MALTA IT LAW
ASSOCIATION

Press Statement

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Proposed defamation laws are a serious threat to Internet Freedoms

The proposed nebulous law presents a perverse affront to basic online rights and the ability of citizens to use the Internet as a tool to exercise free speech.

The Malta Information Technology Law Association (MITLA) takes note of the Bill presented by Government entitled the *Media and Defamation Act*, *2017* (MADA) and expresses its deep reservations regarding a number of proposed elements, especially in relation to its applicability to the Internet.

Whilst MITLA notes that a public consultation exercise is yet to occur, it must immediately voice its concerns regarding certain definitions and obligations being introduced in relation to websites.

MITLA is concerned about the newly proposed obligations for websites, as defined in MADA, to be registered in a Media Register and failure of which can carry, on conviction, the payment of a fine of up to €1,000.

It is unfortunate to note that such registration scheme is similar to a number of repressive laws introduced in totalitarian states such as China, Bangladesh and, most notably, Russia through its infamous '*Bloggers' Law*', by virtue of which certain websites require registration with the State; a direct curtailment to freedom of speech online. The Internet is a bastion of activity and free expression - registration will put this under Government control.

MITLA's preoccupations are further augmented by the definition proposed in MADA for websites as *"any web-based news service or other web-based service relating to news or current affairs that operates from Malta or in respect of which editorial decisions are taken in Malta".* A literal interpretation of this definition implies that any website which contains information about "news" and/or "current affairs" (both undefined terms) will require such registration (which in turn can be nullified after 3 months of inactivity). Such obligations are unprecedented in modern democratic societies.

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MITLA also notes that the definition of "printed matter" has been updated to include *"any media content and any material uploaded on a website"*. Local case law has already recognised the applicability of the Press Act to online environments so the reason for this inclusion, especially in light of the territorial and substantive limitations of the proposed definition for website, is highly questionable.

Generally, one can note that the proposed MADA is attempting to put websites, as defined, at par with printed newspapers without any appreciation of the realities that technology and the Internet, as well as the rights and freedoms associated with their use, cannot be simply considered as identical to traditional press channels in such a draconian fashion.

MITLA further notes the attempts made by the drafters of MADA to utilise the UK Defamation Act 2013 as a model. The issues surrounding this approach are twofold: firstly, MADA contains important omissions from the UK model and secondly, the sections of the UK law regarding websites remain highly controversial and heavily criticized for their rigid complexity. Furthermore, the UK Defamation Act 2013 contains no obligation for websites to be registered with the State, as is the case with MADA.

It is immediately apparent that Article 12 of MADA is modelled on Section 5 of the UK Defamation Act yet with notable differences.

Whilst the Section 5(2) of the UK version states that "*It is a defence for the operator to show that it was not the operator who posted the statement on the website*", MADA's version states that "*It is a defence in mitigation of damages for the editor to show that it was not the operator or person who posted the statement on the website*". [emphasis added]. The proposal puts the editor under undue risk for actions which are not his or her own thus creating a culture of restrained control whilst snubbing expression.

Furthermore, under MADA, the procedures and powers regarding notice of complaints as well as the action required to be taken by website editors in response to a notice and action relating to the identity or contact details of persons posting statements is completely the sole prerogative of the Minister, who may make provisions to this effect. The Maltese version does not seem to include the restriction found under UK law, specifically Section 5(9) which states that: *"A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament".* MITLA is extremely concerned to see regression into a legal framework which concentrates prerogative power in the figure of the Minister.

Guidance published by the UK Ministry of Justice makes it clear that Section 5 of the UK Defamation Act 2013 only relates to operators of websites hosting user-generated content. The situation under MADA appears to be different as it applies to all "websites" thus widening the net of control which is cast on online activity.

Throughout the past two years, there has been harsh criticism in the UK regarding Section 5, where complicated and burdensome procedures set out in in the law are in effect. Consequently, website operators are increasingly deciding to simply remove posts immediately without following the procedure, which subsequently could result in a serious (and often unnecessary) curtailment on freedom of expression.

Article 12 may also seem superfluous since our Electronic Commerce Act contains mere-conduit provisions establishing defences available to information service providers, including website operators.

MITLA shall continue to study the proposed MADA and shall actively participate in the consultation process by providing constructive comments on the general scope of this bill as well as other aspects directly related to IT Law.

Meanwhile, MITLA believes that our Parliament should discuss the Digital Rights Bill, amending the Constitution, presented in 2014 in order to guarantee that the proposed rights of right to informational access, informational freedom and digital informational self-determination find their place as enforceable rights in our Constitution. Any further delay will continue putting our basic internet freedoms, as evidenced by the proposed Media and Defamation Act at serious jeopardy.

About MITLA:

The Malta IT Law Association is a registered Voluntary Organisation and was set up in 2014 with the following objectives:

1. Promote the advancement and development of information technology law, including but not solely limited to computer law, internet law, electronic communications law, information law, electronic commerce law, remote gaming law and cybercrime, (hereinafter referred to as "ICT Law") in Malta and the advancement of Malta as an international centre of excellence in ICT Law;
2. Actively research, discuss and circulate information on legal developments taking place on the international plane and within the European Union with respect to ICT Law and the knowledge economy;
3. Promote with international and regional organisations or associations and other national government and non-government bodies legislative and

regulatory changes related to ICT Law and to consider together with these entities proposals for legislative interventions having the same aim;

4. Afford opportunities for the discussion and consideration of matters of interest to members of the Association and to undertake or assist in the preparation of legal instruments and papers in respect of such matters; and
5. Collect and circulate statistical and other information of interest to the members of the Association and to form a collection of publications and documents accessible to the members of the Association.

MITLA presently counts more than 200 members most of which are C-suite executive which hail from the legal, professional and technical professions.
Visit http://www.mitla.org.mt for more information