

# LAW TRACKER



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GHSL  
Għaqda Studenti ta' Liġi

Academic Partner  
FENECH + FENECH  
ADVOCATES



Grant Thornton

[policy@ghsl.org](mailto:policy@ghsl.org)

# FOREWORD.

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Our upcoming academic term will see various legal amendments take place - there could never be any doubt about that. Yet, parliament is not in session, and thus some amendments prior to the summer break have been selected for analysis in this month's edition of the GhSL Law Tracker. I am sure that the upcoming months will be marked by frequent change. However, in the meantime, I hope this makes an interesting and informative read.



Thomas Cilia  
Policy Officer



# LAW TRACKER

## Act No. XXX of 2023- Environment Protection (Amendment) Act

Act No. XXX of 2023, or the Environment Protection (Amendment) Act of 2023 amends various aspects of the Environment Protection Act<sup>1</sup> and also introduces various novelties. For sake of conciseness, the most pertinent features of this Act shall be given attention.

Amongst these one finds the introduction of a new article, Article 10A, which, as indicated by its marginal note, introduces and establishes an ‘Environmental Commission’. Interestingly, it is provided that amongst the four members of said Commission, one shall be a ‘person representing the interests of environmental voluntary organisations, who shall be chosen from amongst a number of persons nominated by the said voluntary organisations’.<sup>2</sup> The functions of this new Commission will be those that are delegated to it by the Board of the Environmental and Resources Authority (ERA)<sup>3</sup>. Additionally, Article 10A<sup>4</sup> tackles other important aspects of the Commission, including, inter alia, the duration of membership and the requirements for a binding decision. Furthermore, a new Schedule provided for by this Act covers the procedures that are to be followed by the Commission as well as the Board of the ERA.

Apart from the introduction of a new Environmental Commission, various amendments reflect an effort to increase public participation in various environmental decisions. By way of example, new sub-articles added to Article 59 of the EPA<sup>5</sup>, which relates to applications for authorisations to carry out activities referred to in Article 58 of the Act, cater for a declaration of interest by ‘any person’ in these applications for authorisation. Such interested persons may then make representations concerning the application, which are in turn to be considered by the Board. Additionally, a registered interested party within the context of the novel Article 59 (3) may also, according to Article 63 (2), ‘*may file an appeal from a decision of the Board of the Authority or of the Commission relating to an environmental permit with the Tribunal according to the Environment and Planning Review Tribunal Act.*’<sup>6</sup>

The amendment in question also empowers the ERA to issue so-called emergency orders where it believes that ‘there is an imminent danger to the environment’.<sup>7</sup> The importance of this change pertains to the fact that there is no need to wait 15 days to invoke action, as envisaged by the previous legislative situation.<sup>8</sup>

These changes represent a step in the right direction in the battle against environmental degradation, with important stakeholders, such as eNGOs and members of the public given the opportunity to influence environmental decisions.

<sup>1</sup> Environment Protection Act, Chapter 549 of the Laws of Malta

<sup>2</sup> *ibid* Article 10A

<sup>3</sup> *ibid*

<sup>4</sup> *ibid*

<sup>5</sup> Environment Protection Act, Chapter 549 of the Laws of Malta, Article 59

<sup>6</sup> *ibid* Article 63

<sup>7</sup> *ibid* Article 76

<sup>8</sup> Parliament approves Government amendments strengthening the Environment Protection Act’ (*The Malta Independent Online*, 14 July 2023)

<<https://newsbook.com.mt/en/parliament-approves-maltese-version-of-clares-law/>> accessed 9 September 2023

## ACT No. XXII of 2023 - Criminal Code (Amendment) Act

Act XXII of 2023 introduces changes to what had before been a relatively untouched area of criminal law. As indicated by its marginal note, Article 243B of Chapter 9 of the Laws of Malta provides an exemption from criminal responsibility pertaining to abortion should a set of criteria be satisfied.

A reading of Article 241 (1) of the Code<sup>9</sup>, the principal provision on abortion, is necessitated in order to analyse said exception:

*'Whosoever, by any food, drink, medicine, or by violence, or by any other means whatsoever, shall cause the miscarriage of any woman with child, whether the woman be consenting or not, shall, on conviction, be liable to imprisonment for a term from eighteen months to three years.'*<sup>10</sup>

Article 243B now adds the following rider:

**'No offence under sub-article (2) of Article 241 or Article 243 shall be committed when the cessation of a pregnancy or damage to the foetus results from a medical intervention carried out for the purpose of saving the life and protecting the health of a pregnant woman suffering from a medical complication which may put her life at immediate risk or her health in grave jeopardy which may lead to death.'**<sup>11</sup>

The elements of this exception are thus:

- The cessation of the pregnancy or the damage to the foetus may only result and be a direct consequence of a medical intervention.
- The medical intervention must be carried out solely for the purpose of saving the life **and** protecting the health of a pregnant woman.
- The pregnant woman must be suffering from a medical complication.
- Said medical complication must have the potential to put the life of the pregnant woman at immediate risk or put her health in grave jeopardy, which jeopardy may lead to death.

Notwithstanding these elements, the proviso to this article spells out further criteria which is to be satisfied for a defence to subsist. Summarily, said provision states that the article in question is applicable only if it is necessary after considering current medical practices, and then goes on to distinguish between the two scenarios contemplated in the provision, that is, the immediate risk of the pregnant woman's life arising from a medical complication, or the placement of her life in grave jeopardy which may lead to death. In the case of the former, an abortion may be carried out if the medical practitioner tasked with it reasonably believes that the foetus is not yet viable (the latter term being defined by the interpretative limb of Article 243B). However, should the complication put the pregnant woman's life in grave jeopardy which may lead to death, a set of conditions are set out. In short, a medical team composed in terms of Article 243(c) must reasonably believe that the foetus is not yet viable and cannot be delivered according to the standards of the medical profession and that the intervention is necessary. It is only when such elements are satisfied that the abortion can take place, and this only in a licensed and well-equipped hospital.

<sup>9</sup> Criminal Code, Chapter 9 of the Laws of Malta, Article 241

<sup>10</sup> *ibid*

<sup>11</sup> *ibid* Article 243B

## Act No. XXIX of 2023 - 'An Act to further enhance freedom of artistic expression'.

Towards the latter end of July, an Act of Parliament geared at 'further enhancing the freedom of artistic expression'<sup>12</sup> introduced new provisions in terms of the Criminal Code and the Electronic Communications (Regulation) Act, which appear to create an exception to the general rule.

This amendment is particularly interesting in that it appears to be direct reaction to recent affairs concerning the Pastor of an Evangelical Organisation.<sup>13</sup> Summarily, the provisions encapsulated within said amendment constitute a defence in terms of Article 339 of the Criminal Code<sup>14</sup> and Article 49 of the Electronic Communications (Regulation) Act.<sup>15</sup>

A comparison of the law prior to and following the promulgation of this aforementioned Act ensues:

### Article 339 of the Criminal Code

- **Pre-amendment:** '339. (1) Every person is guilty of a contravention against the person who -[...] (e) utters insults or threats not otherwise provided for in this Code, or being provoked, carries his insult beyond the limit warranted by the provocation;'
- **Post-amendment:** '339.(1) Every person is guilty of a contravention against the person who -[...] (e) utters insults or threats not otherwise provided for in this Code, or being provoked, carries his insult beyond the limit warranted by the provocation';

'339. (3) Paragraph (1)(e) insofar as it refers to the uttering of insults or threats shall be **interpreted to allow for the freedom of artistic expression** and in particular the said paragraph **shall not hinder artistic, satirical, comic or cultural expression, of any kind, which does not lead to credible and realistic threats to the personal liberty or security of the complainant or to his property.**'<sup>17</sup>

### Analysis:

From the outset, it is evident that this novel sub-article presents itself as an interpretative guide, which proclaims that insofar as any form of artistic, satirical, comic, or cultural expression does not lead to '**credible**' and '**realistic**' threats to either the personal liberty or security or the property of the complainant, such expression shall not be hindered by the contravention tackled by article 339 (1) (e); in other words, such expression shall not be treated as being of a criminal nature, and shall not lead to criminal responsibility.

The most important question to be addressed in individual circumstances, thus, pertains to whether the expression in question 'leads' to **credible and realistic threats**. The use of the conjunction 'and' is particularly noteworthy, in that a positivist interpretation of the provision would denote that criminal responsibility is negated only if the threat is not credible and unrealistic; this is favourable, since the use of 'or' would imply that a realistic threat be insufficient for criminal responsibility to subsist. In any case, the terms credible and realistic remain undefined by the legislator; jurisprudence would be expected to fill this interpretative lacuna.

<sup>12</sup> Act XXIX of 2023, Artistic Expression (Enhancement) Act

<sup>13</sup> New Bill to Strengthen Freedom of Artistic Expression in Malta' (Compendium Cultural Policies & Trends, 10 August 2023) <<https://www.culturalpolicies.net/2023/08/10/new-bill-to-strengthen-freedom-of-artistic-expression-in-malta/#:~:text=The%20bill%20aims%20to%20protect,%2C%20satirical%20or%20comic%20expression>>. accessed 16 August 2023

<sup>14</sup> Chapter 9 of the Laws of Malta

<sup>15</sup> Chapter 399 of the Laws of Malta

<sup>16</sup> Criminal Code, Chapter 9 of the Laws of Malta, Article 339

<sup>17</sup> ibid



## Act No. XVIII of 2023 - Domestic Violence Protection Act

The Domestic Violence Protection Act, passed in June, can be expected to be an important tool in the fight against domestic violence. Chapter 636 provides for a procedure whereby a person who feels that they are at risk ('person at potential risk' in terms of Article 2 of said Act) of being a victim of domestic violence may request Victim Support Agency to issue a so-called 'domestic violence risk warning',<sup>18</sup> which issuance would essentially, in the words of Home Affairs Minister Hon. Byron Camilleri, 'give a heads-up by providing information on whether your partner was ever convicted of domestic violence.'<sup>19</sup> Importantly, domestic violence is not limited to physical abuse, with the definition provided by the Gender-Based Violence and Domestic Violence Act capturing an extensive range of abuse.<sup>20</sup>

Crucially, the person applicant need not be in a purely 'legal' relationship with the person of concern; in other words, article 3 (1) (b) of the Domestic Violence Prevention Act states that a person who is in an 'informal relationship' (for example, an unmarried couple) with the person of concern may initiate the procedure aforementioned. Furthermore, the parent or legal guardian of a 'vulnerable person' may also submit an application to the Police.<sup>21</sup> This is commendable in light of the fact that said persons may find it more cumbersome to initiate the procedure for various reasons.

This novel piece of legislation appears to take inspiration from what is informally referred to as 'Clare's Law' in the UK,<sup>22</sup> which provides for 'the right to ask' about a current or ex-partner should one feel that they are at risk of being a victim of domestic violence.<sup>23</sup> Whilst 'Clare's Law' also provides for the right to know, which summarily refers to public communication by the Police, our new law does not.<sup>24</sup>

The procedure set out by the law focuses on the safety and the privacy of the victim, with several provisions attesting to this reality. Furthermore, several data protection provisions highlight the law's commitment to the security of one's data. Whilst this novel law will not single-handedly prevent and combat domestic violence, it is certainly a step in the right direction, especially against the backdrop of Malta's worrying rate of intimate partner violence.

<sup>18</sup> Byron Camilleri, 'The battle against domestic violence' (*Times of Malta*, 30 July 2023) <https://timesofmalta.com/articles/view/the-battle-domestic-violence.1046146#:~:text=A%20few%20weeks%20ago%2C%20parliament,Disclosure%20Act%20in%20the%20UK>. accessed 6 September 2023

<sup>19</sup> *ibid*

<sup>20</sup> Gender-Based Violence and Domestic Violence Act, Chapter 581 of the Laws of Malta, article 2: 'domestic violence' means all acts or omissions including verbal, physical, sexual, psychological or economic violence causing physical and, or moral harm or suffering, including threats of such acts or omissions, coercion, or arbitrary deprivation of liberty, that occur within the family or domestic unit, whether or not the perpetrator shares or has shared the same residence with the victim, and shall include children who are witnesses of violence within the family or domestic unit'.

<sup>21</sup> Domestic Violence Prevention Act, Chapter 636 of the Laws of Malta, Article 3.

<sup>22</sup> *ibid* 19

<sup>23</sup> 'The right to know if your partner has an abusive past' (*Clare's Law*) <https://clares-law.com> accessed 6 September 2023

<sup>24</sup> John Paul Cordina, 'Parliament approves Maltese version of Clare's Law' (*Newsbook Malta*, 31 May 2023) <<https://newsbook.com.mt/en/parliament-approves-maltese-version-of-clares-law/>> accessed 6 September 2023