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20<sup>th</sup> January 2026

Dear Dr Gomperts,

Further to your request that we advise on the legality, under Maltese law, of certain conditions imposed following your invitation to participate in the 2026 Malta Biennale, we set out in this legal opinion our analysis and conclusions for your consideration.

This legal opinion addresses two distinct issues, namely:

- I. the request that specific content be removed from a documentary to be screened as part of your participation; and
- II. the request that misoprostol and mifepristone not be brought onto the premises.

Our comments are given in accordance with our engagement and are based on the facts, assumptions, and representations made available to us at the time of writing. Should any material fact or assumption prove to be incomplete or inaccurate, it is imperative that we are informed immediately, as this may have a material impact on the conclusions expressed herein.

In rendering this opinion, we have relied upon the relevant provisions of Maltese law and subsidiary legislation as in force as at the date hereof, the regulations made thereunder, and the judicial and administrative interpretations thereof as known to us at this time. Where relevant, reference is also made to applicable principles of European human rights law. These laws and interpretations are subject to change, whether retrospectively or prospectively, and any such change may affect the conclusions set out herein. We do not undertake to update this opinion for subsequent legal developments.

Our comments are limited to the legal position in Malta as at the date hereof. We express no opinion on the laws of any other jurisdiction. Furthermore, while this opinion reflects our considered professional view, we express no assurance or guarantee that our conclusions will necessarily accord with those of any public authority, regulatory body, or court.

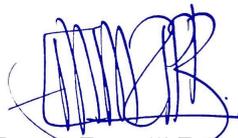
This legal opinion is furnished for your benefit and use in connection with the matters described herein. You have informed us that it is your intention to rely on this opinion in communications with the relevant venue and authorities, and we confirm that such use is permitted, provided that this opinion is reproduced accurately and in full, without selective quotation or modification, and that no duty of care is assumed by us vis-à-vis third parties who may rely upon it. Furthermore, you have also informed us that you may wish to publish or otherwise disclose this legal opinion for advocacy, media, or litigation-related purposes, and we confirm that such use may be permitted, provided that such permission is sought from us prior to sharing this opinion, and that without such permission, this opinion may not be shared publicly.

This opinion is strictly limited to the matters expressly addressed herein and should not be construed as extending, by implication or otherwise, to any other issues.

While we endeavour to provide accurate and timely legal analysis, no guarantee can be given that the legal position will remain unchanged, or that this opinion will not be contested. That said, the conclusions reached herein are, in our view, firmly grounded in applicable law and principle.

We trust that this opinion will assist you in determining your next steps. Should you require clarification or further advice, including in the context of correspondence, public statements, or potential proceedings, we remain at your disposal.

Yours faithfully,



**Emma Portelli Bonnici**

**Partner**

## UNDERSTANDING AND SCOPE

It is our understanding that Women on Waves (the Organisation), a civil society organisation engaged in advocacy, research, and public education in the field of sexual and reproductive health and rights, hereon represented by Dr Rebecca Gomperts, submitted a proposal at the invitation of the curator Rosa Martinez of the Malta Biennale 2026 (the Biennale), and was subsequently formally invited to participate in the Biennale, to be held in Malta during the months of March and May 2026. The Organisation has instructed us to provide a legal opinion on the matters set out herein.

The Organisation's proposed contribution to the Exhibition includes the public screening of an extraordinary documentary addressing access to abortion and reproductive healthcare, as well as a multifaceted performative component intended to contextualise and amplify the themes explored in the documentary. Such components shall consist of the display of the abortion medication in a locked cabinet at the exhibition, as well as the ingestion of such by an individual during the exhibition. The proposed contribution is artistic, documentary, and advocacy-based in nature and is not intended to provide medical treatment, medical advice, or the distribution of any medicinal products to members of the public.

Subsequent to the issuance of the invitation, the Organisation was informed that its participation would be subject to certain conditions, including:

- I. the removal, alteration, or obscuring of specific scenes from the documentary depicting the ingestion of abortion medication; and
- II. the requirement that misoprostol and mifepristone not be brought onto the premises of the Exhibition, notwithstanding that such medication was intended to be lawfully held, secured, and inaccessible to the public at all times.

These conditions were communicated to the Organisation following the issuance of the formal invitation, and are based on correspondence and information made available to us by the Organisation.

It is further our understanding that, as part of the proposed performative component, an individual affiliated with the Organisation would ingest misoprostol and/or mifepristone publicly, not in the context of pregnancy, and not with the intent or possibility of procuring an abortion. No member of the public would be invited, enabled, or encouraged to ingest any medication, and no medication would be supplied, distributed, or administered to third parties.

The Organisation has requested our advice on the legality, under Maltese law, of the above-mentioned conditions and on the extent to which the proposed activities may expose the Organisation or individuals involved to criminal or administrative liability. In particular, we have been asked to consider whether the requested removal or alteration of documentary content constitutes unlawful censorship, and whether the locked display of abortion pills and possession and public ingestion of misoprostol and/or mifepristone, in the circumstances described above, engages any criminal offence under Maltese law.

This legal opinion is confined to the legal position in Malta as at the date hereof and is based on the facts and assumptions outlined above. Our conclusions are based exclusively on the facts and representations provided to us, and any material inaccuracy or omission may require reconsideration of this opinion. This legal opinion does not address matters of policy, ethics, or public morality, nor does it consider the laws of any jurisdiction other than Malta. Our comments are limited strictly to the issues expressly identified herein and should not be construed as extending, by implication or otherwise, to any other matter.

## SECTION A

### REQUESTED REMOVAL OR ALTERATION OF DOCUMENTARY CONTENT

#### 1. Whether the depiction of abortion is criminalised under Maltese law

This section examines whether Maltese criminal law attaches liability to the depiction, discussion, or representation of abortion-related conduct, as distinct from the commission of the underlying act itself.

##### 1.1 Criminalisation of conduct versus depiction or representation

Maltese criminal law draws a clear distinction between the commission of a criminal offence and the depiction, discussion, or representation of such conduct. As a general rule, Maltese law does not criminalise the depiction of unlawful acts, save for narrowly defined and expressly regulated categories. These exceptions are limited to specific forms of content, such as indecent photographs or films involving minors under Article 208A<sup>1</sup> of the Criminal Code, and extreme pornographic images under Article 208D<sup>2</sup> of the same Code. Outside these expressly defined categories, the mere depiction of conduct that may constitute a criminal offence does not, in itself, attract criminal liability.

This distinction is not merely theoretical, but is reflected in the consistent and uncontroversial acceptance, under Maltese law, of the depiction of criminal conduct across artistic, cultural, educational, and journalistic media. If the depiction of a criminal offence were itself unlawful, absent an express statutory prohibition, this would lead to untenable and absurd consequences for the arts and media. It would follow that theatrical productions depicting murder and treason, such as the works of Shakespeare; literary and cinematic portrayals of theft and rebellion, such as the legend of Robin Hood; and contemporary television series depicting homicide, rape, and other serious crimes, such as *Game of Thrones*, would all require suppression or prohibition. Such works are not marginal or fringe examples, but form part of the core canon of theatrical, literary, and audiovisual expression routinely exhibited, broadcast, and publicly funded across Europe, including in Malta - which, coincidentally, served as a filming location for *Game of Thrones*<sup>3</sup>.

The same applies, *a fortiori*, to documentary and journalistic contexts. News reporting necessarily involves the description and visual depiction of alleged or proven criminal offences, including murder, sexual violence, corruption, and abuse. Maltese law does not impose restrictions on such reporting on the basis that exposure to criminal conduct might encourage emulation, nor does it require prior censorship to prevent audiences from witnessing or understanding the reality of criminal behaviour. To suggest otherwise would collapse the distinction between criminal conduct and its representation, and would render the ordinary functioning of theatres, cinemas, broadcasters, and media outlets legally untenable.

Criminal liability under Maltese law arises from the commission of the prohibited act itself, not from its portrayal or discussion in an artistic, documentary, or informational context. Any interpretation to the contrary would not only lack statutory basis, but would be incompatible with fundamental principles of legal certainty and freedom of expression.

In light of the foregoing, any attempt to characterise the mere depiction of abortion-related conduct as unlawful must identify a clear and express statutory basis for doing so. In the absence of such a basis, restrictions imposed on the screening of documentary material cannot be justified by reference to the criminalisation of abortion itself. The question, therefore, is not whether abortion is regulated or

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<sup>1</sup> Criminal Code (Chapter 9 of the Laws of Malta) art 208A

<sup>2</sup> *Ibid.* art 208D

<sup>3</sup> VisitMalta, 'Game of Thrones Filming Locations in Malta'

<https://www.visitmalta.com/en/game-of-thrones-filming-locations/> accessed 19 January 2026.

criminalised under Maltese law, but whether Maltese law recognises any offence that renders the depiction of abortion, or discussion thereof, unlawful.

## 1.2 Absence of a general offence of “promotion” or “apology” of abortion

It follows that, in the absence of any offence criminalising depiction as such, any attempt to justify the requested restrictions must necessarily rest on an alternative characterisation of the content as constituting encouragement, endorsement, or “apology” of abortion. The analysis therefore turns to whether Maltese criminal law recognises any speech-based offence of this nature.

### 1.2.1 Meaning attributed to the term “apology” in ordinary and legal usage

In correspondence dated 30 December 2025 at 19:48, the curator of the Malta Biennale 2026, writing further to consultations with what were described as “official governmental lawyers”, stated as follows:

*“In addition, after consulting with official governmental lawyers, the images showing a woman taking the pill could also be considered in Malta as an apology of abortion.”<sup>4</sup>*

This statement encapsulates the legal concern advanced in support of the requested removal or alteration of the documentary content.

While the term “apology” may have been intended to convey concepts such as encouragement, endorsement, justification, or incitement, criminal liability under Maltese law does not arise from descriptive, rhetorical, or colloquial terminology. The use of non-technical language cannot expand the scope of criminal liability beyond that which is clearly and expressly defined by statute. Regardless of the formulation adopted, the legal question remains whether Maltese law recognises any offence which criminalises the depiction of abortion, or the representation of abortion-related conduct, on the basis that it may be perceived as encouraging or endorsing such conduct, and that answer is categorically no.

### 1.2.2 Absence of “apology”, encouragement, or endorsement as a recognised criminal category

Maltese criminal law does not recognise a general offence of “promotion”, “encouragement”, “endorsement”, or “apology” of abortion. Criminal liability in Malta arises only where conduct falls squarely within the constituent elements of an offence expressly defined by statute. The Criminal Code<sup>5</sup> contains no provision criminalising speech, imagery, or representation on the basis that it may be perceived as endorsing, normalising, or approving of the act of abortion.

In particular, the provisions regulating abortion under Articles 241 to 243B of the Criminal Code<sup>6</sup> are directed exclusively at the commission of specific acts connected to the “procurement of miscarriage”. They do not extend, either expressly or by implication, to the depiction, discussion, or contextual presentation of abortion-related practices in documentary, artistic, or educational settings. To construe these provisions as implicitly criminalising representation would require an interpretative extension unsupported by the text, structure, or purpose of the Criminal Code, and incompatible with principles of legal certainty.

### 1.2.3 Incitement and provocation: exhaustive statutory provisions and inapplicability

Where Maltese law intends to criminalise speech-based conduct, it does so expressly and exhaustively. Incitement offences are specifically delineated within the Criminal Code and arise only in narrowly defined contexts, including accomplice liability under Article 42(e),<sup>7</sup> as well as specific offences relating to

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<sup>4</sup> Email from Rosa Martínez to Rebecca Gomperts (30 December 2025, 19:48) (on file with the authors).

<sup>5</sup> Criminal Code (Chapter 9 of the Laws of Malta).

<sup>6</sup> *Ibid.* arts 241–243B.

<sup>7</sup> *Ibid.* art 42(e).

genocide, terrorism, sedition, hate speech, female genital mutilation, virginity testing, fraud, cybercrime, and other enumerated categories.

None of the incitement or provocation provisions under Maltese law relate to abortion, nor do they criminalise the depiction or discussion of abortion-related conduct. Similarly, offences of provocation are limited to specific contexts, such as crimes against the safety of the Government, homicide, bodily harm, or terrorist activity, and are wholly inapplicable to documentary or artistic representations of abortion. The absence of any abortion-specific incitement offence is determinative.

#### **1.2.4 Thresholds for criminal speech: intent, causation and likelihood of harm**

Even where speech-based offences exist, criminal liability arises only where stringent thresholds are met. These thresholds ordinarily require a clear intention to incite the commission of a specific criminal offence, a sufficiently direct causal link between the speech and the prohibited act, and a real and foreseeable likelihood that the offence will occur as a result.

The mere provision of information, expression of views, or depiction of conduct—without a direct call to action or facilitation of a specific offence—does not satisfy these requirements. The Maltese Criminal Code does not permit the imposition of criminal liability on the basis of abstract encouragement, perceived normalisation, or moral disagreement.

This conclusion is reinforced by the manner in which abortion-related material has historically been treated within Malta in educational contexts. Schools in Malta and Gozo have, for many years, screened the documentary *The Silent Scream* to minor students,<sup>8</sup> notwithstanding that the documentary has been widely criticised and debunked in international medical and academic literature as misleading and factually inaccurate. The screening of such material has not been regarded as unlawful, nor as constituting criminal encouragement, despite its explicit and deliberate use as a tool to influence values and attitudes in relation to abortion.

If the exposure of school-aged children to graphic and demonstrably misleading material showing a woman having an abortion has not been treated as criminal encouragement or incitement, it would be incoherent to suggest that the screening of a documentary to an informed adult audience—presented in an artistic and documentary context—could give rise to criminal liability on the basis that it might persuade viewers to procure an abortion. Such a position would implicitly assume that adults lack the capacity for critical judgment and autonomous decision-making, while affording greater legal tolerance to the exposure of minors to ideologically charged material. Maltese criminal law makes no such assumption, and the imposition of criminal liability cannot rest on speculative assessments of audience influence or moral persuasion.

By way of illustration, even the publication of an advertisement or public notice advising women of their legal rights to travel abroad in order to access abortion services—whether placed on the front page of a national newspaper or disseminated through other media—would not, in itself, constitute a criminal offence under Maltese law. The provision of information relating to lawful options available outside the jurisdiction does not amount to the commission, facilitation, or incitement of an abortion within Malta.

This reinforces the conclusion that criminal liability cannot arise from depiction alone.

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<sup>8</sup> Carmen Sammut, ‘On reading De Beauvoir: reproductive rights as citizen rights and the case of Malta’ (University of Malta, 2022) 12 (referring to screenings of *The Silent Scream* in schools without parental consent) [https://www.um.edu.mt/library/oar/bitstream/123456789/103215/3/On\\_reading\\_De\\_Beauvoir\\_reproductiverights\\_as\\_citizen\\_rights\\_and\\_the\\_case\\_of\\_Malta\\_2022.pdf](https://www.um.edu.mt/library/oar/bitstream/123456789/103215/3/On_reading_De_Beauvoir_reproductiverights_as_citizen_rights_and_the_case_of_Malta_2022.pdf) accessed 19 January 2026.

### 1.3 Distinction between *actus reus* and representation in Maltese criminal law

Maltese criminal liability is founded on the existence of two essential elements, both of which must ordinarily be established before an offence can arise. The first is the *actus reus*, meaning the physical act or omission that the law expressly prohibits. The second is the *mens rea*, meaning the state of mind with which that act is carried out, such as intention, knowledge, or recklessness. Absent either element, criminal liability cannot be sustained.

In simple terms, criminal responsibility arises from doing the prohibited act with the requisite mental state. The mere observation, depiction, discussion, or portrayal of conduct does not constitute an *actus reus*, as it involves no prohibited physical act. Equally, the presentation of documentary material, without any intention to bring about a criminal outcome, does not satisfy the requirement of *mens rea*. Maltese criminal law does not attach liability to the witnessing, recording, or representation of conduct, unless such representation is itself expressly criminalised by statute.

In the specific context of abortion, Articles 241 to 243B<sup>9</sup> of the Criminal Code criminalise defined acts connected to the procurement of a miscarriage in specified circumstances. These provisions are directed exclusively at conduct that directly brings about, or is intended to bring about, the termination of a pregnancy. They do not extend to the depiction of abortion-related conduct, nor do they attach criminal consequences to the viewing, screening, or dissemination of documentary material depicting such conduct.

It follows that the screening of a documentary which includes images of a woman taking abortion medication does not, without more, satisfy the material elements of any offence under Maltese law. The act depicted is not performed by the viewer, is not facilitated by the screening itself, and is not accompanied by any intention on the part of the Organisation to procure a criminal outcome. In the absence of a prohibited act and the requisite mental element, criminal liability cannot arise.

More broadly, Maltese criminal law does not operate extraterritorially by definition. Liability does not arise from the discussion or depiction of conduct carried out outside Maltese territorial jurisdiction where such conduct is lawful in the place where it occurs. The criminal law is concerned with regulating acts committed within Malta and does not extend to penalising the representation of lawful conduct carried out abroad.

Accordingly, attempts to collapse the distinction between criminal conduct and its representation—whether by reference to “apology”, “promotion”, or similar non-technical descriptors—are inconsistent with the structure and principles of Maltese criminal law. The law criminalises acts, not images; conduct, not commentary; and behaviour, not its depiction.

The foregoing analysis demonstrates that the requested restrictions cannot be justified by reference to criminal law. If the communication of lawful alternatives and factual information does not attract criminal liability, it follows a fortiori that the depiction of abortion-related conduct in a documentary context cannot be rendered unlawful merely on the basis that it may be perceived as encouraging or normalising such conduct. To conclude otherwise would impermissibly conflate information, expression, and advocacy with the commission of a criminal act, contrary to fundamental principles of criminal legality.

## 2. Freedom of expression and prior restraint under article 10 of the European Convention on Human Rights

Having excluded any criminal basis for the requested restrictions, it follows that the proposed removal or alteration of documentary content constitutes an interference with freedom of expression. The screening

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<sup>9</sup> Criminal Code (Chapter 9 of the Laws of Malta) arts 241–243B.

of documentary material at the Malta Biennale falls within the scope of artistic and documentary expression protected under Article 10 of the European Convention on Human Rights<sup>10</sup> (the ECHR) and Article 41 of the Constitution of Malta.<sup>11</sup> Any limitation imposed on such expression must therefore be justified in accordance with the strict requirements set out in Article 10(2) of the Convention.

## 2.1 Protection of artistic and documentary expression

Article 10 of the ECHR<sup>12</sup> protects the right to freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority. This protection extends not only to expression that is favourably received or regarded as inoffensive, but also to expression that may shock, disturb, or offend. As the European Court of Human Rights (ECtHR) held in *Handyside v United Kingdom*,<sup>13</sup> Article 10 protects expression that ‘offends, shocks or disturbs’, as these are the demands of pluralism, tolerance and broadmindedness without which the notion of freedom of expression would be rendered illusory if it were confined to uncontroversial or widely accepted viewpoints.

Artistic and documentary expression lies at the core of Article 10 protection. Documentary works, in particular, perform a vital public function by informing audiences, stimulating debate, and facilitating engagement with matters of social, political, and ethical importance. The subject matter of a documentary, even where it concerns conduct that is criminalised or regulated under domestic law, does not remove it from the protective scope of Article 10. On the contrary, expression addressing contested or sensitive issues attracts heightened protection precisely because of its contribution to public discourse.

Documentary and investigative works routinely depict conduct that is unlawful, morally disturbing, or jurisdictionally complex, without attracting criminal liability or censorship, reflecting the established understanding that the function of documentary expression is to observe, record, and inform rather than to endorse or facilitate the conduct depicted. This is exemplified by internationally disseminated investigative documentary projects such as *Dispatches from the Outlaw Ocean*,<sup>14</sup> which document serious criminal and regulatory violations across jurisdictions without any suggestion that their depiction constitutes endorsement, promotion, or participation in the conduct shown.

These principles are mirrored in domestic law. Article 41 of the Constitution of Malta<sup>15</sup> guarantees freedom of expression, including freedom of opinion and freedom to receive and impart ideas and information. Any restriction on that freedom must be narrowly construed and justified by reference to a legitimate aim recognised by law. The mere fact that expression relates to a morally contested or politically sensitive subject does not suffice to justify its suppression. Comparable protections are also reflected in Article 11 and Article 13 of the EU Charter of Fundamental Rights,<sup>16</sup> and in Article 19 of the International Covenant on Civil and Political Rights,<sup>17</sup> which reinforce the narrow scope for restricting lawful documentary and artistic expression.

In this context, it is critical to distinguish between *offence* and *unlawfulness*. Expression does not fall outside the protection of Article 10<sup>18</sup> merely because it is capable of causing discomfort, controversy, or moral disagreement. The Convention does not recognise a general right to be shielded from ideas or images that

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<sup>10</sup> European Convention on Human Rights art 10.

<sup>11</sup> Constitution of Malta art 41.

<sup>12</sup> European Convention on Human Rights art 10.

<sup>13</sup> *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976).

<sup>14</sup> *Dispatches from the Outlaw Ocean* (The Outlaw Ocean Project, investigative documentary series, first broadcast 2023).

<sup>15</sup> Constitution of Malta art 41.

<sup>16</sup> Charter of Fundamental Rights of the European Union arts 11 and 13.

<sup>17</sup> International Covenant on Civil and Political Rights art 19.

<sup>18</sup> European Convention on Human Rights art 10.

challenge prevailing norms or beliefs. As such, the protection afforded to artistic and documentary expression is not displaced by assertions that particular content may be perceived as provocative, inappropriate, or unsettling.

The screening of a documentary addressing abortion and reproductive healthcare at the 2026 Malta Biennale constitutes a paradigmatic exercise of artistic and documentary expression. It is presented to an informed adult audience, within a cultural and curatorial framework explicitly designed to foster reflection and debate. In the absence of any criminal prohibition applicable to the content in question, the proposed removal or alteration of documentary material engages Article 10<sup>19</sup> directly and must be assessed as an interference with freedom of expression requiring strict justification under Article 10(2)<sup>20</sup>.

## 2.2 Prior restraint and conditional participation

The notion of prior restraint refers to restrictions imposed on expression *before* it is disseminated, as opposed to sanctions imposed after publication. The ECtHR has consistently regarded such preventive restrictions as among the most serious interferences with freedom of expression, precisely because they suppress speech in advance and discourage lawful expression through their chilling effect. Where expression is conditioned on prior approval, alteration, or excision, the interference strikes at the very heart of Article 10 protection.

The ECtHR has repeatedly held that prior restraints call for the most careful scrutiny and are permissible only in exceptional circumstances. In *Ürper and Others v. Turkey*,<sup>21</sup> the Court stressed that preventive restrictions imposed before publication carry an inherent risk of suppressing lawful expression and produce a chilling effect that is itself incompatible with Article 10. The danger identified by the Court lies not only in the immediate suppression of the expression at issue, but in the broader deterrent effect on artists, publishers, and institutions who may self-censor in order to avoid exclusion or sanction.

The mechanism adopted in the present case bears all the hallmarks of prior restraint. The Organisation was formally invited to participate in the Malta Biennale. Only *after* that invitation was issued were conditions imposed requiring the removal, alteration, or obscuring of specific documentary content as a precursor to participation. This is clearly not intended as voluntary editorial dialogue or curatorial preference, but a conditional authorisation that operates to suppress lawful expression in advance of its public presentation.

The fact that the restriction takes the form of “conditions of participation” does not alter its legal character. The Court has made clear that prior restraint may arise through indirect means, including administrative conditions, licensing schemes, or access restrictions, where these operate to prevent expression unless prior approval is granted. What matters is not the label attached to the restriction, but its practical effect. Here, the effect is to prevent the screening of documentary material unless it is first modified to align with externally imposed constraints grounded in asserted legal risk rather than identified illegality.

This conclusion is reinforced by the Court’s judgment in *Kablis v. Russia*,<sup>22</sup> where the prior restraint of online expression relating to a peaceful but unauthorised demonstration was found to violate Article 10. The Court reaffirmed that preventive restrictions cannot be justified merely by reference to the contentious, sensitive, or legally regulated nature of the underlying subject matter. Expression does not

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* art 10(2).

<sup>21</sup> *Ürper and Others v Turkey* App nos 14526/07, 14747/07, 15022/07, 15197/07, 15258/07, 15337/07, 15445/07, 15639/07 and 15764/07 (ECtHR, 20 October 2009).

<sup>22</sup> *Kablis v Russia* App nos 48310/16 and 59663/17 (ECtHR, 30 April 2019).

lose its protection because it relates to an activity that is restricted or prohibited under domestic law, still less where the expression itself is lawful.

In the present circumstances, the prior restraint is particularly acute. The requested alterations are not directed at preventing imminent harm, unlawful conduct, or the disclosure of protected information. Rather, they are premised on the perceived risk that the depiction of abortion-related conduct might be viewed as objectionable or controversial. Such considerations fall squarely within the category of interests that Article 10 is designed to protect against. To permit the suppression of lawful artistic and documentary expression on this basis would invert the logic of the Convention and normalise preventive censorship under the guise of institutional caution.

The timing and manner of the restrictions are also legally significant. The Organisation was formally selected and invited to participate following a curatorial process, giving rise to a legitimate expectation that participation would not subsequently be made conditional on compliance with requirements unsupported by law. While curatorial discretion may encompass matters of presentation and logistics, it does not extend to the retroactive imposition of content-based constraints grounded in speculative legal risk. Conditioning participation at this stage engages principles of procedural fairness and reinforces the character of the interference as a form of prior restraint rather than a neutral curatorial choice.

Accordingly, the conditional authorisation imposed by the Biennale constitutes a prior restraint on expression. In the absence of exceptional circumstances capable of satisfying the strict requirements of Article 10(2), such restraint is incompatible with the guarantees of freedom of expression under the Convention.

### **2.3 “Offence” versus necessity in a democratic society**

As already established in Section 1 above, Maltese criminal law does not attach liability to the depiction or discussion of abortion-related conduct in the absence of an express statutory prohibition. Under Article 10(2) of the ECHR, an interference with freedom of expression may be justified only where it is prescribed by law, pursues a legitimate aim, and is *necessary in a democratic society*. The requirement of necessity imposes a high threshold. It is not sufficient for an interference to be convenient, expedient, or politically palatable. Rather, it must respond to a pressing social need and be supported by relevant and sufficient reasons.

A fundamental and well-established principle of Article 10 jurisprudence is that expression does not lose protection merely because it may offend, shock, or disturb. Indeed, the protection of such expression is intrinsic to the notion of a democratic society, which is premised on pluralism, tolerance, and the free exchange of ideas. If the anticipated reaction of offence were capable, without more, of justifying restriction, freedom of expression would be reduced to a right enjoyed only by those whose views align with prevailing sensibilities.

In this context, it is necessary to distinguish clearly between *offence* and *necessity*. Offence is subjective and variable, reflecting individual or institutional discomfort with particular ideas or imagery. Necessity, by contrast, requires an objective assessment grounded in demonstrable risk or harm. The Convention does not recognise a general right to be protected from exposure to controversial or unsettling material, nor does it permit restrictions based solely on a desire to avoid public controversy or institutional unease.

The requested removal or alteration of documentary content in the present case is not directed at preventing the commission of an offence, averting imminent harm, or safeguarding the rights of others in any concrete or substantiated manner. No pressing social need has been identified, nor has any explanation been advanced as to how the screening of the documentary, as proposed, would give rise to a risk warranting preventive intervention. Instead, the justification advanced rests on the perceived

sensitivity of the subject matter and the possibility that the content may be regarded as objectionable within the Maltese context.

Such considerations, even if sincerely held, do not satisfy the requirement of necessity in a democratic society. The Convention framework does not permit the suppression of lawful expression on the basis of anticipated discomfort, moral disagreement, or fear of controversy. To accept offence as a sufficient justification would invert the logic of Article 10, transforming it from a safeguard against censorship into a mechanism for enforcing conformity.

Moreover, the margin of appreciation afforded to States and public authorities is particularly narrow where the expression at issue is artistic or documentary in nature and contributes to public debate on matters of social importance. In such circumstances, the burden of justification is correspondingly high. The absence of any identified illegality, harm, or urgency underscores the lack of necessity for the interference complained of.

Accordingly, even if the proposed restrictions were capable of pursuing a legitimate aim, which is not established, they fail to meet the requirement of necessity in a democratic society. An interference grounded in anticipated offence rather than demonstrable need cannot be reconciled with the guarantees of freedom of expression under Article 10 of the ECHR.

### **3. Lack of legitimate justification: moral disapproval, censorship, and democratic standards**

Having established that no criminal offence is engaged by the documentary content at issue, the requested removal or alteration must be assessed for what it is: an act of censorship grounded not in law, but in moral disapproval and institutional risk aversion. In a democratic society governed by the rule of law, the absence of illegality is not a neutral fact. It is determinative. Where expression is lawful, restrictions upon it demand exceptional justification, particularly in the context of artistic and documentary work presented within a publicly curated cultural forum.

#### **3.1 Absence of an identifiable criminal or legal risk**

Both Maltese constitutional law and the jurisprudence of the ECtHR make clear that freedom of expression cannot be curtailed merely because content is controversial, unsettling, or politically sensitive. Article 41 of the Constitution of Malta, interpreted consistently with Article 10 of the ECHR, protects expression precisely because it may provoke disagreement or challenge prevailing norms. Maltese constitutional law approaches restrictions on expression with caution, requiring clear legal authority and resisting attempts to convert subjective offence or moral unease into enforceable limits on lawful speech. This approach is reflected in constitutional litigation engaging Article 41, where Maltese courts have emphasised that interferences with expression require a clear legal basis and must be assessed with rigorous scrutiny in light of the constitutional protection itself.<sup>23</sup> This cautious approach reflects the broader constitutional principle of legality and legal certainty, which requires that any restriction on lawful conduct or expression be clearly prescribed by law, foreseeable in its application, and grounded in an identifiable legal norm. In that context, the burden lies on the authority seeking to restrict expression to identify a clear legal basis and a demonstrable necessity, not on the speaker or artist to justify the lawfulness of expression.

Restrictions cannot be justified by reference to informal interpretations, precautionary advice, or undefined concepts lacking statutory foundation. Where expression is lawful, the absence of a clear legal basis is not a neutral factor but a decisive one: public authorities and publicly funded institutions may not impose limitations based on conjecture as to how the law *might* be interpreted, rather than how it is in fact formulated.

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<sup>23</sup> *Sunday Times v UK* (No 1) App no 6538/74

This constitutional posture is reinforced at the European level. The ECtHR has repeatedly held that pluralism, tolerance, and broad-mindedness are not abstract values but operational requirements of a democratic society. Artistic and documentary expression enjoys heightened protection because its function is not to reassure, but to interrogate; not to conform, but to expose. Where public authorities or publicly funded institutions impose restrictions in the absence of illegality, the resulting interference engages not only freedom of expression but the democratic integrity of cultural space itself.

The present restrictions therefore cannot be justified by reference to legality, public order, or the protection of rights. They rest instead on the perceived sensitivity of the subject matter and the anticipation of offence. As the analysis below demonstrates, such considerations do not constitute a legitimate basis for restriction under either Maltese constitutional standards or Article 10 of the Convention.

### **3.2 Censorship of artistic expression as a democratic harm**

Censorship of artistic expression within publicly curated cultural spaces constitutes a distinct and serious democratic harm. Art exhibitions, biennales, and cultural programmes supported or facilitated by public institutions occupy a unique position within democratic society: they function as forums for critical inquiry, cultural reflection, and the contestation of ideas. When lawful artistic expression is restricted within such spaces, the harm extends beyond the individual artist or organisation affected and reaches the integrity of the cultural sphere itself.

The ECtHR has consistently recognised that artistic expression merits robust protection precisely because of its capacity to provoke, unsettle, and challenge dominant narratives. In particular, where restrictions are driven by contested notions of morality, offence, or ‘sensitivity’ rather than by concrete and demonstrable harm, the Court’s scrutiny is correspondingly exacting, given the special role of artistic expression in democratic life.<sup>24</sup> Cultural expression is not ancillary to democratic life but an essential component of it. Restrictions imposed not to prevent unlawful conduct, but to mitigate anticipated controversy or institutional discomfort, undermine the very purpose of public cultural institutions and erode confidence in their role as neutral facilitators of artistic discourse.

In the Maltese context, this concern is particularly acute. Publicly supported cultural initiatives operate within a constitutional framework that rejects censorship as a default response to moral disagreement or political sensitivity. The progressive removal of offence-based restrictions from Maltese law, including the decriminalisation of blasphemy,<sup>25</sup> reflects a deliberate shift away from the regulation of expression by reference to subjective offence or prevailing moral sentiment. This shift is also reflected in modern cultural governance norms, which treat artistic freedom as a default position and censorship as an exceptional measure requiring compelling justification. That legislative trajectory underscores a broader constitutional commitment to protecting expression from suppression based on discomfort rather than demonstrable harm.

The imposition of content-based restrictions on lawful documentary material within a major international art exhibition therefore cannot be treated as a neutral curatorial decision. Where such restrictions are grounded in precaution rather than legality, they amount to institutional censorship, regardless of the form in which they are presented. The democratic harm lies not only in the exclusion of a particular work, but in the precedent established: that lawful expression may be curtailed within public cultural spaces whenever it is perceived as difficult, sensitive, or politically charged.

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<sup>24</sup> Müller v Switzerland App no 10737/84

<sup>25</sup> Act XXXVII of 2016 (Malta).

Such an approach is incompatible with democratic standards governing artistic freedom. A cultural forum that conditions participation on the avoidance of controversy ceases to function as a space for artistic engagement and instead becomes an instrument of risk management. The resulting narrowing of permissible expression diminishes pluralism, weakens public debate, and undermines the constitutional values that publicly funded cultural institutions are meant to advance.

### 3.3 Chilling effect and institutional self-censorship

Beyond the impact on individual expression, the imposition of content-based restrictions in the absence of illegality raises concerns of arbitrariness incompatible with the rule of law. Where participation in a publicly curated cultural forum is conditioned on compliance with undefined constraints, the resulting interference is not merely expressive but administrative in character. Maltese constitutional principles require that public bodies and publicly funded institutions exercise their powers on the basis of clear legal authority, consistent criteria, and rational justification. The substitution of institutional caution or reputational risk management for legal standards risks transforming discretionary power into arbitrary control.

Such arbitrariness has a predictable and well-recognised consequence: it generates a chilling effect on lawful expression. When artists, curators, and organisations are required to anticipate and accommodate undefined sensitivities in order to secure or retain access to public cultural platforms, the rational response is pre-emptive self-censorship. Expression is narrowed not by law, but by uncertainty; not by prohibition, but by the fear of exclusion. This dynamic is particularly corrosive in the context of publicly supported cultural institutions, where participation is both selective and reputationally significant.

Where lawful expression is selectively burdened because of its subject matter or perceived ideological sensitivity, the resulting effect is not neutral risk management but viewpoint-based exclusion from public cultural space. Over time, this produces institutional self-censorship, as only those works perceived as unlikely to provoke controversy are advanced, funded, or exhibited. The consequence is a systematic narrowing of artistic discourse, diminishing pluralism and undermining the role of cultural institutions as forums for critical inquiry and democratic engagement.

The harm occasioned by such chilling effects is therefore not confined to the present case. It lies in the precedent established: that lawful artistic and documentary expression may be curtailed in publicly curated spaces on the basis of anticipated offence or administrative unease. Such an approach is incompatible with constitutional principles of legality and legal certainty, and with the democratic standards governing freedom of expression.

### 3.4 Public morality, offence, and the rejection of “feelings-based” censorship

Restrictions on freedom of expression grounded in public morality or offence have long been treated with particular caution under both Maltese constitutional law and Article 10 of the ECHR. While the protection of morals is recognised in abstract as a legitimate aim, neither domestic nor European jurisprudence permits the suppression of lawful expression merely because it is regarded as uncomfortable, provocative, or objectionable to segments of the public. Democratic standards require a clear distinction between subjective offence and demonstrable harm, and do not allow moral unease to substitute for legality.

This approach has been authoritatively affirmed by the Maltese Court of Criminal Appeal in *Il-Pulizija v. Alex Vella Gera*,<sup>26</sup> where the Court rejected attempts to criminalise a literary work on the basis that it was shocking, disturbing, or morally uncomfortable. The Court held that the mere fact that a work provokes

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<sup>26</sup> *Il-Pulizija v. Alex Vella Gera*, Appell Kriminali Nru 163/2011, Court of Criminal Appeal (Scicluna J), 8 February 2012.

disgust, offence, or strong emotional reactions does not render it unlawful, nor does it justify restriction where the purpose of the work is literary, artistic, or critical rather than corruptive. Crucially, the Court drew a firm distinction between material that “shocks and disgusts” and material that is intended to “deprave and corrupt”, stressing that criminal liability cannot be grounded in subjective moral reactions or institutional discomfort. The judgment expressly recognised that the function of literature and art includes exposing “the deplorable and disturbing elements of society”, and that legality cannot be displaced by censorship simply because expression unsettles prevailing norms or sensibilities.<sup>27</sup>

That judicial approach is consistent with the broader constitutional trajectory in Malta. The prosecution of artist Alex Vella Gera on morality-based grounds, including blasphemy-related charges that were subsequently rendered obsolete by legislative reform, illustrated the fragility of offence-based restrictions when tested against constitutional guarantees. The eventual decriminalisation of blasphemy<sup>28</sup> reflected a deliberate rejection of censorship mechanisms grounded in subjective offence or moral indignation, and a recognition that democratic society does not police expression by reference to hurt feelings or ideological discomfort.

A parallel constitutional logic has emerged in the context of journalistic expression. The work of Daphne Caruana Galizia,<sup>29</sup> while distinct in form from artistic practice, is instructive in illustrating the dangers of conflating offence with unlawfulness. Her reporting was frequently characterised as provocative, unsettling, or offensive to powerful interests and prevailing sensibilities. Yet Maltese constitutional discourse following her assassination has repeatedly reaffirmed that expression does not forfeit protection because it disrupts, disturbs, or challenges dominant narratives. The protection of expression in such contexts is grounded precisely in its public interest function, notwithstanding the discomfort it generates.

These developments reflect a coherent constitutional principle: Maltese law has moved decisively away from regulating expression by reference to moral sentiment, institutional unease, or anticipated public reaction. Legislative reform, judicial scrutiny, and public debate have converged on the understanding that lawful expression cannot be curtailed simply because it provokes offence or controversy.

Against that background, reliance on perceived sensitivity or anticipated moral reaction as a basis for restricting lawful documentary content represents a reversion to an approach that Maltese law has consciously abandoned. Public cultural institutions, particularly those operating within a publicly supported or publicly curated framework, are not exempt from constitutional standards. On the contrary, they are required to apply those standards with particular vigilance.

Accordingly, the invocation of public morality or offence, absent illegality or demonstrable harm, cannot supply a legitimate justification for censorship in a democratic society. To permit restrictions on this basis would reintroduce, through administrative practice, a form of regulation that Maltese constitutional development and European human rights law have expressly rejected.

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<sup>27</sup>*Il-Pulizija v. Alex Vella Gera*, Appell Kriminali Nru 163/2011, Court of Criminal Appeal (Scicluna J), 8 February 2012.

<sup>28</sup>Act XXXVII of 2016 (Malta).

<sup>29</sup> Board of Inquiry into the assassination of Daphne Caruana Galizia, *Public Inquiry Report* (Malta, 2021) (on systemic failings affecting journalism and rule of law) <https://www.justice.gov.mt/en/Documents/Daphne%20Caruana%20Galizia%20Inquiry%20Report%20-%20Englsh.pdf> accessed 19 January 2026.

## SECTION B

### PRESENCE AND INGESTION OF MEDICATION

#### 4. Legal status of Misoprostol and Mifepristone under Maltese law

Any assessment of potential criminal exposure alleged to arise from the proposed presence of medication within the Biennale installation must begin not with abortion offences under the Criminal Code, but with the regulatory framework governing medicinal products under Maltese law.<sup>30</sup> Misoprostol and mifepristone are not prohibited substances *per se*. They are regulated medicinal products whose legality turns on authorisation, classification, possession, and control, rather than on the moral or political context in which they are discussed or displayed.

##### 4.1 Regulation under the Medicines Act

Under Maltese law, medicinal products are regulated principally by the Medicines Act<sup>31</sup> and administered by the Medicines Authority. That framework governs marketing authorisation, prescription status, approved therapeutic indications, storage, and supply. It does not criminalise the mere existence, display, or secure possession of authorised medicines, nor does it convert regulated pharmaceutical products into contraband by reason of their potential off-label use.

##### 4.2 Prescription status and approved medical uses

Misoprostol is a medicinal product that holds valid marketing authorisation in Malta<sup>32</sup> under multiple product names and therapeutic classifications, as reflected in Medicines Authority records. It is authorised for use in gastro-intestinal indications and in obstetric and gynaecological contexts. Its classification as a prescription-only medicine regulates who may prescribe and dispense it; it does not render the medicine unlawful to possess, display, or store where no dispensing, administration, or supply to the public is involved.

By contrast, mifepristone does not currently appear to hold a standard marketing authorisation in Malta. That regulatory position does not, however, render the substance prohibited or criminalised under Maltese law. Nor does it convert references to the substance, documentary depictions of its use in jurisdictions where it is lawfully prescribed, or its conceptual inclusion within an artwork into criminal conduct. The absence of domestic marketing authorisation regulates commercial supply and prescribing pathways; it does not create a criminal prohibition applicable to depiction, discussion, or non-accessible presence where no distribution or administration is proposed or intended.

The regulatory position of these medicines within Malta's public health system must therefore be understood separately from questions of criminal liability or expressive use, including their inclusion or otherwise in the Government Formulary.

##### 4.3 Inclusion in the Government Formulary and implications

The Government Formulary<sup>33</sup> governs procurement and availability within the public health system. It does not determine the legality of a medicinal product under Maltese law, nor does it give rise to criminal

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<sup>30</sup> Medicines Act (Chapter 458 of the Laws of Malta).

<sup>31</sup> *Ibid.*

<sup>32</sup> Medicines Authority (Malta), 'Medicines Register / product authorisations' <https://medicinesauthority.gov.mt/> accessed 19 January 2026.

<sup>33</sup> Government of Malta, Government Formulary (latest available version) <<https://pharmaceuticalaffairs.gov.mt/en/resources/the-government-formulary-list/>> accessed 19 January 2026.

consequences in relation to possession, storage, or non-accessible presence outside public-sector supply chains.

#### 4.4 Lawful possession and control

Under Maltese medicines regulation, legal exposure is tied to control, access, and conduct (such as supply, dispensing, administration, or making a medicinal product available to others), rather than to passive proximity. Where medication is held securely under exclusive control and is not accessible to third parties, the regulatory concerns that attach to supply and public access do not arise.

The medication was lawfully obtained pursuant to a valid medical prescription, which prescription has been included as part of the updated proposal to form part of the exhibit, confirming its lawful origin and possession. However, the existence of such a prescription does not convert the medication's presence into clinical administration, therapeutic use, or regulated medical treatment.

#### 4.5 Cross-border possession of prescription medication for personal use

Maltese law does not criminalise the possession of prescription medication lawfully prescribed to an individual outside Malta, even where that medication is not routinely marketed or available domestically. On those facts, the relevant question is not one of 'availability' in a moral sense, but whether any conduct amounting to supply, distribution, or administration is possible. The regulatory framework governing medicinal products draws a clear distinction between *commercial supply* and *personal possession for individual therapeutic use*, including where such possession arises in a cross-border context.

In line with EU free movement principles and established customs practice,<sup>34</sup> individuals entering Malta may lawfully carry prescription medicines for personal use, provided that the medication is intended for the individual's own treatment and is accompanied, where required, by a valid prescription or medical documentation. The absence of a domestic marketing authorisation for a particular medicinal product does not, of itself, render personal possession unlawful, nor does it convert such medication into a prohibited substance under Maltese law.

This approach reflects the regulatory reality that medicines law is concerned primarily with *supply chains, marketing authorisation, dispensing, and public access*, rather than the criminalisation of individual possession. Maltese enforcement practice recognises that patients may be prescribed medication abroad that is not routinely stocked, tendered, or marketed locally, particularly in the context of specialised treatment, cross-border healthcare, or emergency medical circumstances.

Accordingly, the lawful possession of prescription medication by an individual entering Malta does not depend on whether that medication is available through the Maltese public health system or listed on the Government Formulary. What is determinative is the absence of unauthorised supply, distribution, or administration to third parties.

This distinction is legally significant in the present context. Even if a medicinal product were not routinely marketed in Malta, neither its lawful prescription abroad nor its personal possession would give rise to criminal liability. Still less could such a regulatory status be relied upon to characterise documentary depiction, secure storage, or non-accessible display of medication as unlawful conduct.

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<sup>34</sup> Government of Malta, Environmental Health Directorate (Port Health), 'Importation/Carriage of Medicinal Products for Personal Use (Travellers)' <https://environmentalhealth.gov.mt/en/phd/Pages/Travellers.aspx> accessed 19 January 2026.

#### **4.6 Distinction between possession, distribution, and administration**

Following engagement with the Biennale and in response to concerns raised, the Organisation submitted a revised proposal clarifying the manner in which any medication would be present within the installation. Under that revised proposal, any medication would be secured in locked storage, remain physically inaccessible to the public, and be kept under the exclusive control of the Organisation at all times.

The revised proposal expressly excluded any dispensing, administration, or handling of medication by visitors. No member of the public would have access to the medication, nor would any mechanism exist through which it could be used, transferred, or ingested. The presence of the medication under lock and key, was therefore non-operational by design.

From a legal perspective, this clarification is decisive. Maltese law does not criminalise the secure possession or storage of medicinal products where no unauthorised access, supply, or administration is possible. Locked and inaccessible storage precludes the material elements of any offence under the Medicines Act or the Criminal Code, and places the installation wholly outside the scope of regulated pharmaceutical conduct.

The locked storage was also integral to the expressive content of the revised proposal. The amended installation was deliberately conceived to reflect a condition of proximity without access: medication that exists, is medically recognised, and is lawfully used elsewhere, yet remains unavailable in practice to women in Malta. The impossibility of access was not incidental but constitutive of the work's meaning.

That symbolic dimension does not alter the legal analysis. Maltese criminal and regulatory law assess conduct, not metaphor. Where medication is inaccessible, non-functional, and incapable of use, its presence cannot be characterised as possession for the purpose of administration, preparation for an offence, or facilitation of unlawful conduct.

Accordingly, even on the revised and more restrictive proposal placed before the Biennale, the secure and locked presence of medication within the installation does not give rise to any criminal or regulatory liability under Maltese law.

For the avoidance of doubt, this exclusion relates to members of the public and third parties. It does not preclude controlled, ingestion by an identified individual as part of a symbolic or performative act, where such ingestion is not undertaken for medical treatment, is not capable of producing a therapeutic or abortive effect, and does not involve supply or administration to others.

#### **5. Public ingestion as performance: criminal law analysis**

Having addressed the criminal law, constitutional protections, and the regulatory framework governing medicinal products, it is necessary to apply those principles to the installation as proposed. Legal liability does not arise from symbolism, discomfort, or association. It arises only where the material and mental elements of a defined offence are satisfied on proven facts. Even taking the proposal at its highest, including the possibility of symbolic ingestion by an individual who is not pregnant, the conduct remains incapable of engaging the abortion offences under Articles 241 to 243B,<sup>35</sup> which presuppose an actual pregnancy and a resulting miscarriage. This section therefore consolidates the foregoing analysis and applies it directly to the factual configuration placed before the Biennale, demonstrating that the installation, as proposed, does not give rise to criminal liability under Maltese law.

##### **5.1 Elements of the offence of abortion under Maltese law**

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<sup>35</sup> Criminal Code (Chapter 9 of the Laws of Malta) arts 241–243B.

Under Maltese criminal law, abortion-related offences are narrowly and exhaustively defined. Criminal liability does not arise from abstract association with abortion, nor from proximity to medication, imagery, or discourse. It arises only where the material and mental elements of the offence are cumulatively established beyond reasonable doubt.

For an offence relating to the procurement of miscarriage to subsist under Articles 241 to 243B<sup>36</sup> of the Criminal Code, the prosecution must establish, at a minimum, the following elements:

1. The existence of a pregnancy, and knowledge thereof on the part of the person being charged with the crime;
2. A deliberate act intended to terminate that pregnancy; and
3. A causal link between that act and the termination of the pregnancy, such that the pregnancy is in fact terminated as a result of the conduct alleged.

These elements are cumulative, not alternative. The absence of any one of them vitiates the existence of the offence.

Applied to the present context, it is immediately apparent that these elements are not merely unproven but structurally incapable of being satisfied. The proposed installation involves no identified pregnant person and no conduct directed at the termination of a pregnancy. Even if a person were hypothetically to ingest abortion medication in a demonstrative, symbolic, or protest context while not pregnant, such conduct would not engage the offence, as no pregnancy exists and no miscarriage can occur.<sup>37</sup>

Criminal liability under Maltese law does not attach to the ingestion of medication in the abstract, but to conduct causally connected to the termination of an actual pregnancy. Where no pregnancy exists, intent alone is legally irrelevant. There can be no offence without an object capable of being acted upon. The law does not attach criminal significance to the origin or prescription status of medication where the essential material object of the offence—an existing pregnancy—is absent. While the lawful prescription of the medication reinforces its regulatory compliance, criminal liability under abortion provisions does not turn on the provenance of medication but on the existence and termination of a pregnancy. At most, such conduct may engage medicines-regulatory questions of possession and control, which are addressed in Section 4, but it does not engage the criminal offence of abortion.

Crucially, Maltese criminal law does not recognise speculative or hypothetical liability. Criminal responsibility cannot be inferred from symbolism, expressive acts, or conjecture about what conduct might signify. It must be anchored in concrete acts, identifiable actors, and demonstrable outcomes. The law does not permit the imputation of criminal liability based on assumptions about expressive intent, political messaging, or metaphorical association.

This reflects a broader and well-established principle of criminal legality: criminal offences are conduct-based, not atmosphere-based. The prosecution must prove not only that a pregnancy existed and was terminated, but how, when, by whom, and through what means. Absent proof of pregnancy, ingestion with intent to terminate that pregnancy, and causal termination, no offence can arise.

Accordingly, any suggestion that the mere presence of abortion-related medication within a secured, non-accessible installation could engage abortion offences collapses the distinction between criminal

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Pro-choice activist swallows medical abortion pill during rally* (Malta Daily, 5 October 2022)

<<https://maltadaily.mt/articles/pro-choice-activist-swallows-medical-abortion-pill-during-rally>> accessed 19 January 2026.

conduct and expressive reference, and would require a radical and impermissible expansion of criminal liability unsupported by statute or jurisprudence.

By way of analogy, if criminal liability could be inferred from symbolic proximity rather than material conduct, vast swathes of lawful expression would become untenable. A public performance depicting the ingestion of alcohol would expose participants to liability for drunk driving; the on-stage handling of a knife would engage offences of grievous bodily harm; a theatrical simulation of drug use would constitute possession; and a documentary showing the preparation of insulin could be construed as the unlawful practice of medicine. These outcomes are self-evidently absurd, and Maltese criminal law has never operated on such a basis. The law does not criminalise representation, demonstration, or symbolism. It criminalises acts that bring about prohibited outcomes. To suggest that expressive conduct, detached from pregnancy, causation, and physiological effect, could engage abortion offences would collapse that distinction entirely and transform criminal law from a system of rules into a system of insinuation.

## 5.2 Absence of pregnancy and legal impossibility

An offence relating to the procurement of miscarriage presupposes the existence of a pregnancy. In the absence of a pregnant person, the offence is legally impossible. Maltese criminal law does not recognise attempt or preparation where the material object of the offence is legally impossible, including where no pregnancy exists.

As established above, the proposed installation involves no identified pregnant individual and no factual scenario in which a pregnancy could be terminated. Any interaction contemplated within the expressive framework of the work, including symbolic or demonstrative conduct, is necessarily detached from an actual pregnancy. Where the essential object of the offence is absent, criminal liability cannot arise, irrespective of the form or visibility of the conduct in question.

Legal impossibility in this context is absolute. Without a pregnancy, there can be no abortion within the definition inferred within the Criminal Code.

## 5.3 Absence of *mens rea* and intent to procure an abortion

In addition to the absence of the material object of the offence, the requisite *mens rea* is also wholly lacking. Abortion-related offences under Maltese law require a specific intent to terminate an existing pregnancy. Expressive, symbolic, political, or demonstrative intent does not satisfy this requirement.

Any conduct contemplated within the installation is directed toward artistic communication and public discourse, not toward bringing about a physiological outcome in relation to a particular pregnancy. Maltese criminal law draws a clear distinction between intent to express, provoke, or critique, and intent to procure a miscarriage. Only the latter is cognisable for the purposes of criminal liability.

Accordingly, even if conduct were viewed in isolation and stripped of its expressive context, the absence of intent directed toward the termination of an actual pregnancy is fatal to the existence of the offence. Criminal responsibility cannot be inferred from symbolism, protest, or hypothetical association with abortion-related medication.

## SECTION C

### CONCLUSION

#### A. Overall legal assessment

On the basis of the analysis set out in Sections A and B above, it is our considered opinion that the activities proposed by the Organisation in connection with the Malta Biennale 2026 are lawful under Maltese law. Neither the screening of the documentary material nor the proposed performative elements engage any criminal offence, regulatory breach, or other form of legal prohibition recognised under Maltese law as it currently stands.

As demonstrated throughout this opinion, to treat lawful artistic, documentary, or symbolic expression as criminal conduct would produce consequences so overbroad as to render ordinary cultural, journalistic, and educational activity legally untenable.

The conditions requested following the Organisation's selection and invitation to participate are not grounded in any identifiable criminal or regulatory risk. They rest instead on speculative concerns, anticipated offence, or precautionary interpretations that are unsupported by statute, jurisprudence, or established regulatory practice. In the absence of illegality, the imposition of such conditions constitutes an interference with lawful expression rather than a legally mandated safeguard.

Accordingly, there is no legal basis under Maltese criminal law, medicines regulation, or constitutional law that requires or justifies the removal of documentary content or the exclusion of lawfully held medication from the installation as proposed. Conversely, the imposition of such limitations without a clear legal basis may itself raise issues under Maltese constitutional law and applicable human rights standards governing freedom of expression and lawful administrative action.<sup>3839</sup>

In summation:

- The documentary content is lawful and protected expression;
- The proposed presence and controlled symbolic ingestion of medication engage no criminal or regulatory offence;
- The requested conditions are unsupported by statute or jurisprudence; and
- Their imposition risks constituting unlawful interference with freedom of expression

#### B. Criminal liability exposure

On the facts as presented to us, and assuming the installation proceeds in accordance with the revised proposal submitted by the Organisation, we are of the clear view that the proposed activities do not expose the Organisation, its representatives, or affiliated individuals to criminal liability under Maltese law.

In particular:

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<sup>38</sup> Constitution of Malta art 41.

<sup>39</sup> European Convention on Human Rights art 10.

- No offence relating to the procurement of miscarriage under Articles 241 to 243B<sup>40</sup> of the Criminal Code<sup>41</sup> can arise in the absence of an actual pregnancy, an act intended to terminate that pregnancy, and a causal link between conduct and termination.
- The presence of medication in locked, inaccessible storage does not satisfy the material elements of any offence under the Criminal Code or the Medicines Act.
- Symbolic, demonstrative, or expressive conduct undertaken in the absence of pregnancy does not constitute abortion, attempted abortion, facilitation, or preparation of an offence under Maltese law.

Criminal liability in Malta is conduct-based and outcome-based. It cannot be inferred from symbolism, proximity, political messaging, or expressive intent. On that basis, the risk of criminal exposure arising from the proposed installation is, in our assessment, legally non-existent.

### **C. Enforceability of the requested conditions**

The conditions communicated to the Organisation following its formal invitation to participate in the Biennale are not legally enforceable insofar as they purport to require the removal or censoring of lawful documentary content or the exclusion of lawfully held medication in the absence of any legal prohibition.

While curatorial discretion may legitimately extend to matters of logistics, presentation, and exhibition management, it does not extend to the imposition of content-based restrictions grounded in speculative legal risk or anticipated offence. Where participation in a publicly curated cultural forum is conditioned on compliance with requirements unsupported by law, such conditions amount in substance to prior restraint<sup>42</sup> rather than neutral curation.

In the absence of a clear statutory basis, the Organisation cannot be compelled, as a matter of law, to alter or censor lawful expression or to refrain from conduct that is itself lawful. Any attempt to enforce such conditions would therefore rest on administrative or contractual leverage rather than legal necessity, and would remain open to challenge on constitutional and human rights grounds.

### **D. Broader human rights context (non-determinative observations)**

The following observations do not form part of the dispositive legal analysis, but are included to situate the present dispute within its broader human-rights context.

While the conclusions reached in this opinion are grounded firmly in positive law, it would be intellectually dishonest to treat the present issues as isolated or purely technical. They arise within a wider enforcement environment in which women's reproductive lives are subject to heightened scrutiny, legal ambiguity, and institutional pressure, often without clear legal authority or procedural safeguards.

In Malta, the criminalisation of abortion has produced a system in which suspicion frequently precedes evidence, and where women may find themselves drawn into investigative processes not because an offence has been established, but because a pregnancy has ended. In reported cases, women have been escorted by police to hospital settings and requested to undergo pregnancy testing in order to clarify their legal position. While such testing may be framed as voluntary, the reality is that many women are unaware,

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<sup>40</sup> Criminal Code (Chapter 9 of the Laws of Malta) arts 241–243B.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ürper and Others v Turkey* App nos 14526/07 and others (ECtHR, 20 October 2009).

at that moment, that refusal is legally permissible. The distinction between consent and compliance becomes blurred in circumstances marked by fear, authority imbalance, and the implicit threat of criminal consequence.

This dynamic raises serious concerns at the intersection of bodily autonomy, privacy, and criminal procedure.

First, the request that a woman submit to pregnancy testing in order to dispel suspicion engages the core of bodily autonomy and private life. Even where force is not used, the context in which such requests are made matters. A request issued under police escort, in a hospital environment, and against the backdrop of criminalisation cannot be analysed as a neutral medical interaction. The ECtHR has consistently emphasised that consent must be genuine, informed, and free from coercive pressure. Where women do not know that they may lawfully refuse, consent risks becoming a legal fiction.

Second, these practices implicate the prohibition of degrading treatment. Treating women's bodies as sites of evidentiary verification — requiring them to medically prove the absence of pregnancy in order to avoid criminal suspicion — risks instrumentalising physical integrity for enforcement purposes. Even absent physical compulsion, the psychological impact of being subjected to medical scrutiny under threat of criminal investigation is profound. Human dignity is not preserved merely by the absence of force; it requires respect for agency, privacy, and legal certainty.

Third, and most fundamentally, such practices - namely, police escorting women to hospital on suspicion of having undergone an abortion and subjecting them, whether expressly or in practice, to pregnancy testing - are incompatible with the presumption of innocence and the constitutional allocation of the burden of proof. Article 39(5)<sup>43</sup> of the Constitution of Malta guarantees that every person charged with a criminal offence shall be presumed innocent until proved guilty according to law. That guarantee reflects the foundational principle of Maltese criminal law that the burden lies entirely on the State to establish, beyond reasonable doubt, each element of an offence.

Any investigative practice that requires, or effectively compels, a woman to demonstrate that she is not pregnant in order to dispel suspicion constitutes a reversal of that constitutional logic. It places the individual in the position of disproving criminal liability and thereby undermines the substance of the presumption of innocence protected by Article 39. The constitutional infirmity is compounded by the means through which this burden-shifting is achieved. Forcible pregnancy testing entails an intrusion into bodily integrity and personal autonomy, engaging the protection of private life under Article 38<sup>44</sup> of the Constitution. Such an intrusion, carried out under colour of police authority and in the absence of a clear, precise and proportionate statutory basis, cannot be justified.

The practice is therefore constitutionally impermissible. It erodes the presumption of innocence guaranteed by Article 39 and constitutes an unjustified interference with private life and bodily integrity under Article 38.<sup>45</sup> For the same reasons, it is arguably incompatible with Articles 6(2)<sup>46</sup> and 8<sup>47</sup> of the European Convention on Human Rights, which inform and reinforce the interpretation of the corresponding constitutional guarantees.

Compounding these concerns is the current lack of clarity surrounding medical reporting obligations. Recent reporting indicates that doctors have, in some instances, reported their own patients to the

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<sup>43</sup> Constitution of Malta art 39(5)

<sup>44</sup> *Ibid.* art 38.

<sup>45</sup> *Ibid.* art 39.

<sup>46</sup> European Convention on Human Rights, art 6(2)

<sup>47</sup> *Ibid.* art 8.

authorities in circumstances connected to suspected abortion-related conduct. Yet there remains no coherent or publicly articulated framework defining when, if ever, such reporting is legally required. The resulting uncertainty places clinicians in an impossible position and patients in a dangerous one. It undermines medical confidentiality, erodes trust in healthcare settings, and transforms doctors into inadvertent extensions of law enforcement without clear legal mandate.<sup>48</sup>

This ambiguity is not benign. Legal uncertainty in the context of criminalised healthcare does not remain theoretical; it produces over-reporting, defensive practices, and a culture of risk avoidance that disproportionately harms women. When neither patients nor professionals can clearly identify the boundaries of lawful conduct, the predictable outcome is excessive caution, unnecessary disclosure, and institutional self-protection at the expense of individual rights.

Viewed cumulatively, these practices reflect a broader pattern: the regulation of women's bodies through uncertainty, fear, and procedural opacity rather than through clear law. What is treated as routine, regulated healthcare in many jurisdictions becomes, in Malta, a trigger for investigation, surveillance, and institutional anxiety. Women are not merely subject to law; they are required to navigate it without a map, often in moments of acute vulnerability.

It is within this pressurised environment that attempts to censor documentary and artistic expression concerning abortion must be understood. Restrictions on expression do not operate in isolation; they reinforce systems in which women are discouraged from speaking, documenting, or publicly acknowledging experiences that are already heavily policed. Censorship in this context does not merely limit artistic freedom; it contributes to a broader silencing of lived reality.

It is therefore particularly disquieting to observe a major international cultural event—whose publicly articulated mandate and curatorial framework are expressly directed toward fostering creativity, artistic expression, and critical cultural engagement<sup>49</sup>—retreat into precautionary censorship when confronted with a lawful but contested subject. When institutions dedicated to culture and expression begin to internalise and replicate the logic of suppression, the damage is not confined to a single exhibition or artist. It signals a broader erosion of the space available for critical thought, especially on issues that primarily affect women and marginalised groups.

These observations are not determinative of the specific legal conclusions reached in this opinion. However, they underscore why exceptional caution is required when public institutions seek to impose restrictions in this field. Measures justified as neutral, cautious, or preventative can, in practice, entrench systems of control that sit uneasily with constitutional democracy, human dignity, and the rule of law.

A legal system committed to rights does not require women to prove innocence with their bodies, nor does it suppress expression to preserve comfort. Where law drifts toward surveillance, silence, and fear, it is not neutrality that is being protected, but power.

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<sup>48</sup> *Doctors need guidance on reporting abortion cases, lawyers say* (Times of Malta, 19 April 2024) <https://timesofmalta.com/article/doctors-need-guidance-reporting-abortion-cases-lawyers-say.1109636> accessed 19 January 2026;

*Lawyer demands answers on secret abortion medical board* (Times of Malta, 17 May 2024) <https://timesofmalta.com/article/lawyer-demands-answers-secret-abortion-medical-board.1117700> accessed 19 January 2026.

<sup>49</sup> Malta Biennale, *The Malta Biennale 2026 Announces Participating Pavilions* (Heritage Malta, 4 December 2025) <https://heritagemalta.mt/news/the-malta-biennale-announces-participating-pavilions-for-the-2026-edition/> accessed 19 January 2026.

## **E. Final observations**

In conclusion, the proposed installation, as revised and clarified by the Organisation, is lawful in its entirety under Maltese law. The concerns advanced in support of the requested conditions do not correspond to any recognised criminal offence, regulatory breach, or legally cognisable risk. As such, they cannot justify interference with lawful expression or conduct.

Should the Organisation wish to engage further with the Biennale, public authorities, or other stakeholders on the basis of this opinion, it may do so in the knowledge that its legal position is sound. We remain available to provide further advice or assistance, including in relation to correspondence, public statements, or potential proceedings arising from the matters addressed herein.