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(Attention: Ms Tee Yock Sian)
Email: consultation@imda.gov.sg

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Dear Ms Lee

Representation on Amendments to the Films Act 2017

Please find herein our written comments on the proposed amendments to the Films Act 2017. This paper is submitted by us in our personal capacity. The views expressed here are strictly ours and do not represent the views of our respective institutions.

Yours sincerely

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Amendments to the Films Act: Problems and Concerns

1 Introduction

1.1 The Films Act (Cap 107) was enacted to regulate the "possession, importation, making, distribution and exhibition of films". The Government now proposes to pass the Films (Amendment) Act, which is the subject of this representation. We have major concerns on the following fronts:

a. *Widening of the Scope of Offences*. The new legislation significantly widens the offences of "distribution", "exhibition" and "possession" of unauthorised or unclassified films such that, given the current ease of producing and circulating videos, makes almost the entire population of Singapore vulnerable to the Act's operation.

b. *Not Updating Offences Relating to "Party Political Films"*. While this amendment Act undertakes a comprehensive revision of the original Films Act, it has not updated the definition and offences pertaining to "party political films" under sections 2 and 33 of the Act. Given the advances in technology and trends in social interactions and behaviour, this also opens almost the entire population of Singapore to being caught under these provisions, especially given the widening of the offences mentioned above.

c. *Excessive Enforcement Powers for Police and Regulators*. The new section 23A gives unnecessary and excessive enforcement powers to the police and to IMDA regulators given the objects of the Act and the potential harm that may result in the absence of such powers.

1.2 We will deal with and elaborate on each of these concerns in turn.

2 Widening of the Offence of "distributing", "exhibiting" and "possession" of unauthorised or unclassified films.

2.1 Under the current Films Act, it is an offence to *possess* or *exhibit* or *distribute* or *reproduce* "any film without a valid certificate" (Section 21(1)(b)). It is also an offence to import, make, reproduce, distribute or exhibit a "party political film" (Section 33). It is proposed to replace Section 21(1)(b) with a new Section 21(1) that makes it an offence for any person to *distribute* or *publicly exhibit* an unclassified film or to have such a film in his or her *possession* "with the intention of distributing or publicly exhibiting the film."

2.2 The phrase "publicly exhibit" is not defined in the Act although it does provide a definition of "public place", which refers to any place in Singapore "to which members of the public have access as of right" or where they have access by virtue of express or implied permission. The new definition of "exhibit" in Section 2(1) is now also much broader than

the old definition of "exhibition", which required some kind of projection of the said film. Under the proposed new regime, "exhibit" under the new Section 2(5) includes the situation where content "is supplied by broadcasting service, telecommunications or other electronic transmission" and "is received on a computer monitor, television screen, mobile device or similar medium equipment appropriate for receiving that content." Furthermore, the "showing of the content by the recipient to one or more other individuals is taken to be an exhibition of a film."

2.3 The new Section 2(6) does exempt the "private viewing alone of a film by an individual" from the meaning of "exhibit" but this is much too narrow an exemption. Any person, having on his or her mobile device, an "unclassified film" may be caught under the new law if he or she watches it along with a friend while standing in the void deck of an HDB flat or at the local coffee-shop.

2.4 Other than for commercial distributors and exhibitors of films, the implementation of these new provisions is problematic especially with the ubiquity of mobile phones, tablets and other kindred devices. Individuals on chat groups may receive "films" from any person anywhere around the world. How is the recipient supposed to know if the "film" received is or is not an "authorised" film, or for that matter, a party political film? Indeed, if the recipient of the "film" were to show it to a friend to determine if it is party political, he or she would be caught under the provision.

2.5 Today, everyone shares files through various applications such as WhatsApp, Line or WeChat, including video files, which will almost certainly qualify as "film" under the Act. The sharing is often done through sending entire files through these applications, which means that to view these files (even to ascertain what they are about), the recipient will have to download the file and open it before he or she can view it. This means that a copy of the file will automatically be saved on the recipient's mobile device or computer. When this happens, the recipient will be "in possession" of the film; and if the recipient thought the film worth sharing with another friend, he or she would theoretically possess the film "for the purposes of exhibiting" the film.

2.6 The cumulative impact of these amendments is to make it all too easy for anyone to be prosecuted under the Act, whether for possessing, distributing or exhibiting unauthorised or unclassified films. To be sure that one is not caught and penalised under the new provisions, one must be sure (a) never to click on or download any video file received on one's mobile device; and (b) never to forward or show a video on one's mobile device to someone else. This is a serious overkill and totally disproportionate to the potential harm the new provisions appear to be aimed at arresting.

3. Not Updating Offences Relating to "Party Political Films"

3.1 Section 33 of the Films Act was inserted back in 1998, long before the advent of popular video-sharing platforms such as Vimeo (created in 2004) and YouTube (2005).

Speaking during the Second Reading of the Films (Amendment) Bill on 27 Feb 1998, Minister for Information and the Arts George Yeo explained that Section 33 was introduced because "political videos are an undesirable medium for political debate in Singapore" and that these videos could be "sensationalised or presented in a manner calculated to evoke emotional rather than rational reactions." At the same time, videos did not allow for "effective rebuttals" and carried the "risk that political debates on serious matters will be reduced to a contest between advertising agencies" (*Singapore Parliamentary Debates*, vol. 68, 27 Feb 1998, col. 477). The Government's objective was thus to "keep political debates in Singapore serious and not have them become like the selling of soap." Minister Yeo stated that while Section 33 would affect all political parties, it would "not affect the freedom of political debate in Singapore" as there were "already sufficient avenues for political parties to get their views, platforms and manifestos across to the public" (col 477).

3.2 It is clear that when Section 33 was introduced, it was targeted specifically at political parties who might be tempted to make, exhibit and distribute "party political films." It did not anticipate the advance of affordable technology and the popularity of video-sharing platforms that allow individuals to make videos on their own (at very little cost) and distribute them online. The first camera phones only became available in Japan and Korea in 2000, with the first video-camera phones following a few years later. Section 33 of the Films Act is now seriously out of date. Practically every "home-made" video or film would almost certainly be an "unclassified film" and accordingly render its possessor, exhibitor or distributor liable under the proposed new Section 21(1)(a)(ii). Pure possession is in itself insufficient for prosecution under this Section since it further requires that the possession be "with the intention of distributing or publicly exhibiting the film." These additional requirements are easily met because few people take videos (blowing out the candles on the birthday cake) only for their personal enjoyment and not to share with a family member (grandmother) or friend.

3.3 In addition, the definition of "party political films" in Section 2 of the Act – which remains unchanged in the proposed amendments – is so wide and vague as to make it all too easy for someone to be caught under the Act. Section 33 prohibits the importation, reproduction, distribution and exhibition of "party political films." Section 2(2)(a) defines a "party political film" as a film —

> (a) which is an advertisement made by or on behalf of any political party in Singapore or any body whose objects related wholly or mainly to politics in Singapore, or any branch of such party or body; or
>
> (b) which is made by any person and directed towards any political end in Singapore.

The meaning of "towards any political end in Singapore" is explicated in Section 2(2), which provides that such a film —

> (a) contains wholly or partly any matter which, in the opinion of the Board [of Censors], is intended or likely to affect voting in any election or national referendum in Singapore; or
>
> (b) contains wholly or partly references to or comments on any political matter which, in the opinion of the Board, are either partisan or biased …

3.4 "Political matters" include, among other things, "a current policy of the Government or an issue of public controversy in Singapore." The words "partisan" and "biased" are not defined and left to the sole discretionary interpretation of the Board of Censors.

3.5 Thus, reading Section 33 with the definition in Section 2, any film that even partially *refers* or *comments* on any political matter in "either partisan or biased" manner is a party political film. This effectively prevents any person from commenting on politics in Singapore or proffering any view on Government policy – on film. Thus, someone who has recorded a video of himself criticising a controversial policy such as the Population White Paper or the frequency of the breakdown of SMRT trains will *prima facie* find himself running afoul of Section 33. Technically, any criticism of government policy or action is potentially partisan or biased as it goes against the status quo. Such a prohibition runs counter to the freedom of expression under Article 14 of the Singapore Constitution and also to the intention of Parliament as stated by then Minister George Yeo.

4. Excessive Power of Enforcement

4.1 The new Section 23A gives excessive power to the police and classification and licensing officers from the IMDA to enforce the Act. The current Section 23(2) only allows a person holding the rank of Deputy Commissioner, Assistant Commissioner or Assistant Superintendent of Police to conduct a search of premises without first obtaining a warrant. Even so, there are only two conditions when such drastic action may be taken:

> (a) if he has personal knowledge of such facts as satisfy him that there are sufficient grounds for a search;
>
> (b) if he receives information orally in such circumstances that the object of a search would in his opinion be defeated by the delay necessary for reducing the information to writing except that the name and address of the person giving the information is known to or ascertained by him before he acts upon the information.

These procedural requirements and minimal safeguards are absent in the proposed amendments (Section 22).

4.2 Under the new Section 23A, any "police officer" or "classification officer" or "licensing officer" may "enter and search without warrant, the premises and to search any equipment, vehicle or other thing at the premises" if it is done "for an enforcement purpose." The new Section 23A(9) provides that "enforcement purpose" means the obtaining of evidence of an offence "where there is reasonable cause to believe that evidence of the

commission of the offence can be found on those premises" or "investigating any offence under the Act."

4.3 Other than entering and searching a premise or vehicle, enforcement officers are also empowered to:

(a) photograph or film, or make audio or video recordings or make sketches of, any part of the premises or anything at the premises;

(b) detain any individual found within those premises until the search of the premises is complete;

(c) seize any film, advertisement for a film, equipment or material, if the officer knows or has reason to suspect that the film, advertisement, equipment or material is evidence of an offence under this Act or any of its subsidiary legislation;

(d) inspect and make copies of, or take extracts from, (without fee or reward) any document kept at the premises; or

(e) take any document or any other thing at the premises, including asking any individual who is able to operate any equipment at the premises to do so for the purpose of enabling the enforcement officer to ascertain whether the equipment, or a disk, tape or other storage device that can be used or associated with the equipment, contains information that is relevant;

(f) require any person in Singapore who is believed to be acquainted with any facts or circumstances relevant to the carrying out of the provisions of the Act to attend before the officer to answer questions or provide information or produce documents believed to be in their possession.

4.4 The general power to enter into and search premises is currently governed by Section 32 of the Criminal Procedure Code (Cap 68), which permits the conduct of a search of a property without a search warrant only by "any police officer of or above the rank of sergeant" upon "reasonable cause" and "suspecting that any stolen property is concealed or lodged in any place and he has good grounds for believing that by reason of the delay in obtaining a search warrant such property is likely to be removed."

4.5 Searches and seizures without warrants may be found in other statutes but in all these instances, an exception is made because of the danger that the subjects of investigation and apprehension escape or because evidence may be removed or destroyed. Such urgency does not exist in the enforcement of the Films Act. Today, most film is stored in digital form and unless the subjects of investigation destroy their computers, mobile devices and such, evidence of their wrongdoing can easily be recovered through digital forensics.

4.6 In most instances, searches without warrants are permitted by law only under exceptional circumstances. In particular:

(a) Some imminent danger or urgency exists – such as removal of stolen property while a warrant is being sought – is such that the prior obtaining of a warrant is impracticable.

(b) The presence of three key safeguards. First, only empowering the police to conduct such searches; second, requiring the decision to be made by a police office of higher authority; and third, the requirement that the officer have bona fide grounds for such a search.

4.7 The new Section 23A of the Films Act goes against all these requirements. The power to conduct a search without a warrant is given not only to *any* police officer, but *also* to any classification officer or licensing officer. No higher authorisation is required.

4.8 The phrase "reasonable cause" under Section 23A(9) is not defined and can easily be misused by an over-zealous enforcement officer. Given this ambiguity, the odds are stacked against the victims of searches without warrants because courts in exercise of their supervisory powers are likely to apply the test of *Wednesbury* unreasonableness whereby an executive action may be quashed if it is "[s]o outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, paraphrasing the principle of "unreasonableness" in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

4.9 This means that the burden shifts to the accused in proving that the officer's belief that he or she had "reasonable cause" was so ridiculous as to have no basis or that the officer acted arbitrarily or in bad faith. This burden is extremely difficult to discharge.

5. Conclusion

5.1 The proposed amendments need to be studied and reconsidered.

5.2 Based on the proposed amendments, the following hypothetical, while outrageous, would legally be condoned:

> An IMDA licensing officer hears a rumour that a Minister has made a video of himself criticising a certain member of the Opposition. He also knows from newspaper reports that the Minister is leaving the country for an official visit that very evening. He decides to act. The video was certainly never submitted for classification, and could well also be a party political film. Together with five other licensing officers, he enters the Minister's house without a warrant to conduct a search. He detains the Minister and his family for 25 hours while he and his colleagues search the Minister's house and leaves with whole cabinets full of the Minister's papers, all the mobile phones, computers and digital storage devices in the house. He further instructs the Minister to report to IMDA to answer questions pertaining to the seized material.

5.3 Our laws certainly need to be reviewed and updated where necessary to align with the Smart Nation thrust. That the hypothetical in paragraph 5.2 above may be legally condoned, however, should give pause to the current bill. We urge the IMDA to work with the relevant

stakeholders to draft a law that while updating our law to the digital era does not inadvertently work against the end of a Smart Nation.

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