

**AN ACT to further amend
the Criminal Code, Cap. 9.
Bill No. 28**

A POSITION PAPER

November 2022

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Executive Summary

This position paper is prepared by a group of experts in various fields. We are gravely concerned about the new Bill that government wants to introduce and thus we strongly urge the wording of the proposed Bill to be changed to:

No crime is committed under article 241(2) or article 243 when the death or bodily harm of an unborn child results from a medical intervention conducted with the aim of saving the life of the mother where there is a real and substantial risk of loss of the mother's life from a physical illness.

Moreover, we raise the following serious concerns and propose several recommendations aimed at improving the drafting of the Bill in order to contribute to a healthy discussion on this Bill.

1. The Bill is too telegraphic and bereft of detail. Bearing in mind that the Bill touches upon nothing less than the most fundamental of all human rights – the right to life - we propose that it would be better to include more details as to how the provision ought to operate in practice.
2. Key terminology is not defined and might be misconstrued. The term “health” can sometimes be used to describe non-life-threatening situations. This might place obstetricians in a position where they are unable to carry out their duty of care to patients without risking criminal prosecution or disciplinary proceedings because of lack of clarity in the language used.
3. There is inconsistency in the terms used between this Bill and other relevant articles in the Criminal Code, contributing to further lack of clarity and leading one to understand that there is a difference between these same concepts where there ought to be none.
4. There is no mention in government’s Bill to the effect that where medically possible a viable foetus should be allowed to be born prematurely rather than resorting to a termination of life *in utero*.

In addition, we recommend, *inter alia*, that:

1. More legal certainty be employed in the drafting of the Bill, which would benefit the medical professional undertaking the medical procedure, the pregnant woman and the unborn child, be it at the foetal or embryonic stage, and the judiciary who might eventually be called upon to interpret the provision of the Criminal Code.
2. A new article be added to the Criminal Code, which is to apply only in those cases of a pregnant woman whose life is in manifest danger of death or where a real risk to her life exists from a physical illness.
3. Doubt is to be avoided and legal clarity ensured by stating that cases where a pregnant woman’s life is in danger does not include non-life-threatening cases (e.g. anxiety, emotional distress, organic mental disorder, rape, foetal abnormality etc.).

Position Paper

Introduction

1. By means of clause 2 of Bill No. 28 of 2022, published in *The Malta Government Gazette* of Monday, 21 November 2022, government is proposing to amend the Criminal Code, Chapter 9 of the Laws of Malta, as follows:

243B. "No offence under article 241(2) or article 243 shall be committed when the termination of a pregnancy results from a medical intervention aimed at protecting the health of a pregnant woman suffering from a medical complication which may put her life at risk or her health in grave jeopardy."

2. This position paper has been prepared by a group of experts in clinical medicine, gynaecology and obstetrics, health sciences, midwifery, law, psychology, well-being, social policy, family studies, philosophy, ethics and theology.
3. First and foremost, the interdisciplinary group considers that as the law stands today, the right to life of the mother is amply protected when a pregnancy causes a life threatening condition; so much so that, in spite of the fact that at least four pregnancies per year are considered life threatening, no mother, or any medical personnel has ever been prosecuted when they gave the necessary medical treatment in order to protect the mother's life, even when this led to the loss of the unborn child. Besides, it has now transpired that in the unfortunate Prudente case, which is the justification for the presentation of this Bill, the government health authorities have now confirmed that Mrs Prudente was never in danger of losing her life which belies the assertion that Maltese law as it stands now prefers to protect the life of the unborn child rather than the mother.
4. Once this Bill has been published, however, this group would like to raise certain concerns on the government's proposed amendment to the Criminal Code in light of the fundamental right to life as enshrined in the Constitution of Malta and the European Convention Act, and the fundamental right to legal certainty also inscribed in these two laws.

Concerns

5. First, the Bill is too telegraphic and bereft of detail. Once the government is taking the opportunity to amend the Criminal Code to achieve clarity and legal certainty, it would be better to inscribe in the Bill more details as to how the

provision ought to operate in practice, bearing in mind that the Bill touches upon nothing less than the most fundamental of all human rights – the right to life – and that, unfortunately and regrettably, where subsequent to treating the mother, there may be the inevitable loss of life of the unborn child.

6. Second, key terminology is not defined and might be misconstrued. For instance, ‘put her life at risk or her health in grave jeopardy’ raises several interpretation problems on the part of the medical community that will be called upon to carry out the medical intervention on the pregnant woman. Any clarity which this amendment seeks to bring on the matter will thus be lost. Furthermore, the wording used is very similar to that used in the section 1(a) of the UK Abortion Act and can give rise to misinterpretation in the sense that it could be wrongly understood as permitting abortions even when the pregnant woman’s life is not in grave danger, as government is trying to achieve. Moreover, ‘health’ is so wide a term that it can give rise to non-life-threatening situations that may be considered to pose a ‘grave jeopardy’ or danger to the pregnant woman short of termination of life. In addition, the word ‘grave’ is not defined and can open a pandora’s box. Indeed, according to the United Nations and the World Health Organization, the term “health” includes also mental health. Abortion on demand, in several jurisdictions, is allowed precisely on the basis of mental health issues that are not linked to a physical life-threatening situation to a pregnant woman.
7. Of course, it is understandable that when it comes to providing definitions, this is not an easy task as definitions, of their very own nature, have to be general and thus cannot regulate each and every conceivable situation that may arise in the future. Yet, on the contrary, in the absence of a definition, the matter would be left to the absolute discretion of the medical professional carrying out the medical procedure without providing such professionals any concrete guidance as to what is legal or illegal. The legal clarity that is sought in this amendment is therefore not achieved. Moreover, this can place obstetricians in an untenable position to carry out their duty of care to patients without risking criminal prosecution or disciplinary proceedings for breach of the Ethics of the Medical Profession Regulations (Subsidiary Legislation 464.17; Legal Notice 303 of 2008).
8. Third, the terminology used in the Bill is different from that used in the provisions referred to in the Bill provision itself, that is, articles 241(2) and 243 of the Criminal Code. In particular, the Bill refers to ‘termination of pregnancy’ rather than to ‘miscarriage’ and to a ‘pregnant woman’ rather than to a ‘woman with child’. Needless to say, once there is no consistency and uniformity of terminology in the Bill vis-à-vis the two Criminal Code provisions that it seeks to except, this can only contribute to lack of clarity, bearing also in mind that by resorting to different terminology to mean one and the same concept leads one

to understand that there is a difference between these same concepts where there ought to be none.

9. Fourth, there is no mention in government's Bill to the effect that where medically possible a viable foetus should be allowed to be born prematurely rather than resorting to a loss of human life *in utero*. Such a *lacuna* can thus give rise to a termination of pregnancy when the foetus is viable as there is no limit imposed in the provision as to what stage termination can take place.

Recommendations

10. In order to address the above concerns raised in the preceding section, that are not strictly speaking concerns related to the object and reasons of the Bill, but to the drafting of the wording of the Bill, it is necessary to bring in more legal certainty to the benefit of one and all – first, the medical professional undertaking the medical procedure, second the subjects of that medical procedure – the pregnant woman and the foetus or embryo – and, third, the judiciary who might eventually be called upon to interpret the provision of the Criminal Code once the text of the Bill still leaves certain issues unresolved.
11. It is therefore being proposed to add a new provision, article 243B, to the Criminal Code, that will substitute the clause proposed in the Bill in relation to the application of the fundamental right to life in exceptional circumstances within the particular context of articles 241 and 243 of the Criminal Code. The text should read as follows:

No crime is committed under article 241(2) or article 243 when the death or bodily harm of an unborn child results from a medical intervention conducted with the aim of saving the life of the mother where there is a real and substantial risk of loss of the mother's life from a physical illness.

12. First, for the avoidance of doubt and for the purposes of legal clarity, it is to be stated that the following instances are not cases where a pregnant woman's life is in manifest danger of death or where a real and substantial risk to her life exists from a physical illness and require the taking of extraordinary measures that the proposed provision allows: (a) anxiety; (b) emotional distress; (c) organic mental disorder; (d) a stressful situation arising from economic circumstance or unwanted pregnancy; (e) cases of rape; (f) inconvenient pregnancy; (g) an abnormal foetus; or (h) such other medical, mental, psychosocial, or psychological conditions or disorders that may be treated through ordinary clinical measures. By excluding these non-life-threatening cases, the attending obstetrician is given proper guidance as to what is life threatening and what is not.

13. The following fundamental principles of health ethics are to be kept in mind in these circumstances:

(a) the *overriding principle of affording the highest protection to human life* whereby the attending obstetrician, in the light of his/her duty to protect human life in accordance with his/her professional ethos, in order to protect the pregnant woman and foetus or embryo, takes all the necessary measures so that both the pregnant woman and the foetus or embryo are saved. Should this not be possible after all possible life saving measures to save both the life of the pregnant woman and of the foetus or embryo have been taken, resort to a medical intervention aiming to save the life of the mother, even if this leads to the loss of life of the foetus or embryo may be justified on the basis of the principle of proportionality outlined below;

(b) the *principle of absolute necessity* in terms of which it is recognized that:

- i. extraordinary measures would have to be taken that could not be addressed otherwise through ordinary clinical measures, and
- ii. where both the pregnant woman and the viable foetus or viable embryo would die if no extraordinary action is resorted to;

(c) the *principle of proportionality* whereby the attending obstetrician has to balance out the clinical condition of the pregnant woman where there is a manifest danger of death or where a real and substantial risk to her life exists from a physical illness with not intervening, in which case both the pregnant woman and the viable foetus or viable embryo would die, even if such intervention might bring about the termination of the pregnancy to save the pregnant woman's life, provided that where the pregnant woman signs a declaration, after having granted her informed consent, to the effect that the viable foetus or viable embryo should be saved rather than herself due to other terminal medical conditions that she might have but which, at that stage, are not yet life threatening; and

(d) the *principle of prudential judgment* in cases when the life of the pregnant woman is a condition for the vitality and sustainability of the foetus or embryo.

14. A regulatory system should be legally set up whereby the decision to terminate is a collective one involving a minimum of three specialist professionals in the field. In addition, the Superintendent of Public Health should maintain a register to document these cases. The rights of conscientious objection by the attending medical professional should be safeguarded.

Conclusion

15. By way of conclusion, the interdisciplinary group considers the intention of this Bill to be to address and clarify the treatment protocols of pregnant women and to provide clear guidelines to the treating physician. Nevertheless, it notes that the Bill needs to remove all the uncertainties contained therein that might possibly arise in the future and this group is therefore also proposing ethical guidance by way of applicable principles.

16. Finally, considering that this amendment touches upon the fundamental right to life, one must ensure that this right is safeguarded and protected. This is what the suggested provision aims to do. In sum, the proposed clause is intended to comply with the dignity of the human person and the human rights deriving therefrom, in particular, the fundamental right to life of the woman and the unborn child, and the right to legal certainty, in relation to the situation where a pregnant woman's life is in manifest danger of death or where a real and substantial risk to her life exists from a physical illness.

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