

NGO Input on the *“Draft Strategy Document: Strategy for the Reception of Asylum-Seekers and Irregular Migrants”*

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Introduction

Background

On 9 November 2015 the Ministry for Home Affairs and National Security (MHAS) launched a [public consultation](#) through the draft strategy document “*Strategy for the Reception of Asylum-Seekers and Irregular Migrants*”.

As clearly stated in the document, through the consultation the Government aims to seek input leading towards the formulation of a national strategy having the following key objectives¹:

“the adoption of a comprehensive approach to the reception of asylum-seekers and irregular migrants, addressing all basic needs, and

the institution of procedures intended to better safeguard the rights of asylum-seekers and irregular migrants, though always with reference to national security and public order, as well as public health.”

The present document is jointly submitted by a group of non-governmental organisations working with and for asylum-seekers, refugees and migrants. Given the extremely limited timeframe for preparation and submission of submissions within the public consultation framework, we must make a number of preliminary comments:

1. Our advocacy efforts on Malta’s reception policies and systems have been on-going for several years. Throughout recent years, we held several meetings with Ministries and government departments wherein we had the opportunity to present our observations on the way Malta receives migrants and asylum-seekers. We have also drafted several reports on the matter, either in general terms addressing broad themes or on specific aspects of the system. It is therefore impossible for this present document to be interpreted as our main - and exclusive - input on the proposed strategy document. On the contrary, we reiterate the need for MHAS to recall all our earlier submissions in order to elicit our concerns, appraisals and recommendations. In particular, we refer to submissions made to the Officer of the Prime Minister;
2. We also underline that we are approaching the proposed strategy as an on-going exercise, with a view to constant improvement and alignment with Malta’s human rights obligations. We are therefore keen to underline that we look forward to being given the opportunity to discuss these matters in depth with MHAS and other relevant ministries and departments.

Core Values

Although we all operate within our individual mandates, focus on different aspects of migration/asylum and engage in a broad spectrum of activities, we are nonetheless united and committed to core values that we feel ought to underline Malta’s approach to its migration and asylum management. In this regard, we emphasise the following:

¹ Page 3.

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1. Respect, protection and fulfilment of the fundamental human rights of all persons should be at the heart of Malta's reception strategy. This approach should underline all legal norms, policy instruments and discourse on the matter, in accordance with Malta's relevant obligations and in line with a true spirit of solidarity;
2. Effective strategies require on-going review and evaluation processes to be in-built within the same strategies. Particularly in a migration context that is so fluid, regular assessment exercises are necessary to ensure that strategies and implemented practices remain effective and relevant;
3. Vulnerable persons require particular attention in order to ensure their protection and also to guarantee a rehabilitation process that, where possible, leads to their self-reliance and independence;
4. Dialogue and cooperation with NGOs must be truly mainstreamed throughout Government policy-making and implementation, not merely as service-providers for those activities where Government is unwilling or unable to fulfil its obligations, but also as active participants in the formulation and review of legislation, policy and practice protocols.

General Comments

The Review Process

We welcome the proposed strategy document as a much-needed assessment and review of Malta's experiences. Since 2002, when Malta first started experiencing the phenomenon of boats arriving packed with men, women and children leaving Libya's shores, there has been a significant absence of comprehensive policy-making. This despite the issue topping Malta's national political agenda since the very first boat arrival. In fact, the 2005 national policy document remains today the only public document outlining Government's perspectives on migration and asylum, and providing an insight - albeit limited - into Malta's policy intentions.

The proposed strategy comes at a time when Malta is able to take stock of its experiences, evaluate lessons learnt and work towards constructing a national strategy that strengthens the positive elements of the existing policy framework and amends or removes the negative ones. We are also happy to note extensive reference in the document to human rights and the need for Malta to ensure the dignified treatment of all persons passing through its reception system. This is further evidenced through the document's appreciation of the impact of the European Convention of Human Rights as well as of key judgements of the European Court of Human Rights (ECtHR), namely the cases of Louled Massoud, Ibrahim Suso and Aden Ahmed.

“...too often, migration and asylum strategies suffer from being based on short-term goals...”

In this regard, we however note the absence of reference to the EU Charter of Fundamental Rights, a key document that ought to direct Malta's actions in particular due to its inclusion, amongst others, of the principle of human dignity (Article 1), the right to asylum (Article 18), the right to an effective remedy (Article 47) and the right to good administration (Article 41).

It is also positive to note that the proposed document embraces the idea of long-term solutions as an integral component of its vision. Too often, migration and asylum strategies suffer from being based on short-term goals, thereby failing to understand the implications this limitation has on policy effectiveness, budgeting and financial planning, and impact on human lives. We therefore strongly urge MHAS to maintain this long-term vision and to reflect it in its implementation plans and budgetary allocation.

The Strategy's Scope

The Draft Strategy Document's title includes asylum-seekers and irregular migrants, seemingly intending to apply to all asylum-seekers irrespectively of their manner of arrival to Malta. However, the document's substance and proposed steps and structures seem to exclusively presuppose and therefore cater for asylum-seekers entering Malta in an irregular manner by sea. Whilst this very specific entry scenario does in fact represent the reality of most asylum-seekers reaching Malta for many years, it was not the exclusive scenario and is certainly not so at the present time. Whilst the document does in fact refer to numbers of asylum applications filed by persons who entered Malta in a regular manner, their situations are nowhere provided for in the document.

It remains unclear how these individuals, also entitled to reception conditions under the EU's recast Reception Conditions Directive, would interact - if at all - with structures such as the Initial Reception Centre, the Detention Centres and other

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procedures established on the premise of asylum-seekers entering Malta irregularly by boat. For example, it is unclear how and if vulnerable persons will be identified and referred to appropriate services, how persons alleging to be unaccompanied minors will access the age assessment process, how important information on issues such as the asylum procedure, Dublin III, rights and obligations and integration will be provided to such persons.

From our experience working with asylum-seekers we know that in practice the rights and entitlements of this category of asylum-seekers are not always clear and it is very important that any policy document addresses this gap effectively.

These queries are also relevant for refugees *sur place*.

Would MHAS clarify how the Strategy will incorporate in its scope asylum-seekers who do not enter Malta irregularly by sea?

We also note that the Strategy Document seems to interpret 'reception' rather restrictively, almost limited to considerations of detention or non-detention. This also emerges from the document's explanation of the requirements of the recast Reception Conditions Directive (page 5), that focuses on four points all directly referring to detention considerations. Whilst the Directive's main impact on Malta is undoubtedly its regulation of the detention of asylum-seekers, we must underline that is much more substance in the Directive that its detention provisions, such as access to information, rehabilitation, identification of vulnerable persons, children. Some of these elements are referred to in the Strategy Document, and also possibly in current practice, yet there is a clear need for Malta to get out of the mind-set that reception is all about whether asylum-seekers should or should not be detained."

The Strategy's Relationship with the MSDC Integration Strategy

The reception of asylum-seekers is the first interaction they have with Malta, to be closely followed by a deeper and more long-term relationship that could last several years and, in some cases, be a permanent one. There is a minor reference to this in the Strategy Document, where it notes the importance of organising language and other classes in reception centres, yet we feel the strategy fails to create a strong link between reception and eventual integration of persons remaining in Malta. In this regard we note the on-going activities of the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties (MSDC) in preparing Malta's first national integration policy.

This link is an important one not only because there is need to ensure consistency and harmony between policies, yet also because it affects the approach and methodologies of open centres in relation to their residents. The current lack of an integration policy coordinating national efforts and providing clear direction to stakeholders and to migrants/refugees, does not only affect persons living in the community but has a significant impact of persons living in the open centres. Difficulties accessing mainstream services, persons with health (including mental health) problems, incidents of discrimination, social exclusion and other serious concerns are often a direct consequence of absence of policies, lack of clarity in existing policies, and arbitrary or inconsistent application of rules. Persons living in open centres, whatever their statuses, are directly exposed to these concerns.

We also feel it is necessary to ensure corresponding discourse and targets in both policy documents, also in order to address the integration needs of those persons who might be channelled towards returns operations yet whose return is highly unlikely to ever materialise.

We urge MHAS to liaise with MSDC to ensure consistency in their respective policy approaches.

Identification and treatment of Vulnerable Individuals

The Strategic Document makes several references to vulnerable persons, yet it does not give a clear outline of the procedure and criteria for assessing vulnerability, or of the specific care and support they will receive following identification. The recast Reception Conditions Directive contains several articles on identification and support procedures, also requiring Member States to ensure that vulnerable persons enjoy specialised reception conditions.

We note that the document generally endorses the current practice of immediate referral of manifestly vulnerable persons, whilst allowing subsequent referral of persons not to manifestly vulnerable. It is not clear how decisions relating to non-manifestly vulnerable persons will be taken: will there be an overall assessment of all persons and decisions taken individually? Will there be criteria for assessing who is and who is not manifestly vulnerable? Which entity is taking these important decisions, and what is the individual's role - and that of his/her legal representative - in this assessment? What timeframes will apply from the moment of referral until a decision on vulnerability?

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1. Malta's reception policy should contain a specific section on vulnerable individuals, outlining the above-mentioned issues and specifying the entities responsible for conducting assessments, as well as referral mechanisms. The policy should also clarify the consequences of vulnerability assessment.
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2. Importantly, we feel the policy should clearly stipulate that persons found to be vulnerable at any stage of the return or asylum procedure will not be detained.
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Specific Comments

Chapter 2

Procedures upon Arrival

We note how at this very delicate stage no provision has ever been made for the presence of interpreters. Given the fact that medical assessments are conducted, as well as important interviews with immigration authorities that will have an impact of the person's asylum application and subsequent interactions with State authorities, it is imperative that persons understand what is being requested of them, as well as that their responses are understood by competent authorities.

Engage the services of interpreters/translators at all stages of interactions.

Reference is made to the booklet containing the migrants' rights and obligations. The booklet is, in itself, a positive initiative yet we understand that the language adopted is highly technical, the content is limited and the number of available languages is limited. Furthermore, it is also important that information remains available and accessible at all stages, and not just at post-arrival.

As part of the strategy, review the publication to make it available at least in Arabic, Somali, Tigrinya, Amharic, Bambara and Fula. We confirm our willingness to support this review and provide feedback on the booklet's substance and also dissemination methodology.

The document states that personal possessions would be confiscated, and receipts given.

It is essential that rules governing the handling of migrants' personal possessions stipulates that:

1. Individual and not collective receipts are issued for all items that are confiscated, with specific mentioning of all items;

2. Proper records must be kept of all items, and these should be safely and centrally stored;

3. Upon release from detention all personal items must be immediately returned;

4. All documentation must be readily accessible to detained persons, particularly where these are necessary for the asylum procedure;

5. Funds should be transferred to specific accounts, enabling detained individuals to access and use them while in detention.

Accommodation

We remain unclear as to the status of the Initial Reception Centre and, importantly, of the legal regime under which persons will be required to remain within the IRC for any given period of time. The Strategy Document seems to rely on two legal instruments relating to public health management, a theme very clearly underlining the document's entire approach.

Although the Strategic Document refers to time spent at the IRC as 'confinement', it is our understanding, also in terms of extensive jurisprudence of the ECtHR, that it will actually amount to deprivation of liberty, detention. We would like to

"This approach reinforces the demonising discourse that irregular migrants are a health risk to Malta and the EU."

reiterate that deprivation of liberty is definitely permitted under ECHR Article 5, yet only as long as a series of procedural guarantees are provided for in law and in practice. The IRC approach, whilst moving away from detention for the more traditional immigration purposes (preventing unauthorised entry or in order to effect removal), seems to rely on detention for the purpose of prevention of spreading of

infectious diseases. Such a ground is envisaged in ECHR Article 5, yet it requires a series of guarantees. The current blanket approach, coupled with lack of provision of information on reasons for detention (in fact and in law), clearly runs contrary to the ECHR, the ECtHR judgements and the EU recast Reception Conditions Directive.

Also, since asylum-seekers reaching Malta in a regular manner would not be required to pass through the IRC, we question whether the entire IRC process is in fact discriminatory and based on the assumption (without evidence) that irregular boat arrivals are at a higher risk of contracting and/or transmitting infectious diseases. This approach reinforces the demonising discourse that irregular migrants are - primarily - a health risk to Malta and the EU.

Whilst it is in fact essential to safeguard public health, any measures imposed should be proportionate, non-discriminatory and based on individual assessments.

1. Please clarify what guarantees will be provided to ensure that detention within the IRC conforms to ECHR Article 5.

2. To ensure further clarity, we recommend that all stages relating to the IRC are associated with clear time-frames.

Legal Grounds for Detention

Given the complexity of this specific theme, at this stage we will merely reiterate that the three above-mentioned ECtHR judgements against Malta's detention regime were largely focused on this particular issue: the impossibility of detained migrants to challenge the legality their detention.

We therefore welcome the replacement of the current blanket approach to detention with an individual assessment process that will take into account the exhaustive set of legal grounds for detention in the specific context of every single person. We also welcome the consolidation of the detention review introduced in 2014, as a key tool to avoid a detention regime that is arbitrary and in violation of ECHR Article 5 and relevant EU norms. It also positive to note a review process for the detention

"We (therefore) welcome the replacement of the current blanket approach to detention with an individual assessment process..."

review of asylum-seekers, as required by the recast Reception Conditions Directive, and also the provision of free legal aid to persons whose detention is being reviewed. Reduction of the maximum detention period from 12 to nine months is also a positive initiative. These measures go a long way in improving Malta's reception regime.

Clearly, in order for us to provide comprehensive comments on these technical procedures, full access to transposing legislation would be required in advance of its adoption.

Specific recommendations include:

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1. Provide the legal aid pool with access to training materials, capacity-building sessions and networking opportunities in order to ensure a service truly beneficial for the detained migrant. In this regard, we are willing to support MHAS' efforts;
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2. Introduce the possibility of detained migrants challenging the legality of their detention before a body that fulfils the effective remedy requirements of the ECHR, and of relevant EU norms. This challenge possibility should be in parallel with, and not in replacement of, the proposed review mechanisms;
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3. Initiate a comprehensive review of the body(ies) that will assess detention legality, since current capacity is dramatically limited in terms of resources and also of technical approach.
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Alternatives to Detention

The Strategy Document proposes to include for the first time in Malta legislation the notion of alternatives to detention, in accordance with the requirements of the recast Reception Conditions Directive and of the Returns Directive. Yet we note that the document refers to detention alternatives as a set of measures imposed on an asylum against whom detention is found not to be required in terms of legal grounds. This interpretation is incorrect and could result in the imposition of alternatives on all persons not detained under any of the legal grounds, a situation not envisaged or intended by any of the two Directives. The Chart on page 13 is incorrect and requires revision prior to adoption and implementation.

Legislation clearly states that detention alternatives are measures that may be imposed on either asylum-seekers or migrants to be returned against whom there does exist at least one ground to detention but, for reasons specific to that individual, detention is deemed to be too coercive in relation to the end to be attained. If there are no grounds to detain, detention alternatives may not be applied.

Procedurally, the application of detention alternatives should only occur in situations of persons in respect of whom there exist legal grounds to detention but detention is, in the context of the decision-making process, not necessary and proportionate. The Strategy Document seems to reverse this procedure, resulting in possible situations where asylum-seekers in respect of whom no legal grounds to detain exist are faced with administrative orders to deposit documents, or report at a local police station. It is certainly possible to restrict the freedom of movement of an asylum-seeker, also in terms of the recast Reception Conditions Directive, yet these measures would not be considered detention alternatives.

Revise the detention alternatives approach to ensure it reflects the true spirit and meaning of the intended measures.

Vulnerable Persons

With regard to the paragraph before last on page 11, we caution against adopting a punitive approach towards persons found not to be unaccompanied minors following the age assessment process.

Ensure that detention is not used as a punitive measure against persons who are found not to be unaccompanied minors following the age assessment process.

Chapter 3

The Initial Reception Facility

In the context of the shift from automatic detention to a system centred around individual assessments, the initial Reception Facility is a welcome reception model. We also support the approach of assigning AWAS case workers to all persons, allowing for the possibility of individualised and consistent support and case management. This latter element is clearly dependant on appropriate allocation of resources.

We are seriously concerned at the exclusion of NGOs in the list of entities granted access to the Facility (page 14). This exclusion ignores the years of commitment, resources and efforts by many of us in supporting a reception system that in many cases was deficient and unable to provide even the most basic services to extremely vulnerable persons. We fail to appreciate why MHAS believes NGOs are obstacles in the smooth-running of operations, as opposed to necessary providers of indispensable services that many Government entities are simply unable to offer, due to technical or resource limitations, lack of trust by service-users, policy constraints, or other reasons. This attitude is reproachable and totally unacceptable, particularly in a context where many of our services are in fact relied up - even directly - by public entities in acknowledgement of our expertise and ability to engage with service-users in way many public entities are often unable to.

Furthermore, we question an approach that deprives individuals of their rights to receive and information from lawyers, doctors, social workers, psychologists who are independent of the system they might be trying to avoid, challenge or simply understand.

We are also concerned that the document refers to detention facilities as the threshold to be met in relation to reception standards in the Facility. In the light of the challenging conditions in all detention centres, we feel that this threshold is far from ideal.

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1. We strongly urge MHAS to ensure access by asylum-seekers and migrants to NGOs during their stay at the Initial Reception Facility, and to ensure effective access to information and activities.
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2. Reception conditions must meet the standards established in the recast Reception Directive, also taking note of detailed input we have regularly provided, and also that provided by bodies such as the CoE CPT.
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3. The roles and responsibilities of AWAS case workers should be clarified. Furthermore, in view of resource constraints, we recommend more effective cooperation with NGOs for the provision of individual support and information.
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Chapter 4

Detention Conditions

We welcome the Strategic Document's acknowledgement of the need to dramatically improve the quality of living conditions in the detention centres including, for example, the possibility of detained persons to receive visits from family and friends.

This is an area of serious concern, as also expressed by all independent human rights bodies visiting detention for monitoring purposes, including the CoE Committee for the Prevention of Torture, the CoE Human Rights Commissioner and the UN Working Group on Arbitrary Detention. We also welcome the document's approach in outlining the rules and regulations governing living conditions in detention.

We reiterate our concerns and recommendations in this regard, and also urge MHAS to publish the detailed rules and regulations governing life in the detention centres so as to avoid arbitrariness and unnecessarily restrictive practices.

Chapter 5

Services provided by Open Centres

The Strategy Document repeatedly states that Open Centres are primarily intended for asylum-seekers and protection beneficiaries, also stating that *“irregular migrants may be required to leave Centres earlier (than 12 months).”* Whilst we certainly appreciate resource considerations, we are unclear as to what MHAS expects such persons to do. We often deal with persons who are unable to achieve a level of independence necessary to leave the Open Centres, primarily owing to vulnerability that may relate to physical or psychological issues. Irregular migrants, although not falling within the protection offered by the recast Reception Conditions Directive or the recast Qualification Directive, should nonetheless be entitled to a level of treatment that respects their dignity and that does not violate their fundamental human rights.

Would MHAS clarify its plans for persons who are not beneficiaries of international protection, yet who are unreturnable?

Chapter 6

We welcome the specific inclusion of health issues in the Strategy Document, with an acknowledgement of the challenges faced by most migrants in accessing medical services. Reliance on the services of translators, interpreters and cultural mediators is a welcome approach and we trust that this inclusion actually implies a commitment on behalf of Government to ensure that all necessary services are indeed available.

1. We reiterate our recommendations relating to the need to ensure the inclusion of access to mental health services within the strategic vision, notably with regard to rehabilitation of survivors of torture and sexual violence.
 2. We also underline the need for Government to ensure clarity in terms of entitlement to medical care, as our experiences confirm lack of such clarity not only within migrant and refugee communities but also amongst public stakeholders.
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Annex A: Detention Guidelines

The detention grounds introduced in the recast Reception Conditions Directive will certainly present challenges in relation to their interpretation and implementation. We welcome the initiative of attempting to establish clear interpretative guidelines in order to support those Police Officers who will be taking important decisions affecting the liberty of asylum-seekers and persons pending return.

In this regard, we recommend the following:

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1. All guidelines should respect the principles of necessity and proportionality in the way they guide interpretation and application, as these two principles are very clearly enshrined in the relevant EU norms;

 2. All persons in respect of whom such decisions are being taken ought to have access to information on the grounds of their detention, including on the factual elements giving rise to a specific ground. Access to an effective remedy requires this clarity of law and fact;

 3. The guidelines should reflect relevant international standards, notably as published by UNHCR and as included in ECtHR jurisprudence;

 4. The guidelines must emphasise that detention should be approached as means of last resort;

 5. Asylum-seekers should not be penalised for the mere fact that they entered, or attempted to enter, Malta in an irregular manner as this would contravene the 1951 Refugee Convention and, possibly, EU norms;

 6. These guidelines, once finalised, should be made public so as to ensure transparency and accountability, also in the light of the detention review mechanism;

 7. Appropriate training should be provided to all those Police Officers who will be taking these decisions.
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Conclusion

We welcome the Strategy Document as a positive step toward a comprehensive revision of Malta's migration and asylum policies. It is an exercise we fully support, and with which we are keen to actively interact so as to share our expertise and experiences.

We look forward to meeting MHAS in order to receive clarifications on key points, and to discuss our recommendations in further detail.