

Malta: Comprehensive reforms still needed to protect journalists

ARTICLE 19 welcomes the various proposals designed to improve the protection of journalists and media freedom in Malta, both in the Government's own proposal and in the proposal of reforms introduced by the Opposition Members of Parliament. At the same time, we are concerned that the Government proposal is not comprehensive enough to bring the necessary changes. In particular, the protection of freedom of expression in the Constitution should be strengthened to include the right to information and permissible restrictions should strictly comply with the language of international human rights standards. The Government must also adopt complex measures to fulfil its international obligations to create an enabling environment for journalism and protect journalists from legal harassment in Malta, not just in cases when local courts are enforcing judgements from third countries. Finally, we also urge the Government to undertake more ambitious measures to increase the protection of journalists, including through preventive measures.

Background

In January 2022, following recommendations of the Public Inquiry on the assassination of journalist Daphne Caruana Galizia, the Government of Malta established the [Committee of Experts on Media](#) (the Committee). It was tasked with analysing the state of media freedom in Malta and providing legislative recommendations to the Prime Minister to rectify the situation. The Committee was also to examine "the draft legislative amendments prepared by the government following the consultations carried out with key stakeholders".

On 27 January 2022, the Government released two draft laws:

- A draft Act "to amend the Constitution and various other laws to strengthen the right to freedom of expression and the right to privacy and to implement various measures for the protection of the media and of journalists"; and
- A draft Act "to provide for the establishment of structures for the protection of democratic society including the protection of journalists, other persons with a role in the media and in non-governmental organisations and persons in public life."

Also, in January 2022, a group of parliamentarians (MPs) from the Opposition published their legislative proposals, suggesting amendments to 12 laws, including amendments to Malta's Constitution, the Criminal Code, the Code of Organisation and Civil Procedure, and the Media and Defamation Act. These Opposition proposals, which were in line with the recommendations of the Public Inquiry, were voted out by the government after a parliamentary debate.

Both the Government and MPs' proposals also sought to introduce measures to curb the abusive practice of strategic litigation against public participation (SLAPPs). SLAPPs are meritless claims brought in clear abuse of the judicial process. Their aim is not to win compensation but to harass or subdue the media and other critical voices in society and to create a chilling effect on the right to

freedom of expression. This is particularly important as investigative journalists and the family of Daphne Caruana Galizia face numerous SLAPP cases.

ARTICLE 19 welcomes the initiatives to strengthen the protection of freedom of expression and media freedom in Malta. Adopting a comprehensive reform of the media and freedom of expression laws, improving the protections of journalists and deterring and combating the pervasive practice of SLAPPs are long overdue. In this brief, we examine how the proposals comply with international freedom of expression standards and offer key recommendations to the Government on how to improve these proposals.

At the same time, ARTICLE 19 remains concerned about the lack of [meaningful and transparent consultation](#) about these proposals. Unfortunately, despite [the assertions of the Government](#) that the proposal was “widely consulted,” the work of the Committee and the Government was shrouded in secrecy and there were no consultations with civil society or a broader range of stakeholders. ARTICLE 19 believes that this situation must be urgently remedied. As the legislative reform progresses in Malta, all stakeholders must be able to shape the outcome of the process.

Proposed amendments to the Constitution of Malta

Both the Government and the Opposition’s proposals aim to amend the country’s Constitution to address some of the recommendations of the Public Inquiry. Both suggest amending [Article 41](#) of the Constitution which guarantees the protection of the right to freedom of expression. Additionally, the Opposition proposed to add a new Article 22 that would explicitly recognise the commitment to media freedom and broaden participation in public debate, improve the protection of journalists and journalistic sources, include explicit protection against SLAPPs and improve access to information.

ARTICLE 19 finds positive that the new working Article 41 would expressly guarantee the right to freedom of expression as provided for in the international human rights standards. The new paras 1 and 2 would basically replicate the text of article 11 of the Charter of Fundamental Rights of the European Union. We also welcome the proposal to explicitly recognise the respect for freedom and pluralism of the media and the importance of the role of journalists.

Here, ARTICLE 19 would suggest expanding the suggested protections by also including the **constitutional protection of the right of access to information**. Namely, the text should clearly state that freedom of expression also includes the right to seek information.

At the same time, ARTICLE 19 is concerned that the Government proposal imposes **restrictions on freedom of expression** in a broader way than permitted under international human rights law. Namely:

- The proposed Article 41 para (3) states that “proportionate restrictions on the freedom of expression of public officers may be imposed by law within the limits provided for in this sub-article for the purposes of maintaining confidence in the public service.” We note that such restrictions are not permitted under international freedom of expression standards. “Maintaining confidence in the public service” is a broad concept, open to subjective interpretation. There might of course be legitimate reasons to restrict the freedom of expression of those employed by the State (public officers). However, such restrictions would have to meet the requirements of Article 10 para 2 of the European Convention and Article 19 para 3 of the International Covenant on Civil and Political Rights (ICCPR); there is no reason why specific restrictions should be stated for a certain category of speakers. These provisions might be used to limit criticism of

state employees or whistle-blowers from within the government and limit the speech that contributes to open debate. We recommend that the respective part is eliminated from the Draft.

- Proposed wording of Article 41(6) in the Government's proposal also goes beyond restrictions permitted under international human rights law. The proposed text states that "this article shall not be interpreted as protecting hate speech which incites to violence or hatred such as racial, religious, ethnic or gender hatred." In general, we would recommend any restrictions on 'hate speech' take due account of the treaty language of Article 20(2) of the ICCPR. We note that the ICCPR narrowly defines the restrictions as "advocacy of hatred [on prohibited grounds] that constitutes incitement to discrimination, hostility or violence." We propose to reword the respective section accordingly.

As for the Opposition proposal, we appreciate the suggestions to include several principles strengthening the protection of freedom of expression, in line with international freedom of expression standards. Importantly, the proposed amendments for Articles 41(4) and 41(5) of the Constitution provide more clarity and robust protection regarding journalistic sources and the right of access to information than that of the Government.

We note, however, that provisions of Article 22(3) are somewhat confusing as they mention the State's recognition of "the **obligation of the press** to impart, in a manner consistent with its responsibilities, information and ideas on all matters of public interest, acting as public watchdog". It is unclear what is the purpose of setting an obligation upon the press in the Constitution. In particular, we note that:

- These provisions might wrongly suggest that 'obligations of the press' serve as a precondition to the protection of freedom of expression. If this was the case, human rights would only be granted to those who perform their duties to a community whose codes and values they accept and share and such a conception would be "[antithetical to both the unconditional nature of the rights and freedoms \(which are not "meritorious"\) and their universal nature.](#)"
- Secondly, there is nothing exceptional about freedom of expression that requires such a special emphasis upon 'obligations'. All human rights involve equal respect for the rights of others. Any suggestion that freedom of the media, in particular, may be limited by reference to 'obligations' is contrary to the very spirit of human rights, as they belong not just to the virtuous but to all without qualification.

Hence, should the Opposition proposal be further considered, this section should be rephrased. Instead, the Constitution could recognise that independent and diverse media play an essential role in supporting the functioning of democratic societies.

ARTICLE 19's recommendations:

- All MPs' proposed amendments to Article 41 and new Article 22 should be considered;
- The Government's proposal for Article 41 (3) of the Constitution, which imposes proportionate restrictions on public officials' speech for the purposes of "maintaining confidence in the public service" should be eliminated;
- Proposed text of Article 41 (6) of the Government proposal should be amended. It should replicate the wording of Article 20(2) of the ICCPR and restrict "advocacy of hatred on prohibited grounds that constitutes incitement to discrimination, hostility or violence", instead of "hate speech."

Proposed amendments to the Media and Defamation Act

Both the Government and the MPs recommend to amend the Media and Defamation Act in order to introduce legislation against SLAPPs. This is important given the history of SLAPPs in Malta, targeting journalists, editors and media outlets. The key proposals concern the following issues:

1. Restrictions on defamation proceedings against the deceased

The Government proposal introduces new provisions (Article 3A) which allows the court in defamation proceedings against an author or editor after their death to “not award any damages against the heirs of the deceased author or editor.” Upon request of the heirs of the deceased, the court can also “summarily order the discontinuance of the proceedings subject to such orders and conditions with regard to the merits of the case and to the payment of costs as it may consider appropriate.” However, it also says that such proceedings may continue upon the request of the plaintiff against the publisher instead of the heirs.

ARTICLE 19 welcomes these provisions. We have long argued that in defamation cases, the harm from an unwarranted attack on someone’s reputation is direct and personal in nature. Unlike property, it is not an interest that can be inherited or transferred upon their death. This reform is also particularly relevant in the context of pervasive SLAPPs against the family of Daphne Caruana Galicia. As for the possibility of the transfer of the liability onto the publishers, we believe that the proposal must include further safeguards; namely to state that such proceedings could continue against publishers *only* when legal liability can be separately established against publishers as well.

2. Protection against SLAPPs – enforcement of defamation judgements from third countries

The Government proposes a new Article 24A on the protection of journalists against SLAPPs. This would allow the courts to limit the execution of defamation judgements from third countries under specific provisions. “Without prejudice to the application of European Union law and of any treaty to which Malta is a party,” the courts will be able to limit the execution of such judgements if:

- The action giving rise to the judgment was substantially based on claims related to Malta and could have been filed in Malta; and
- It was probably not so filed as part of a strategy intended to place an unwarranted financial burden on the defendant,

Additionally, courts can also refuse the execution in Malta of such a judgment if the court considers that “the execution of that judgment would violate the right of freedom of expression as protected in the legal system of Malta.” At the same time, third country judgements could still be enforced “to such amount which the Court considers would be due in damages and, or costs under [Defamation Act of Malta] had the action been filed in Malta and decided against the author, editor or publisher.”

ARTICLE 19 appreciates the attempt to limit the enforcement of SLAPP judgements from third countries as we are concerned about the cross-border SLAPP cases against journalists. Despite these positive intentions, we find the provisions confusing and open to an arbitrary interpretation of the courts.

- First, the protection against SLAPPs in this proposal is exclusively focused on the enforcement of SLAPPs judgements (in defamation cases) from the third countries. This is not sufficient and the

Government should also introduce a comprehensive protection against SLAPPs originated from and brought directly to courts in Malta.

- Second, the comprehensive protection against SLAPPs is urgently needed also in light of the additional provisions of the new Article 24A which states that judgements from third countries can still be enforced if the “the Court considers would be due in damages and, or costs under [Media and Defamation Act of Malta] had the action been filed in Malta and decided against the author, editor or publisher.” Unless the domestic law provides protection against SLAPPs, this will allow SLAPPs judgements from abroad to be still enforced as they could be granted if brought in Malta.
- Third, it is not clear how the courts in Malta will assess the level of damages when actually enforcing the third country judgement (as noted above, the courts can enforce such judgements “to such amount which the Court considers would be due in damages had the action been filed in Malta and decided against the author, editor or publisher”). In practice, this can very well mean that the defendants will actually face a double burden in litigation. Depending on the actual interpretation of these provisions, the defendant would have to defend their case in third countries and then again, in separate damage proceedings in Malta. This would be extremely problematic since – as we repeatedly stated – one of the key problems with SLAPPs cases is the financial and other burdens that must be sustained by those facing defamation cases. It also fails to incorporate the public interest as a key legal interest to be protected by courts when conducting said assessment.

Importantly, ARTICLE 19 observes that the Opposition’s proposal to amend the Media and Defamation Act provides far stronger protection against SLAPPs than the Government proposals, in particular Clause 49, Article 5(4) and Clause 50. These mention the public interest defence as a key factor for the courts to assess when exercising their power to dismiss defamation related claims. MPs’ proposals also include an important procedural provision concerning the stage at which courts can decide to dismiss the claim on the basis of public interest. They focus on public interest assessments as the basis for dismissing cases, a core element of the anti SLAPPs legal responses.

Similarly, ARTICLE 19 appreciates that the MPs propose amendments on the Code of Organisation and Civil Procedure concerning the enforcement of foreign or third country judgements when the courts consider that the judgement is contrary to the public policy on the basis that it is likely to have a chilling effect on public participation on matters of public concern.

ARTICLE 19’s recommendations:

- Proposed Article 3A of the Government proposals, allowing for the continuation of the proceedings against the publisher after the death of the author or editor, should be amended. It should stipulate that in case of the death of the author or editor, publishers can only be liable if legal liability can properly and fairly be established and determined in the absence of the deceased journalist, respecting the due process of law.
- The Government should adopt comprehensive measures against SLAPPs – both in the Media and Defamation Act and in the civil procedure. Procedural rules should include the options to initiate early dismissals proceedings at the court’s own motion and upon petition of the defendant, short (six months) deadlines for initiating cases, provisions on legal aid and awards of costs as well as the provisions on judgements from the third countries.

- If the current provisions on enforcement of the third countries judgements (a newly proposed new Article 24A of the Media and Defamation Act) are maintained, they should be clarified to avoid possible confusion of the level of damages.
- When amending the Media and Defamation Act, considerations should be given to incorporating the Opposition proposal on new Articles 5 (4) (b) and Article 10 (4) of the Media and Defamation Act, as well as the proposal to amend Article 827 (1) of the Code of Organisation and Civil Procedure.

Amendments to the Criminal Code

The Government makes a proposal to introduce a new section to Article 222 that deals with aggravating circumstances for the crimes of bodily harm. It provides for higher penalties for crimes of bodily harm if the victim was “a journalist” and the offence was committed because they exercised or have been exercising their functions.

ARTICLE 19 welcomes this proposal. We recall that in their 2012 Joint Declaration, international mandates on freedom of expression called for the law to provide for heavier sanctions for crimes motivated by a desire to silence the victims (which they called crimes against freedom of expression), based on the serious consequences of such crimes, not only for the victims but for society as a whole.

As for the heightened penalties in cases of bodily harm of “a journalist,” ARTICLE 19 appreciates that the provisions refer to “journalists... exercising his/her function” but it is not clear who would be considered ‘journalist’ in the first place. We recall that under international human rights standards, ‘a journalist’ should not be defined by reference to some recognised body of training, or by affiliation with a media entity or professional body. We have long argued that journalism is an activity that can be exercised by anyone and that it is important that any legal standards applicable to the activity should reflect this. In particular, the understanding of the term ‘journalist’ should be broad to include any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication. For these reasons, it might be more appropriate to state that aggravating circumstances will be engaged if an individual was targeted for exercising their right to freedom of expression.

At the same time, we are concerned about the lack of further proposals addressing other serious issues faced by journalists and the media and clearly identified in the Public Inquiry. For example, those concerning serious threats to life or harassment that risk escalating and putting journalists’ safety at increased risk.

We also note that under international human rights law, the measures to protect journalists and create an enabling environment for journalism are not limited to legal provisions. The Government should also adopt a comprehensive strategy and various measures that can reduce the risks of attacks against journalists. Again, we recall that in their 2012 Joint Declaration, international mandates on freedom of expression called for the establishment of specialised protection mechanisms, “where there is an ongoing and serious risk of crimes against freedom of expression.” Such mechanisms include but are not limited to prevention mechanisms, such as an early warning and rapid response mechanism, creating special investigative units or independent commissions, appointing a specialised prosecutor, and adopting specific protocols and methods of investigation and prosecution.

ARTICLE 19's recommendations:

- Article 222 could specify that aggravating circumstances will apply when the victim was targeted for exercising their right to freedom of expression. In any case, the understanding of the term 'journalist' should be broad and not limited to those associated with professional media outlets.
- In addition to a reform of the Criminal Code, the Government should adopt comprehensive measures [to strengthen the protection of journalists in the country](#), as proposed by the Board of the Public Inquiry. The Government should also develop a National Action Plan on the Safety of Journalists in close collaboration and consultation with journalists, media outlets and civil society.