated by s 415,⁷ an existing provision against cheating.

I. The 2019 Reforms

A. Law Prior to Reform

Before the 2019 reform, consent for the purpose of *both sexual and non-sexual offences* were addressed under s 90(a)(ii).⁸ It provided that consent will be invalidated by “a misconception of fact”. This equal treatment of consent across both sexual and non-sexual offences was a unique feature of the Penal Code. In particular, this meant that in principle, the use of any of type of fraud to obtain sex would be as much a crime as if it was used to obtain property.

B. Section 377CB: Departure of the Penal Code’s Unique Origin

Section 377CB⁹ reduces the types of misconception of fact that can invalidate sexual consent. Now, for the purpose of sexual offences, the misconception of fact must relate to:

1. The nature or purpose of the act (now under ss 377CB(1)(a)¹⁰ and (b)¹¹ respectively);
or

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¹ Criminal Law Reform Act 2019 (GN No 15 of 2019). [Ed Note: this act came into force on 1 January 2020]

² MHA, “Commencement of Amendments to the Penal Code and Other Legislation on 1 January 2020” (27 December 2019) < <https://www.mlaw.gov.sg/news/press-releases/commencement-of-amendments-to-the-penal-code-and-other-legislation-on-1-january-2020> > (accessed 11 February 2020).

³ Ed Note: This seminar was based on A/P Chen’s research paper titled “Fraudulent Sex Criminalisation in Singapore: Haphazard Evolution and Accidental Success”.

⁴ Penal Code (Cap 224, 2008 Rev Ed) (“the Penal Code”).

⁵ *Id.*, at s 376H.

⁶ *Id.*, at s 377CB.

⁷ *Id.*, at s 415.

⁸ *Id.*, at s 90(a)(ii).

⁹ *Id.*, at s 377CB.

¹⁰ *Id.*, at s 377CB(1)(a).

¹¹ *Id.*, at s 377CB(1)(b).

2. The identity of the person doing the act (now under s 377CB(1)(c)).¹²

C. Section 376H: Criminalisation of “stealthing”

However, this resulting reduction on the types of misconception of fact that can invalidate consent is mitigated by s 376H. Under s 376H, Singapore became the first Asian country to explicitly criminalise “stealthing”.¹³ Sexual intercourse obtained through deception or false representation is now a distinct sexual offence. This deception or false representation must relate to:

1. The use of any sexually protective measure (such as male or female condoms); or
2. Whether the person in question is a carrier of a sexually transmitted disease.

II. An Accidental Success

A. 2019 Reform: Creating a gap in the law?

A/P Chen observed that the 2019 reform also inadvertently created a gap in the law. The changes followed Recommendation 86 of the Penal Code Review Committee Report,¹⁴ i.e. to not include a statutory definition of “consent”.¹⁵ However, Recommendation 87, which stated that no amendments are required to clarify the type of misconceptions of fact which can invalidate consent, was not incorporated.¹⁶ Thus in effect, s 377CB declares when a misconception of fact *does not* amount to consent, but without stating what consent *is*.

This disrupts the synergy of both recommendations. Without a positive definition of consent, offenders may get away if the misconception of fact falls outside of s 377CB¹⁷ and s 376H.¹⁸ In England, the positive definition of consent safeguards against such situations. For example, the English courts have sustained rape convictions where the misconception is to the biological gender of the accused.¹⁹ These convictions were made on the basis that there was a lack of consent (as per the positive definition) even though the misconception did not fall under the grounds of nature, purpose or identity.²⁰

B. Section 415: Plugging the gap?

To resolve this gap, A/P Chen proposed a potential prosecutorial strategy by charging the accused under the offence of cheating in s 415.²¹

¹² Penal Code, *supra* n 4, at s 377CB(1)(c)

¹³ Ed. Note: VICE, “Singapore is about to make stealthing illegal” (15 February 2019) <https://www.vice.com/en_asia/article/8xy5vb/singapore-is-about-to-make-stealthing-illegal> (accessed 2 February 2020).

¹⁴ Report of the Penal Code Review Committee (Parl 13 of 2016, 20 September 2018).

¹⁵ *Id.*, at 248; Ed. Note: See also, *First Reading of Criminal Law Reform Bill and the Government’s Response to Feedback on it* (11 February 2019) <<https://www.mha.gov.sg/newsroom/press-release/news/first-reading-of-criminal-law-reform-bill-and-the-government-response-to-feedback-on-it>> (accessed 15 February 2019): The Government agrees with the PCRC’s recommendation not to adopt a positive definition of “consent” (following Recommendation 86) as any proposed definition would be too vague and too broadly phrased to be useful to the courts. Instead a new section will be introduced to clarify the types of misconception of fact that negate consent in the context of sexual offences (not following Recommendation 87).

¹⁶ *Id.*, at p 253.

¹⁷ Penal Code, *supra* n 4, s 377CB.

¹⁸ *Id.*, at s 376H.

¹⁹ *R v McNally* [2014] QB 593, at p 595-596.

²⁰ *Id.*, at p 600.

²¹ Penal Code, *supra* n 4, at s 415.

Section 415 criminalizes acts of deception that induce others to do what they would not otherwise have done.²² Sexual activities obtained by deception may thus fall under its ambit. Nonetheless, given that s 415²³ is primarily a property-related offence, A/P Chen acknowledged that this would be a novel application in circumstances where financial considerations was involved. It was thus uncertain if this argument would be accepted by the Singapore courts.

C. Bottom-line: Law that means what it says

In addition, A/P Chen argued that the 2019 reform is desirable for aligning the ordinary meaning of the statutory provisions with the Government's understanding of the law. Going through the court cases on fraudulent sex, A/P Chen observed that the prosecution has so far only brought cases where the misconception relates to either the nature or purpose of the act.

A/P Chen also noted that the sexual misconduct policies of Singapore's public universities did not provide the important legal information that "a misconception of fact" will invalidate consent under the pre-2020 Penal Code. He observed that this discrepancy was undesirable, and will hopefully be remedied by the 2019 reform.

III. Conclusion

Introducing a provision against "stealthing" and providing clarity on what misconceptions of fact may invalidate sexual consent, are positive steps towards criminalising fraudulent sex. A/P Chen believes that s 377CB, while problematic, may be mitigated by s 415. This makes the amendments relating to fraudulent sex an accidental success. However, the new amendments have only just come into force. It remains to be seen how the courts will interpret these new provisions.

We writers enjoyed ourselves at this research seminar, which was a throwback to our criminal law classes. We appreciate A/P Chen's detailed research and insights in this regard.

²² *Ibid.*

²³ *Ibid.*