

**NGO SUBMISSIONS TO THE
MINISTRY FOR SOCIAL DIALOGUE, CONSUMER
AFFAIRS AND CIVIL LIBERTIES**

(HUMAN RIGHTS & EQUALITY CONSULTATION)

MARCH, 2014

SUBMITTED BY:



aditus foundation (2011) is an independent, voluntary and non-profit NGO established with a view to monitor, act and report on access to fundamental human rights. We believe in the universality, interdependence and indivisibility of all human rights.

www.aditus.org.mt

aditus coordinated this joint submission & contributed to all sections.



The **Jesuit Refugee Service Malta (1993)** is the Malta branch of an international Catholic organisation working in 57 countries around the world. JRS Malta seeks to accompany, serve and defend the rights of asylum-seekers and forcibly displaced persons who arrive in Malta.

www.jrsmalta.org

JRS contributed to the Migration/Asylum sections.



Integra

Integra foundation (2004) is a non-profit organisation based in Malta, operating independently of any political, economic or religious affiliation at a global level. The Foundation's vision is that of supporting inclusive, non-discriminating and non-disabling societies, where all individuals have the right to human dignity, freedom, respect and social justice.

www.integrafoundation.org

Integra contributed to all sections.



Richmond Foundation (1993) endeavours to provide optimal community mental health services that promote mental wellbeing, address the prevention of mental health problems and provide support for good quality of life.

www.richmond.org.mt

Richmond Foundation contributed to the sections referred to persons with mental health problems.



SOS Malta (1991) is an NGO working in Malta and overseas, with a mission to aid people experiencing times of crisis and empowering them by providing support services and opportunities to implement development and change in their country to ensure a better quality of life.

www.sosmalta.org

SOS Malta contributed to all sections.

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Introduction

Consultation parameters

On 24th February the Ministry launch a scoping consultation in order to gather input from a variety of sources on the suggested way ahead for human rights policy and institutional development in Malta.

The scoping consultation was framed as the following questions:

Do you think that human rights and equality are sufficiently protected and promoted in Malta?

If not:

- a. Which human rights do you believe need further protection and promotion?*
- b. How can Malta better protect and promote human rights and equality overall?*
- c. Are there any models that you would propose that government should consider looking at in terms of legislation, institutional frameworks or both? If yes, what is especially good about such models?*

These submissions are being presented in response to the above invitation, with the understanding that our feedback could lead to more in-depth technical discussions on the responses and their legal, policy, financial and institutional implications.

We further wish to note that these submissions are intentionally formulated in a generic language, since we are approaching this exercise as a strategic dialogue starting point and not as an end in itself.

It is emphasised that this document is not intended to represent a holistic or in-depth assessment of the human rights situation in Malta.

Furthermore, we are keen to attach to this document a number of NGO submissions presented by aditus foundation and various other civil society organisations in the context of similar exercises. We recommend that these annexes be read as integral components of our submissions, also since they provide technical details on specific areas of human rights concern. Where relevant, references to these annexes are made throughout our submissions.

Note from the contributing organisations

This document is prepared and submitted by the above-listed organisations, with each organisation contributing and endorsing the views expressed in their respective thematic sections.

The views, concerns and recommendations made in each thematic section may only be attributed to the organisations identified at the start of each section. These views do not necessarily reflect those shared by the other endorsing organisations.

Overview of positive structural elements

Legal framework

1. Malta's current human rights legal framework is a relatively solid one, with a firm entrenchment in the Constitution and in various other legal instruments. Although this framework is far from complete or exhaustive, it nonetheless provides a basic level of protection for persons within Malta's jurisdiction in at least the more straightforward civil and political rights.
2. It is also noted that recent inclusions in Malta law of legal instruments adopted at the European Union level have substantially increased and strengthened human rights enjoyment levels in areas such as gender and racial discrimination, LGBTI rights, social protection, civil and political participation, victims' rights and several others.
3. Together with Malta's regional obligations, it is a worthwhile exercise to reiterate the extensive list of international human rights instruments signed and/or ratified by Malta including the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the 1951 Convention Relating to the Status of Refugees (1951 Convention), the Convention on the Rights of Persons with Disabilities (CRPD) and, importantly, the Charter of Fundamental Rights of the European Union (EU Charter).
4. These instruments emphasise – and underline – Malta's commitment to respect, protect and promote all the human rights of all persons under its jurisdiction, on the basis of the core procedural and substantive principles of equality and non-discrimination, and the universality, interdependence and interrelatedness of all human rights.

Redress mechanisms

5. Together with and related to this intricate legal framework, we note the establishment of various measures that seek to provide redress to persons whose rights have been violated by state or non-state actors. Various judicial, quasi-judicial and other procedures are available to victims in order for them to bring their claims and seek compensation for the violations suffered. Attempts to ensure that access to these remedies is in fact effective are evident, *inter alia* through appeal or other second instance procedures, judicial review mechanisms, procedural guarantees, access to legal aid and use of interpreters.

Institutional framework

6. What can be called the third pillar for effective human rights protection – the institutional framework – is also visibly present in Malta. The progressive

establishment of equality bodies and other mechanisms empowered, to varying degrees and with varying levels of effectiveness, to ensure a fair and just society is further witness to the need to complement legislation and procedures with appropriate entities geared towards human rights respect, protection and promotion.

7. It is noted that the activities of, for example, the National Commission for the Promotion of Equality, the Commissioner for Children, the Office of Ombudsman, the Director of Industrial and Employment Relations and the National Commission Persons with Disabilities have been pivotal in pushing a human rights agenda at the national, regional and international levels.

Our concerns

Limited protection against discrimination

8. Historically, Malta's legal development in this regard has been intimately linked to legal developments at the EU level with Malta conducting the barest and most minimum transposition exercises in order to bring national law in conformity with EU requirements. This is evident in the plethora of Acts and Regulations adopted in pursuance of various EU directives. This fragmentation in the manner Malta has chosen to approach anti-discrimination has led to a situation where the current framework is deficient in various areas.
9. The current framework does not cover all the grounds of discrimination in all sectors of activity, leaving groups of persons totally unprotected from discrimination, harassment and related offences or leaving specific areas unregulated in this regard.
10. Furthermore, the levels of protection afforded in the legal norms vary in accordance with the nature, effectiveness and procedures of the redress mechanisms established within the norms. Although sharing the same aim of preventing discrimination and of preventing its proliferation, the redress procedures before the above-mentioned equality bodies, are far from harmonised in the way they are able to receive, process, decide and follow-up on individual complaints.
11. For example, whereas some procedures may lead to a case being instituted before the Courts, other procedures are merely mediatory in function and whilst some procedures provide for legal aid support when applicants are unable to afford private legal counsel, others do not.
12. It is also interesting to note that the equality bodies adopt non-identical definitions of the term 'discrimination', leading to the incongruous situation of decisions based on a non-harmonised approaches to the term itself.
13. Lack of harmonisation also results in lack of clarity as to which equality body or procedure is competent to deal with specific issues, a difficulty often encountered by professionals and organisations as well as by victims themselves. The exercise of attempting to figure out where one should lodge a complaint is often extremely technical as it requires an assessment of the context where the activity complained of was carried out, the possible ground of discrimination (if at all clear), the possibility of multiple grounds of discrimination, the effectiveness or otherwise of specific bodies/procedures, etc. This renders the procedures effectively inaccessible, particularly for victims mostly in need to access them such as migrants, persons with disabilities and persons with mental health problems.
14. Other procedural concerns we wish to highlight include:
 - a. The impossibility before some of the bodies of organisations filing

complaints either on behalf of individuals or independently of any actual victim status;

- b. Multiple discrimination scenarios pose serious challenges due to the facts that they are not regulated by the current legal framework and because, by definition, several equality bodies could be competent to receive and decide complaints, albeit limitedly if not competent to deal with the complaints in their entirety.

15. In this regard, it ought to be reiterated that human rights law requires all remedies to be effective and accessible in order for them to comply with relevant standards and, importantly, for them to appropriately fulfil their roles.

Where are the 2nd and 3rd generation rights?

16. With regard to the human rights standards themselves, as protected primarily in the Constitution, we believe that whilst offering a level of protection this level is actually a basic one. Chapter IV *Fundamental Rights and Freedoms of the Individual* is a reflection of the socio-political environment surrounding the Constitution's drafting and, as such, reflects the so-called 'divorce' between civil and political rights on the one hand, and economic, social and cultural rights on the other hand. This is also seen in the UN's own handling of the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR).

17. This 'divorce' is also seen across the entire range of Maltese human rights legislation, where exclusivity is given to the 1st generation of human rights and little or no attention at all is paid to the 2nd and 3rd generations of human rights. Whereas 2nd generation rights are included in the Constitution's second chapter, these are mere formulations of principles and intent, instead of justiciable rights are required by international human rights law. In particular, we reiterate the principles underlined in '*General comment No. 3: The nature of States parties obligations*', published by the Committee on Economic, Social and Cultural Rights¹.

18. In this regard, we also note that Malta has not yet ratified the Optional Protocol to the ICESCR, allowing for the possibility of individuals and groups lodging complaints on alleged violations of the rights protected under the Covenant. Also, Malta has not yet authorised the lodging of Collective Complaints before the European Committee of Social Rights, in relation to the European Social Charter.

19. Furthermore, in relation to 3rd generation rights we note that this set of rights is totally absent for legal, policy and administrative formulations. Such is the absence of this group, such as environmental rights, that they are rarely – if at all – described or treated as fundamental human rights that should be enjoyed by all persons and for which effective redress mechanisms ought to be established. Various international documents describe the environment and cultural life as

¹ Available here:
[http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1991%2f23\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1991%2f23(SUPP)&Lang=en)

integral components of a truly comprehensive human rights package, placing such rights on the level of importance and justiciability as other more popular rights such as freedom of expression, right to religious freedom, freedom from torture and the right to life. Examples include UDHR Article 27(1), ICECR Article 12, CRC Articles 24 and 29(1).

Right to an effective remedy

20. Access to justice and the right to an effective remedy remains an area of concern. Despite having adopted established several judicial, semi- or quasi-judicial and administrative entities with mandates to provide effective remedies to persons claiming violations of their rights, gaps within many of these entities result in these remedies not actually being effective in terms of the requirements of human rights law.
21. It is not our aim in this document to comment on Malta's overall justice system, also since it is not within our technical capacity to do so. We are however in a position to note that the Constitutional remedy, one of the primary tools for human rights redress, has repeatedly been found to fall short of the standards established by the ECHR and by the Strasbourg Court's jurisprudence. This shortcoming has been noted in the context of human rights claims brought by migrants in relation to their detention, where international human rights law requires a speedy review of their detention.
22. We are also concerned that vulnerable persons, including children, victims of domestic violence, migrants, persons with physical or mental disabilities and trafficked persons are being denied the exercise of their procedural rights due to, *inter alia*:
 - a. Lack of understanding of relevant procedures, rights and obligations, and implications of decisions;
 - b. Difficulty accessing justice at the reporting stages, particularly in the case of domestic violence victims, persons with physical and/or mental disabilities and migrants;
 - c. Impossibility of migrants to access legal remedies, including legal aid services, due to their detention;
 - d. Limited active involvement of vulnerable groups in proceedings about or involving them, due to possible misconceptions about limited capacity, interest or need to involve.

Does anyone know their ICCPR from their ICESCR?

23. Although Malta has signed and/or ratified several international and regional human rights instruments, many of these instruments seem to remain at the ministerial or inter-ministerial level without being disseminated, publicised or approached in a comprehensive and inclusive manner. The UN's core human rights conventions clearly stipulate that States Parties should engage with the treaties in a public, transparent and inclusive manner so as to ensure the full dissemination of the conventions' contents, to stimulate an environment of civic empowerment and to engage in national exercises geared at improving human

rights enjoyment for all.

24. In particular, the state reporting processes for the UN instruments Malta has signed/ratified remain relatively closed and unpublicised processes, contrary to repeated conclusions and statements by the UN treaty-monitoring bodies that all States Parties, including Malta, should adopt the opposite approach. We are concerned that at no point are the treaty-body Conclusions made public, that no civil society engagement is sought during the state reporting process, that no clear commitments of follow-up activities are ever publicly made. More seriously, we are very concerned that none of these core human rights conventions – bar possibly the CRC – ever make their way into Maltese homes, classrooms, work places and offices.

What role for civil society?

25. Following from the previous point, we wish to also underline the limited space granted to human rights NGOs to perform one their core roles: advocacy. There is currently no established forum for civil society organisations to engage in strategic dialogue with the Government on issues of national importance, especially when such issues are of horizontal impact.
26. We also noted that although bilateral relations between individual NGOs and public entities might be strong and productive in certain sectors, we are concerned that these seem to be largely based on an understanding that the role of civil society is to provide material or other services, and not also to:
- a. Highlight structural deficiencies;
 - b. Stimulate public discussions;
 - c. Monitor state behaviour and decisions;
 - d. Hold public entities accountable to principles of justice and equality;
 - e. Provide technical input into law- and decision-making;
 - f. Foster an environment that demands respect for procedural rules; and
 - g. Engage in strategic litigation.
27. In this regard, we also refer to a string of worrying incidents targeting civil society organisations and their representatives, including verbal abuse (also online), violence, vandalism and increased difficulties accessing public funding.
28. We also observe the direct relationship between the absence of a public engagement between public entities and civil society, and the general public's attitude to NGOs and their democratic functions.

Human rights education

29. The latter point highlights the absence of human rights education within the Maltese educational system. We are deeply concerned that principles of equality, human dignity and human rights are not given prominence at all educational stages, including the tertiary level, and that this void fuels a society that is repeatedly failing to fully comprehend and act on the values of solidarity, understanding, accountability and transparency.

30. We also emphasise policy and legal shortcomings ensuing from the generally widespread limited human rights understanding by the public service/sector, especially in relation to how human rights necessarily influence relations between the State and individuals.

International relations

31. Whilst membership of the EU has to some extent triggered a number of notable initiatives with regard to Malta's positioning vis-à-vis particular states, we also note that human rights elements are at times absent from bilateral or multilateral discussions. This is of particular relevance in those diplomatic contexts involving states the behaviour of which, either at home and/or overseas involved the repeated and consistent denial of basic fundamental freedoms either with regard to their entire nations or to specific minority groups.
32. Whilst the sensitivity of this matter is clearly appreciated, we nonetheless wish to flag the concern that Malta's engagement with such states might only indirectly support such oppressive regimes, *inter alia* through financial elements, but might also act as a public endorsement of such oppressive behaviour.

Public discourse

33. Whilst we appreciate the recent measures improving the quality of LGBTI rights in Malta, we are deeply concerned that the current understanding of human rights seems to be limited to gays, lesbians and transgender persons.
34. In this regard, we note how public discourse on persons with disabilities, persons with mental health problems, children and the elderly fails to embrace the rights-based approach. Also, as noted above, the natural and cultural environments are rarely described as fundamental human rights, with the legal and political implications such a positioning entails.
35. It is extremely worrying to note that not only are several other minority groups excluded from national human rights discourse, political and non-, but also some groups are spoken of with a language that is totally unacceptable in a modern democracy.
36. Referring particularly to migrants, asylum-seekers and refugees, public discourse tends to adopt harsh, negative and dehumanising terms that do absolutely nothing to promote a national environment of respect, equality and understanding. Instead, racist abuse has become the unchallenged norm and legal provisions on hate speech are rarely resorted to by the competent authorities, especially in relation to widespread online abuse directed at ethnic minorities and organisations/individuals working to uphold their human rights.

Migration and Asylum

37. In view of the extensive submission already made on this subject, we would like to direct you to the documents in annex.

Miscellaneous

38. Sexual and reproductive health does not seem to warrant any form of discussion. This is observed not only in relation to mainstream issues, but also to more challenging aspects of these rights such as, for example, with regard to persons with disabilities and children.

Our recommendations

39. Particular attention should be paid to the conclusions and recommendations made recently in the context of Malta's UPR.

National human rights body

40. Establish a national human rights body with the mandate, resources and authority to act as Malta's focal point on human rights issues. We reiterate the recommendation to Malta by several UN human rights entities to base this body on the '*Paris Principles*'.
41. Within this body, establish one uniform and speedy complaints mechanism for all persons, covering all sectors. This complaints mechanism should be empowered to adopt various courses of action dependant on several elements, such as the nature of violation, confidentiality and protection requirements, effective remedy principles, national impact, etc. Within this system, ensure provision of legal aid to complainants, *inter alia*, through the support of existing individual and organisation services, and grant *locus standi* to organisations, either on behalf of victims or without the need for victim status.
42. The national human rights body should be mandated to provide technical input to the Government, particularly in the contexts of law- or policy-making including the national budget.

International and institutional relations

43. Establish a public, inclusive and on-going process of consultation with civil society and interested stakeholders on Malta's relationship with the UN treaty-monitoring bodies and other human rights mechanisms (e.g. the UPR). This dialogue should not be limited to the pre-reporting stages, but should extend to the dissemination and implementation processes.
44. Explore internal arrangements to ensure that Malta's foreign policy contains key human rights targets, not only in relation to overseas development aid matters but also as a broader encompassing policy approach.
45. Malta should sign and ratify key international and regional human rights instruments, and act as an advocate for further signatures and ratifications. Furthermore, Malta should withdraw reservations from key instruments, such as CEDAW.
46. Provide for a truly effective remedy for persons claiming that their human rights have been violated, in accordance with established standards and criteria.

Legal framework

47. The above-mentioned exercise of establishing a national human rights body should also include efforts to harmonise equality legislation into a streamlined

legal instrument.

48. Attention should be paid towards including all fundamental human rights within Malta's revised Constitution. All human rights should be recognised and treated as such, in accordance with international human rights law and core principles.
49. In particular, efforts should be made to explore mechanisms to render justiciable economic, social and cultural rights.
50. International human rights support the introduction of special temporary measures to combat discrimination. In accordance with relevant legal standards, Malta should introduce such measures in order to ensure *de facto* equality for all persons.

Human rights education

51. Undertake an assessment of national curricula at primary and secondary levels to ensure the inclusion of human rights education, to include elements such as the UDHR, human rights development, diversity, equality, human dignity, etc.
52. At the University of Malta, explore possibilities of introducing human rights elements as a horizontal element in most, if not all, courses.
53. Ensure the on-going and progressive human rights development of Maltese society, through the support of institutions such as Local Councils, media agencies, local parishes and civil society organisations.
54. Capacity-building exercises in human rights and related policy, financial, legal and operational implications should be organised for all persons working within the public service/sector to ensure confirming law- and policy-formulation.
55. Efforts should be made to remove sexual and reproductive health from its current taboo status, so as to ensure the full enjoyment by all persons of their related human rights.

Public approach and discourse

56. As part of a holistic review of Malta's human rights approach, efforts should be – as far as possible – made to ensure that national discourse adopted by political figures is in respectful of core human rights values.
57. Whilst this is particularly relevant for the situation of migrants, asylum-seekers and refugees, we also recommend a thorough assessment of the way other groups/themes are referred to, such as women, persons with disabilities, LGBTI persons, environmental issues and persons with mental health problems.

Migration and asylum

58. As above, we defer to the recommendations made in the annexed documentation.

Annexes

Joint Submissions on the Draft National Children’s Policy, aditus foundation and JRS Malta, May 2012

Joint Submissions to the UN CRC for the Day of General Discussion, “*The Rights of all Children in the context of International Migration*,” aditus foundation and JRS Malta, September 2012

Joint Submissions to the Committee on the Rights of the Child for the Consideration of State Reports (Malta), aditus foundation, JRS Malta, Malta Gay Rights Movement, Equal Partners Foundation, Malta Federation of Organisations Persons with Disability, December 2012

NGO Submissions to the UPR of Malta during its 17th Session, aditus foundation, Integra Foundation, JRS Malta, KOPIN, Equal Partners Foundation, March 2013

**JOINT SUBMISSIONS ON THE
DRAFT NATIONAL CHILDREN'S POLICY**



May 2012

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Introduction

Our input targets two parallel elements. Firstly, we would like to underline the need to adopt a horizontal reading of migrant child issues throughout the draft National Children's Policy¹. We believe this is central to ensuring that every measure and proposal in the policy is made applicable and accessible to all children, including migrant/asylum-seeking children, irrespectively of their legal status and situation.

We would like to encourage policy- and decision-makers to include migrant children more specifically throughout the new policy and we recommend a mainstreaming approach so that migrant child issues are addressed wherever appropriate, thus securing the best interests and well being of the children involved. Accessibility of the draft National Children's Policy measures also by migrant children is key to the document's success, and we therefore suggest that this be taken into consideration at the finalisation and implementation stages.

Secondly, we would like to present input and recommendations with regard to the inclusion of measures relating to the specific situation of migrant/asylum-seeking children. These areas of concern broadly include the following: the asylum procedure, reception conditions, administrative detention, age assessment, care orders and legal guardianship, and trafficking in children.

General recommendations

As stated above, we welcome the fact that the draft National Children's Policy has been developed on a rights-based approach. Our present input is also inspired by existing international and regional legal instruments relevant to children's rights, primarily the Convention of the Rights of the Child. Yet it is to be noted that several other human rights instruments are also of direct relevance, including: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention against torture and Other Cruel, Inhuman or Degrading treatment or Punishment, the Convention on the Rights of Persons with Disabilities, the European Convention for the Protection of Human Rights and Fundamental Freedom and the European Social Charter.

Furthermore, the specific instrument relating to refugees, including refugee children – the 1951 Convention Relating to the Status of Refugees – also forms the basis of our input.

In this regard we would like to underline that the above-mentioned instruments apply to all persons within Malta's jurisdiction, irrespectively of nationality and other considerations. The core principle of non-discrimination is to be observed in all situations.

Specific areas of concern

Together with the above general recommendations recommendation regarding the horizontal mainstreaming of migrant children issues throughout the draft National Children's Policy, we have identified a number of specific areas that we feel should be taken into consideration when addressing the rights of the migrant child.

The asylum procedure

We welcome the fact that the Office of the Refugee Commissioner automatically grants Temporary Humanitarian Protection to all minor asylum-seekers, since this ensures their protection until they turn eighteen. The legal challenges presented by asylum-seeking children may be of a highly technical nature, often requiring a particularly meticulous analysis of the refugee definition. Furthermore, asylum-seeking

¹ Although reference to 'migrant children' should be interpreted as referring to all third-country national children, the majority of our specific recommendations relate to the situation of asylum-seeking children.

children often also present logistical challenges in terms of the skills required to interview them in what is by definition a sensitive and unfamiliar context.

Our recommendations

- In line with the principle that all persons dealing with children should be appropriately skilled and trained to do so, we recommend that all personnel of the Office of the Refugee Commissioner and of the Refugee Appeals Board receive appropriate induction and on-going training in dealing with the specificities of asylum-seeking children.

Reception conditions

The draft National Children's Policy outlines that children, including those entering Malta in an irregular manner should be provided with adequate ambiance and accommodation (p.26). We welcome this statement, but also believe that the Policy should emphasise its extension and applicability to the reception conditions in which children entering Malta in an irregular manner are detained.

Furthermore, whilst acknowledging the great efforts by the Agency for the Welfare of Asylum Seekers (AWAS) at accommodating children in appropriate facilities, we remain concerned at the use of facilities such as the Hangar Site (Ħal Far) and Ħal Far Tent Village to house families with children.

Our recommendations

- Improved reception conditions for migrant children, including the avoidance of their detention and of accommodating them in sub-standard reception facilities.

Administrative detention

In the draft National Children's Policy (p.26 and p.43) it is stated that detention of minors is unacceptable and that alternative methods should be resorted to. We fully support this position, noting that the detention of migrants, including adults, is strictly regulated by human rights law whereby a series of mandatory conditions should be present throughout the entire duration of a migrant's detention.

These mandatory conditions include that detention should be in accordance with national law, that national law and procedures should protect the individual from arbitrariness. To avoid arbitrariness the detention must be carried out in good faith, it must be closely connected to the purpose of preventing unauthorised entry or deportation, the conditions of detention must be appropriate (keeping in mind that the detainees have not committed criminal offences) and lastly the duration of the detention must not exceed reasonable length required for the purpose pursued.²

With regard to children – whether accompanied or unaccompanied – stricter compliance with these mandatory conditions is required due to the particular vulnerability of minors and the demonstrated psychological impact of detention of this category of migrants.

In relation to current practice, it is to be noted that despite a policy affirming the non-detention of children, all minors entering Malta in an irregular situation are automatically detained. Accompanied minors are detained with their families until required medical clearance is obtained for the entire family and placement in an Open Centre is possible. The placement may take a number of days and, under certain circumstances, weeks or months. The waiting time should be in an environment safe to children.

Persons claiming to be unaccompanied minors or separated children are detained throughout the age assessment procedure, a process that may last up to a number of months. We would also like to note that throughout this procedure, the minors are not detained in segregated sections but are kept with adults. We

² International Commission of Jurists (2011) *Migration and international Human Rights Law, Practitioners Guide no. 6*, p.150 and p.152

are concerned at the safety risks presented by this joint accommodation of adults and persons claiming to be minors.

Minors are exposed to an environment that is not only an obstacle to their personal and social development but also of serious detriment to their physical and psychological well-being. Detained children are kept within confined spaces, without adequate access to fresh air, sunlight, recreation and an appropriate age-sensitive diet. The environment is hostile and offers no space for the child to enjoy his/her right to privacy with his/her family. Furthermore, all detained children are denied access to education for the entire duration of their detention.

We would further like to add that delays have been noted between the decision on the minor age and the release of the child resulting in unnecessary duration in detention. Such delays could be related to the provision of required medical clearance, the issuing of a care order and the lack of availability of place in an Open Centre.

Our recommendations

- Stricter compliance with human rights standards to secure children from being detained;
- Minors should not be placed in detention – not even for a shorter period of time. We strongly urge the Policy to reaffirm the non-detention of minors and to insist on the exploration of alternatives.

Age assessment

All migrants claiming to be minors are processed by an Age Assessment Panel established by the Agency for the Welfare of Asylum Seekers (AWAS), with a view to determine whether the applicant is in fact a minor or otherwise. Persons found to be minors are released upon attainment of the required medical clearance.

In our view, the age assessment procedure is characterised by a lack of transparency and accountability, as well as a lack of consistency. The Age Assessment Panel is not regulated by publicly available, written rules including core issues such as procedural timelines, assessment criteria, Panel composition, etc. The procedural information provided to persons undergoing assessment is extremely limited. Written decisions (all provided in English) are never supported by reasons, with no real possibility of appeal or review. The person concerned can only ask for it to be reviewed, but do not have a guarantee for revision. There is no real possibility of any form of professional assistance or representation and inadequate guarantees of independence and impartiality.

With regard to the quality of the assessment, we are concerned that assessment is conducted on the basis of purely subjective methods of assessment and of medical tests, i.e. the wrist x-ray, which is notoriously unreliable in this context; even conservative sources estimate that there is a margin of error of at least two years in either direction.³

Although we do not have access to proper statistics, quite a number of claims to minor age are rejected (or accepted) simply on the basis of an interview. Credibility assessment obviously plays a large part in determinations made on the basis of one interview, and here the standards applied are anything but clear.

Moreover, we are concerned that the agency conducting the age-assessment is the same one requesting the child's release, accommodating the child once released, and providing legal guardianship, leading to potential conflicts of interest.

Our recommendations

- The Policy should include clear guidelines on the implementation of age assessment procedures for persons claiming to be minors;

³ ILPA (2007) *When is a child not a child?* p. 29

- Following the publication of policy guidelines, we further recommend the formalisation and publication of the age assessment procedure, containing clear statements on core elements such as the procedure's intended duration, panel composition, assessment criteria, appeal and review criteria and procedure, representation and assistance, conduct of the assessment, relevance of documentation, etc;
- All applicants should be duly informed, in a language they understand, of all aspects of the procedure, including information on their relevant rights and duties;
- All decisions should be provided in accordance with administrative requirements: clear, intelligible, motivated and reasoned;
- The persons concerned should be given the benefit of the doubt, as age assessment is by definition imprecise;
- Distinction in personnel between the persons carrying out the assessment of vulnerability and requesting for the child be released. An establishment of an independent body would be preferred.

Care order and guardianship

It is suggested in the draft National Children's Policy (p.44) that the care and custody of children, including unaccompanied children, should be the responsibility of a Board of Professionals instead of the Minister. We would like to stress the importance that such a board has a multidisciplinary competence in order to secure the most appropriate decisions for children with different needs, such as refugee children, children with disabilities, etc.

The highly technical issues related to children in a migration context further stress the importance of this multidisciplinary approach, particularly in view of issues such as: child-related persecution, child soldiers, FGM, culture sensitivity, etc.

Closely linked to the care and custody of the unaccompanied child, is the notion of legal guardianship. It is however not referred to in the draft National Children's Policy.

The legal guardianship of an unaccompanied migrant child should in our view be a one-to-one relationship, where the guardian has the responsibility of the well-being of the child. Several best practices may be observed in a number of EU Member States. In Denmark, for example, the Danish Red Cross⁴ functions as the coordinator of a corps of guardians (most deployed on voluntary basis, with some professionals). The Red Cross carries out the recruitment, training and referral of guardians to unaccompanied minors and seeks to match the guardian and the minor. The role of the guardian is primarily to offer support to the unaccompanied minor in the asylum procedure including contact with authorities, planning social activities and provision of general support.

In this regard, we are concerned that the current arrangements fail to ensure the appointment of legal guardians with sufficient expertise in asylum issues. Furthermore, since the legal guardians are also the social workers responsible for the children, we feel that the necessary distinction between the two roles is blurred. Whilst appreciating the resource limitation, it is also of concern that each legal guardian is responsible for a relatively large number of minors, with a possible negative impact on the quality of the service offered.

We would also like to express our concern at situations where unaccompanied migrant children travel abroad with the consent of the authorities, but never return to Malta. We understand the wish of providing the right of the minors to visit family/friends in other Member States, but are concerned at the possibility of the situation being classified as one of a missing child. In this regard, we would like to highlight the vulnerability of such children to human rights violations such as trafficking, child prostitution, slave labour, etc.

Our recommendations

⁴ In Denmark, the Danish Red Cross is hired by the State to operate most of the asylum centres, including the centres for unaccompanied minors.

- The suggested Board of Professionals should have a multidisciplinary composition;
- The Policy should contain clear policy guidelines on a system of legal guardianship for unaccompanied minors;
- Procedures should be established to ensure that every unaccompanied child does not go missing, locally or overseas.

Trafficking in children

As the draft National Children's Policy mentions there are a number of legal instruments issued to protect children from exploitation (p.42). However, we would like to add that the identification of potentially-trafficked children remains a concern, particularly in relation to migrant children. We are also concerned at the possibility of migrant children being vulnerable to being trafficked following their release from detention, primarily owing to their social, legal and economic vulnerability

Our recommendations

- Procedure for identification of victims of human trafficking should be implemented;
- Implementation of a risk-analysis for assessing the elements that could lead migrant children to being trafficked.

UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD

DAY OF GENERAL DISCUSSION

***“THE RIGHTS OF ALL CHILDREN IN THE CONTEXT OF
INTERNATIONAL MIGRATION”***

28TH SEPTEMBER 2012

JOINT SUBMISSION



9TH SEPTEMBER 2012

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Introduction

The core spirit of this Joint Submission rests on the need to ensure that migrant children have a right to a full and effective application of the principles and provisions of the *Convention on the Rights of the Child* in a manner equal to all other children.

Our experience in working with migrant and asylum-seeking children urges us to reiterate this point and to stress the urgency of adopting a human rights based approach to the interpretation and application of the best interests principle. Too often we have seen and continue to see this principle sacrificed for the sake of heightened securitisation of national and regional borders, exclusive attention to national interests, populism and xenophobic sentiment. On the basis of this understanding, we are presenting this Joint Submission with two main components.

Firstly, we would like to underline the need to adopt a horizontal application and inclusion of migrant child issues. We believe this is central to ensuring that all measures, policies, legal instruments, and practices in international, regional and national law are made equally applicable and accessible to all children, including migrant/asylum-seeking children, irrespective of their legal status and situation. We would like to encourage States to specifically include migrant children within policy and legal discussions on themes affecting children, through methodologies that ensure the mainstreaming of migrant children issues at all levels of dialogue, adoption and implementation. The best interests of the migrant child would be best secured in national and local contexts already structured on the best interests principle.

Secondly, we would like to present input with regard to measures relating to the specific situation of migrant and asylum-seeking children. These areas of particular concern broadly include the following: the asylum procedure, reception conditions, administrative detention, age assessment, and legal guardianship.

Our present input is largely inspired by existing international and regional legal instruments relevant to children's rights: primarily the *Convention of the Rights of the Child*. Yet it is to be noted and strongly reiterated that several other human rights instruments are also of direct relevance, including: the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of all Forms of Racial Discrimination*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Rights of Persons with Disabilities*, the *European Convention for the Protection of Human Rights and Fundamental Freedom* and the *European Social Charter*.

The specific instrument relating to refugees, including refugee children – the *1951 Convention relating to the Status of Refugees* – also forms the basis of our input.

Specific Themes

Together with the above general observations regarding the importance of the horizontal mainstreaming of migrant children issues, we have identified a number of specific areas that we feel should be taken into consideration when addressing the rights of the migrant child.

The asylum procedure

We acknowledge that legal challenges presented by asylum-seeking children may be of a highly technical nature, often requiring a particularly meticulous analysis of the refugee definition. Furthermore, asylum-seeking children often also present logistical challenges in terms of the skills required to interview them in what is by definition a sensitive and unfamiliar context.

Child-specific persecution remains a challenge for all States conducting refugee status determination proceedings, and we also note the difficulty in establishing the child's country of origin or of permanent

residence due to elements such as lack of memory, lack of maturity, communication hurdles, limited documentation or registration possibilities, etc. Trauma related to events experienced in countries of origin and/or countries of transit further exacerbates these challenges, compounded with the need to ensure appropriate psychological, psychiatric or other services for the child's well being.

Yet in the above context we strongly reiterate the fundamental nature of the right of all persons to seek asylum, underlining the utmost importance we attach to ensuring that children – as adults – be granted access to a safe territory where their asylum claims will be heard in a fair and effective manner.

Reception conditions

The best interests principle should also be the key consideration in all decisions relating to the reception conditions provided to migrant children, as established by CRC Article 37. In this regard, it is imperative to reiterate that the principle should be unaffected by the child's manner of entry or stay in a country, and that reception conditions – including those provided in administrative detention centres – should be provided in a manner that does not violate the Convention provisions but which, more importantly, promote and facilitate the child's physical and psychological well-being. They must therefore be child-friendly with due account being taken of the child's rights to civil, political, economic, social and cultural rights as, for example, the right to food and water, health, education, legal recognition, etc.

Administrative detention

We believe that the detention of migrant children is unacceptable and that alternative accommodation measures can and should be resorted to. We strongly support the Committee's *General Comment Number 6(2005)* establishing that the underlying approach should be one of care and not of detention, and that detention is never to be justified on the basis of the child being unaccompanied or separated, or on their migratory or residence status or lack thereof.

Detained children are exposed to an environment that is not only an obstacle to their personal and social development but also of serious detriment to their physical and psychological well-being. Detained children should not to be kept within confined spaces as they have a right to have access to fresh air, sunlight, recreation and an appropriate age-sensitive diet. The child is also entitled to privacy with his/her family. Friends, relatives, religious, social and legal counsel and guardians should be permitted regular contact and visits. Furthermore facilities should not be of hindrance to access to legal aid, they should provide for the child's right to education and should provide the opportunity for the child to receive all basic needs, including medical and psychological counselling.¹

We further wish to underline that the detention of migrants, including adults, is strictly regulated by international and regional human rights law whereby a series of mandatory conditions should be present throughout the entire duration of a migrant's detention. These mandatory conditions include that detention should be in accordance with national law and that national law and procedures should protect the individual from arbitrariness. To avoid arbitrariness the detention must be carried out in good faith, it must be closely connected to the purpose of preventing unauthorised entry or deportation, the conditions of detention must be appropriate (highlighting that this form of detention is unrelated to the commission of a criminal offence) and lastly the duration of the detention must not exceed reasonable length required for the purpose pursued.²

With regard to children – whether accompanied or unaccompanied/separated – we believe that a stricter compliance with these mandatory conditions is required due to the particular vulnerability of children and the demonstrated psychological impact of detention of this category of migrants.

¹ Committee's General Comment 6 (2005).

² International Commission of Jurists (2011) *Migration and international Human Rights Law, Practitioners Guide no. 6*, p.150 and p.152. These principles have been often reiterated by the Human Rights Committee, the European Court of Human Rights, and other key human rights actors.

Regrettably, minors crossing borders in an irregular manner or found to be in an irregular situation are nonetheless automatically detained in many parts of the world. As established in the Committee's *General Comment 6 (2005)* we recommend that release from detention and placement into appropriate accommodation ought to be a priority for all stakeholders. However we also acknowledge that such placement may take a number of days and, under certain circumstances, weeks or months. This is particularly so in countries where the influx of migrants and asylum-seekers poses severe logistical challenges to the competent authorities, either due to their numbers, manner of entry or other aggravating factors. In such circumstances, we urge that the time spent waiting to be placed should be in an environment that is safe and appropriate for children.

Age assessment

All migrants claiming to be minors require efficient, fair and speedy processes to determine whether they are in fact minors or otherwise. In our view, these procedures ought to be characterised by transparency and accountability, as well as consistency. The procedure should be regulated by publicly available, written rules covering essential issues such as procedural timelines, assessment criteria, etc. We are concerned that in several countries the procedural information provided to persons undergoing age assessment is extremely limited, excluding the applicant from active participation in the process. Written decisions should be supported by clear reasons, providing a real possibility of appeal or review. It is important to ensure a real possibility of professional assistance or representation and adequate guarantees of independence and impartiality.

With regard to the quality of the assessment, there seems to be a tendency for the procedures to be conducted on the basis of purely subjective methods of assessment and of medical tests that are known to be unreliable. Moreover, to avoid potential conflicts of interests, the agencies conducting age-assessment procedures must be independent of other agencies dealing with the child's release from detention, accommodation following release, and legal guardianship.

It is also of concern that migrants claiming to be unaccompanied or separated children are at times detained throughout the age assessment procedure, a process that may last up to a number of months. These concerns are further aggravated when the migrant is detained with adults pending outcome of the age assessment procedures.

Legal Guardianship for unaccompanied or separated children

We stress the importance that entities or individuals tasked with the legal guardianship of unaccompanied or separated children be suitably trained and specialised, in order to secure the most appropriate decisions for children with different needs, such as refugee children, children with disabilities, etc. The highly technical issues related to children in a migration context further stress the importance of professional approach, particularly in view of issues such as: child-related persecution, child soldiers, FGM, culture sensitivity, etc.

The legal guardianship of an unaccompanied or separated migrant child should, as far as possible, be an individual relationship. The guardian's role should also extend to offering support to the child in the asylum procedure so as to ensure the full effectiveness of the refugee status determination process.

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Annex – Recommendations

Recommendation 1 – Ensure delivery of professional services

As a general principle, it ought to be ensured that all persons working directly or indirectly with children be appropriately skilled and trained to do so. Furthermore, due to the particular challenges posed by migrant children, especially in forced migration contexts and/or when children are travelling alone, it is imperative that the recognition and enjoyment of children's human rights do not suffer due to limited technical capacity of relevant stakeholders.

Recommendation 2 – Do not detain children

We strongly urge the Committee to reiterate that national or regional migration management measures should never authorise, condone or encourage the detention of children, irrespective of their immigration or asylum status. This is particularly relevant for unaccompanied or separated migrant children pending age assessment procedures, in which cases a presumption of minor age ought to be adopted to ensure that no children are detained.

Recommendation 3 – Age assessment procedures must be in the child's best interests

The Committee is urged to provide technical advice, including guidelines, on how to ensure that age assessment procedures and their implementation do not result in violations of the human rights of migrant children and that the best interests of the child should remain at the heart of such procedures. Furthermore, we urge the Committee to recall the importance of guaranteeing relevant procedural rights particularly providing the child and his/her guardian with information on the procedure's duration, assessment criteria, appeal/review criteria and procedure, representation and assistance, manner of conduct of the assessment, relevance of documentation, acknowledgment of imprecision of age assessment, etc.;

Recommendation 4 – The child must be an active participant in the asylum procedure

Together with recommending that asylum procedures be child-friendly in terms of, for example, inclusive interpretations of the 1951 refugee definition, use of appropriate interpreters, specialised interviewing techniques, acknowledgement of child-specific persecution, and use of experts in child behaviour and psychology, the Committee is also urged to reiterate the procedural rights of an asylum-seeking child. These would include, but are not limited to, appropriate and comprehensible information on the procedural steps, on rights and obligations within the procedure, on possibility to bring documents and other forms of evidence, of appeal/review criteria and procedure, of receiving decisions reasoned in fact and in law, access to lawyers/NGOs/UNHCR, etc.

Recommendation 5 – Appropriate legal guardianship measures are imperative

The Committee is urged to provide technical advice, including guidelines, on various models establishing legal guardianship for unaccompanied or separated children. In this regard, it is imperative that at all times legal guardian acts in the best interests of the child. We urge particular attention to situations where unaccompanied or separated migrant children run the risk of going missing, locally or overseas.

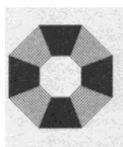
**SUBMISSIONS TO THE
COMMITTEE ON THE RIGHTS OF THE CHILD**

(CONSIDERATION OF STATE REPORTS – MALTA)

DECEMBER, 2012



Malta **Gay** Rights Movement



**Federazzjoni Maltija ta' Organizzazzjonijiet
Persuni b'Dizabilità**
Malta Federation of Organisations Persons
with Disability

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Introduction

This report is being presented to the Committee on the Rights of Child in the context of its examination of the State Report to be submitted by Malta in accordance with the Convention.

As will be immediately noted all data, research, concerns and recommendations are gathered in three thematic sections, three specific perspectives of the child in Malta: children with disabilities; lesbian, gay, bisexual, transgender and intersex (LGBTI) children and children in LGBTI families; migrant, asylum-seeking and refugee children. The three sections are similarly structured, providing general comments followed by more considerations of a more specialised nature.

By way of introduction, it is pertinent to highlight a main concern/recommendation underlying all three sections as it is seen to be central to the way the Maltese authorities are currently approaching their obligations towards the fundamental human rights of children.

All three sections underline the importance of mainstreaming their respective perspectives into all local and national actions relevant to children. Too often, we note how children that somehow pertaining to particular minority or non-mainstream groups are excluded from child-specific policies, laws and schemes. Whilst we acknowledge that some of such situations might be borne of lack of technical capacity in acknowledging the most appropriate manner of respecting, protecting and fulfilling the rights of the child, we are concerned that their impact results – directly or indirectly, intentionally or unintentionally – in legal and social marginalisation.

This report acknowledges extensive efforts made by the Maltese authorities in particular areas, as for example the effective work of the Office of the Commissioner for Children in disseminating the principles and contents of the Convention. Yet we remain concerned that children in Malta are not yet viewed as rights-holders, especially within the three themes we have chosen to highlight.

We hope this report proves to be useful in the Committee's assessment and evaluation of the status of the Convention in Malta, and look forward to receiving the Committee's Conclusions for us to cooperate together and with the relevant authorities in their dissemination and implementation.

Note from the contributing organisations

This document is prepared and submitted by aditus foundation, Jesuit Refugee Service (Malta), the Malta Gay Rights Movement, the Equal Partners Foundation and the Malta Federation of Organisations Persons with Disability.

It is to be noted that the views, concerns and recommendations made in each thematic section may be ascribed to aditus foundation (as report drafter) and the specific organisation relevant to the particular theme. These views do not necessarily reflect those shared by the other organisations.

Disability Perspectives

Positive Developments

We support the enactment of *Equal Opportunities (Persons with Disability) Act, 2000* (Chapter 413 of the Laws of Malta) which provided for the establishment of the Kummissjoni Nazzjonali Persuni b'Diżabilitá (KNPD, National Commission Persons with Disability). Further legal initiatives include: *Legal Notice 461 of 2004*¹ brought into force the *Equal Treatment in Employment Regulations*, which augmented protection against discrimination on several grounds including disability; and *Legal Notice 53 of 2007*² which refers particularly to the provision of suitable accommodation to persons with disabilities³.

We commend the establishment of the *National Minimum Curriculum*⁴ that is meant to 'emphasis self- understanding and emotional development, on values such as respect for differences among people, on the development of social and personal commitment, and so on. There is also, for the first time, an important emphasis on creative thinking, reasoning, decision-making, and problem solving and a sense of curiosity. These are catalysts for the development and economic viability of our society and of the individual girl and boy.'

Furthermore, Malta deposited the documents for the ratification of the UN Convention on the Rights of Persons with Disabilities, which will start being enforced from November 9⁵. This shows a step towards greater commitment to a better quality of life for disabled persons, including children.

General Considerations

We stress the importance of specifically including children with disabilities within policy and legal discussions on themes affecting directly or indirectly them, through process methodologies that ensure their effective mainstreaming at the local and national levels. In this respect, efforts that seek to empower children with disabilities and allow them space to voice their own views ought to be initiated. Access to those legal and policy measures affecting their rights and obligations should be ensured.

We acknowledge the activities and efforts of KNPD, however are concerned that so far public consultation has been largely limited to KNPD with little or no attention being paid to children with disabilities themselves and the vary array of extremely active non-governmental organizations. A broader consultation would certainly ensure a wider perspective on relevant issues, as such engagement "not only ensures that the policies

¹ Available at <http://justiceservices.gov.mt/LegalPublications.aspx?pageid=32&type=4>, accessed 27th October 2012.

² Ibid.

³ European network of legal experts in the non-discrimination field, 'Report on Measures to Combat Discrimination. Directives 2000/43/EC and 2000/78/EC. Country Report 2011 Malta. State of affairs up to 1st January 2012', available at <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination>, accessed on 27th October 2012.

⁴ Available at <http://www.curriculum.gov.mt/nmc.htm>, accessed 9th December 2012.

⁵ Times of Malta, 'Malta ratifies the UN 'disability' convention', 26th October 2012.

are targeted to their needs and desires, but also functions as a valuable tool for inclusion since it ensure that the decision-making process is a participatory one.”⁶

In this regard, we feel that the setting up of an appropriate coordinating mechanism between various government and non-governmental institutions is essential. We support that *“this body should be multisectoral, including all organizations public or private. It must be empowered and supported from the highest possible levels of Government to allow it to function at its full potential”⁷.*

NGOs often provide various care and support services with sometimes limited funding and/or recognition from public authorities. We encourage the State to *“support and cooperate with NGOs enabling them to participate in the provision of services for children with disabilities and to ensure that they operate in full compliance with the provisions and principles of the Convention”⁸.*

We are concerned that the rights of children with disabilities might be prejudiced due to the limited availability of parent training and access to full and inclusive information on available services and organisations. We therefore strongly recommend the strengthening of structures providing appropriate training for parents of children with disabilities. Furthermore, a more inclusive approach is required to ensure that children and parents are given full access to information on all existing organisations and services, so that they may make informed decisions on important matters. In the long-term, parents and children with more appropriate information will be in a better position to avoid the concerns highlighted below, particularly with regard to health and interpersonal matters.

Together with the above general comments, we would also like to present our concerns and recommendations with regard to the inclusion of measures relating to the specific situations of children with disabilities. These areas of concern broadly include: access, education, health and integration into Maltese society.

Specific Considerations

Access

Physical access to several buildings, including those of a public nature, remains problematic, thus hindering access to many services. Such a hindrance may also be observed in relation to a number of public schools, we have received reports of children with disabilities not being able to pursue their studies (general or specific) due to classes being located on higher and inaccessible levels.⁹

In order to further encourage and promote the empowerment and increased independence of children with disabilities, improved access to public transport services is urgently required. Whereas a number of public buses are equipped with the necessary access functionalities, the vast majority are not. We also note that signage and directions at bus stops are not available in accessible formats. Whereas this is also

⁶ Committee on the Rights of the Child, ‘*General Comment 9*’ (2006).

⁷ Ibid.

⁸ Ibid.

⁹ See Committee on the Rights of the Child, ‘*General Comment 9*’ (2006) paragraphs 39-40.

problematic for adults with specific disabilities, in the context of children we note the occurrence of double discrimination and the increased negative impact of these limitations on the child fulfilling his/her rights. Any further steps to facilitate the use of public transport by children with disabilities are encouraged, since lack thereof compromises the child's possibility of self-reliance and personal growth. It also denies access to several rights, including health and education.

Education

We welcome the establishment of learning support in State mainstream schools, provided by facilitators and other learning support assistants (LSAs)¹⁰. Further positive initiatives include: pre-schooling facilities offered at home for children with a disability who have not yet attained the age of four years, mainstream schooling by peripatetic teachers to hearing impaired children and the establishment of the Home-Teaching Scheme of the Ministry of Education that caters for the instruction of children who are housebound, through visits by a specially designated teacher¹¹. We emphasise the need for such services to be truly accessible to whoever requires them and that knowledge of such services be widely disseminated.

Yet we also strongly urge the educational authorities to ensure that these measures should not be seen as an alternative to increased teacher training on inclusion in classroom setting. The presence of an LSA in the classroom should not be viewed as an alternative teacher to the child with disability. We are further concerned that the current model highlight's the child's exclusion from the class setting, focusing on differences instead of empowerment through inclusion. In this regard, we would recommend a class-model approach whereby the classroom's entire educational needs are taken into account, moving away from dealing with inclusion matters on an individual basis to a truly mainstreamed and comprehensive approach.

Whilst, as stated, we do welcome the introduction of LSAs into schools, we are concerned that the current required qualifications to become an LSA are far too low, not reflecting the highly technical and challenging tasks performed. Furthermore, we recommend that LSAs receive on-going professional education to ensure that they are adequately trained in contemporary methodologies on educational inclusion, with regard to specific aspects of disability as well as to general elements.

Bullying in schools remains problematic and further awareness and attention ought to be paid in cases of children with disabilities, due to their increased vulnerability to being victims of bullying. Children suffering from particular disabilities may be unable to recognize that they are being bullied, or may be unable or unwilling to speak up, resulting in the incidents not being reported. Indeed, it is often quoted that '*children with disabilities are five times more likely to be victims of abuse*¹²'. Furthermore, as stated above, we feel that the one-on-one approach for LSAs singles out such children and works against their educational and social inclusion, encouraging labelling by peers and focusing on the individual children's needs rather than potential.

¹⁰ UN, 'Second periodic report of States parties due in 1997 Malta', 5 May 2010.

¹¹ Ibid.

¹² Committee on the Rights of the Child, 'General Comment 9' (2006). See paragraph 42 -43.

Article 29 of CRC establishes that the education of the child shall be directed to “*development of the child’s personality, talents and mental and physical abilities to their fullest potential*”. In Malta, the State is required to ensure access to education to all children between five and sixteen years of age¹³, however it seems that a number of obstacles prevent children suffering from certain disabilities, particularly mild/severe Down syndrome, from reaching their fullest potential within such duration. At primary, secondary and MATSEC¹⁴ level there is no established notion of differentiated exam papers to ensure proper academic assessment and therefore effective continuing access to education.

In several reported cases, this results in children with disabilities being unable to sit for yearly or end-of-school exams, despite possibly spending the entire academic year engaged in intense academic efforts. Courses similar to the ‘Pathway Course’¹⁵ established by the Malta College of Arts, Science and Technology (MCAST) should be encouraged.¹⁶

Health

The Ministry of Health offers diagnostic services for all persons with disabilities, and medical assessments of any type or degree of disability, physiotherapy, limited speech, therapy services, as well as genetic counselling by way of information and advice regarding the cause and prevention of disabilities¹⁷. We fully support this and all other services provided, whilst acknowledging that such support and services do require improvement, since these are currently rather weak and coordinated.

We reiterate our above recommendation calling for a national coordination mechanism whereby better communication between the health and education authorities could be facilitated. Effective compilation and sharing of relevant statistics by the health authorities (e.g. number of children with disabilities, nature/severity of the disabilities, data disaggregated by age, etc.), with due safeguards protecting the children’s privacy, could better inform policy-making and operational efforts by the education authorities. For example, such data could be utilised to prepare mid- and long-term plans on ensuring effective access to education and employment by such children.

We share the Committee concern at the “*high number of children with disabilities being placed in institutions and the opinion that institutionalization is the preferred placement option*”¹⁸. Whilst the streaming of children in schools has been recently phased out, we remain concerned that there remains a trend in recommending and encouraging parents to send their children to specialised and segregated educational establishments.

¹³ Laws of Malta, *Education Act* (Chap. 327).

¹⁴ The Matriculation and Secondary Education Certificate (MATSEC) Examinations Board was established in 1991 by the Senate and Council of the University of Malta. The Board was entrusted with the development of an examination system to replace the GCE Ordinary and Advanced level examinations set by UK examination boards. The new board also took over the function of the Matriculation Board which also used to set examinations at Ordinary and Advanced level in a number of subjects.

¹⁵ Available at http://www.mcast.edu.mt/support_pathwaycourse.asp, accessed on 27th October 2012.

¹⁶ See Committee’s *General Comment 9* (2006) paragraph 64 – 68.

¹⁷ UN, ‘*Second periodic report of States parties due in 1997 Malta*’, 5 May 2010.

¹⁸ Committee’s *General Comment 9* (2006).

Whilst we appreciate the possible logistical challenges faced by educators and educational institutions when attempting to adopt an inclusive approach to education, we strongly reiterate our objection to any form of encouragement, effort and measures directing towards the educational and social segregation of children with disabilities. It is imperative that appropriate financial, human and capacity resources are directed towards supporting mainstream service-providers to enable them to guarantee the rights of all children.

The right of the child to his/her own privacy, and the extent to which this is related to sexual and reproductive health issues remain a great concern, also seen in the a great lack of institutional dialogue and information on such matters. We are seriously concerned that the lack of institutional ownership of these issues results in a nation-wide taboo and information and service vacuum. In relation to the children themselves, we are aware that these challenges impinge on their social and emotional development since they remain excluded from interpersonal relationships and are generally deprived from the capacity to decide on their own lives, hence limiting their rights to privacy and family life.

We note that substantial numbers of parents seem to refrain from encouraging their children's engagement in mainstream social activities. It seems that this is in part due to the limited accessibility of such activities to children with disabilities, but also due to limited efforts at empowering children through social interactivity. These elements raise concerns with regard to Convention Article 31¹⁹.

Furthermore, due to lack of knowledge, misinformation and resultant fear we have received reports of parents expressing a wish to sterilise their children as a means to prevent grandchildren with disabilities or prevent sexual abuse of their children. We find these reports extremely disturbing. Sterilisation is a serious, permanent and very intrusive medical intervention and should only be considered in the context of serious medical needs, and should require as far as possible the child's full informed consent. Forced sterilisation by parents constitutes an extremely serious violation of the rights of the child, including exposure to cruel, inhuman or degrading treatment, limitation of the right to marry and found a family, unjustified intrusion into the child's private life and, ultimately, an affront to the child's dignity as a human being.

We recommend that the Maltese authorities consider this with utmost gravity by ensuring that all of its information and counselling services include a sexual and reproductive health component targeting children and parents. Furthermore, we also encourage the health authorities to ensure that no health practitioners – whether public or private – engage in the forced sterilisation of children unless absolutely necessary.

Inclusion

A predominance of the charity model over the social model of persons with disabilities is still existent in Maltese society. This is reflected in the view that persons with disabilities

¹⁹"States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity." See also Committee's General Comment 9 (2006) paragraph 71-72.

are to be dealt with on a daily basis instead of seen as an investment for their own futures, and for that of the wider Maltese society. The lack of a national long-term vision for proper inclusion in Malta fails to address such an attitude.

Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) perspectives

Introduction

The Malta state report submitted to the UN Committee on the Rights of the Child fails to satisfactorily delve into matters concerning LGBTI issues in relation to children. We believe that a further in-depth look into such issues is required since we believe it is insufficient and incomplete to merely declare that in Malta all people – including children – are protected against any discrimination based on sex, religion, disability, age, sexual orientation and race by means of the Equality for Men and Women Act, 2004 (Chapter 456 of the Laws of Malta) and by Legal Notice 461 of 2004, Equal Treatment in Employment Regulations²⁰.

Positive Developments

We welcome the adoption in 2012 of hate crime legislation that extended the scope of existing legislation from race and creed to also include sexual orientation and gender identity²¹. We are pleased to acknowledge that the changes were brought about as an immediate political and legal reaction to a violent incident against two young lesbians earlier in 2012²².

We also welcome the position taken by the MEP's in support of a resolution to condemn homophobic laws and discrimination in Europe adopted by the European Parliament²³.

General Considerations

We would like to encourage policy- and decision-makers to include LGBTI children more specifically throughout policy and we recommend a mainstreaming approach so that LGBTI child issues are addressed wherever appropriate, thus securing the best interests and well being of the children involved. We further recommend the establishment within the Office of the Commissioner for Children of a specific monitoring mechanism/procedure that would look into *de facto* experiences of LGBTI children.

²⁰ The Laws of Malta, Subsidiary Legislation 452.95, Available at <http://justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono&p=1&lawid=8566> accessed 24th October 2012.

²¹ Laws of Malta, *Criminal Code*, Cap 9.

²² See Times of Malta, 'MGRM welcomes approval of hate crime law', available at <http://www.timesofmalta.com/articles/view/20120620/local/mgrm-welcomes-approval-of-hate-crime-law.425092>, accessed 24th October 2012.

²³ Times of Malta, 'Gay lobby welcomes resolution', 27th May 2012, available at <http://www.timesofmalta.com/articles/view/20120527/local/Gay-lobby-welcomes-resolution.421429>, accessed 12th November 2012

This monitoring mechanism/procedure would need to gather data on experiences of LGBTI children, violence and discrimination, and evaluate the effectiveness of related policies. Such a good practice, on a more general level, may be seen in operation through the establishment of a Dutch National LGBT monitor in the Netherlands²⁴.

We would also like to highlight that LGBTI children should not be seen as one whole indistinct group: the distinct needs of lesbian, gay, transgender, bisexual, intersex and queer children need to be acknowledged.

Together with the above general considerations, we would like to present our concerns and recommendations with regard to the introduction of measures relating to certain specific issues faced by LGBTI children and LGBTI families. These areas of concern include: bullying in schools, intersex and transgender children, and LGBTI families.

Specific Considerations

Bullying in Schools

On a comparative level, LGBTI youth are deemed to be at an increased risk at experiencing violence, primarily due to the negative attitudes towards them. Violence includes: bullying, name-calling, harassment and physical assault²⁵. Violence may lead LGBTI children to feel stressed, depressed and at times ashamed of whom they are²⁶. Regrettably, more studies are needed to better understand the effects of such violence on LGBTI youth.

The Malta Gay Rights Movement's (MGRM) survey on sexual orientation and gender identity discrimination against lesbian, gay, bisexual and transgender persons in Malta in 2006-2008²⁷ found that 73.8% of the respondents felt the need to conceal their orientation from other students. Indeed, the survey also found a positive correlation between the degree of concealment of one's relationship and one's level of education, with respondents having tertiary education tending to conceal their relationship more than others.

Furthermore, 78.6% of the respondents said they concealed their sexual orientation and/or gender identity from teachers, the most common reason being fear that the teacher will not be sympathetic, possibly indicating that teachers might not project themselves as being open to LGBT students. Due to this fear, it seems that LGBT children who experience homophobic and transphobic bullying are not willing to turn to teachers for support and the matters go unreported. The survey also found:

²⁴ Final Seminar Report: '*Good Practice Exchange seminar on public policies combating discrimination against and promoting for LGBT people*', by Niall Crowley (Thematic Expert), The Netherlands 18-19 March 2010. (Good Practice Exchange Seminar).

²⁵ Survey: '*Sexual orientation and gender identity discrimination against lesbian, gay, bisexual and transgender persons in Malta*', The Malta Gay Rights Movement (MGRM), 2006-2008 (MGRM Survey).

²⁶ *ibid*, also look at 'MGRM: Think Before You Speak: Making Life Better for LGBT Youth' Campaign statements, available at <http://www.maltgayrights.org/latest.php?ref=localcamp03>, accessed 24th October 2012.

²⁷ Available at <http://www.maltgayrights.org/publicationsselected.php?title=LGBT%20Discrimination%20in%20Malta>, accessed 24th October 2012.

“Lack of LGBT role models for students among their teachers”²⁸

“most LGBT teachers conceal their sexual orientation for fear that they may lose their job or be undermined by other teachers, heads of schools, education authorities, students and their parents”²⁹.

The report further found that 16.7% of those who were subjected to physical violence experienced violence by fellow students at school, 11.3% of all respondents were harassed at an educational institution, and an alarming 53.3% of those who were under 18 years of age reported at least three incidents of psychological harassment by fellow students. The ages of the perpetrators varied, and included children less than 12 years of age for 6 respondents, yet in most cases it involved fellow students in their age group.

All this indicates that homophobic bullying at Maltese schools is rife and needs to be addressed with urgency. This shows a possible failure of the State to adhere to certain duties established under Convention Article 29 that states that education of the child shall be directly aimed to the *“development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations”*, and that education ought to prepare the child for a *“responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin”*.

“I was insulted, humiliated and ridiculed repeatedly at school, on the Internet and by messages on the mobile phone.”

Gay minor, male.³⁰

“At school I was subjected to general verbal abuse by fellow students many times... Some teachers tried to help the situation.”

Gay minor, male.³¹

The impact of such negative experiences on LGBT students during their formative years is often devastating, as evidenced by the fact that respondents who had been subjected to violence and harassment at school were less open about their sexual orientation and/or gender identity at the workplace, and more prone to discrimination and harassment, rendering these youth serial victims of discrimination, violence and harassment³².

Whilst we welcome the introduction of the Anti-bullying Policy³³ in Malta, we however believe that such policy needs to be further broadened and enhanced, so as to ensure the inclusion of a specific reference to homophobia and transphobia within this policy. Alternatively a specific Anti-homophobic and Anti-transphobic bullying policy may be introduced. Various countries have such specific policies in their schools since specifically mentioning the issues further addresses the matter.

²⁸ MGRM Survey.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ ‘*L-Imġieba Tajba fl-iskejjel*’ 1999 (Anti-Bullying Policy), available at <https://www.education.gov.mt/Page.aspx?pid=211&depid=2&pageid=14>, accessed 24th October 2012.

We do acknowledge that some Maltese schools have taken active action to prevent bullying through lessons and other activities promoting equality, and discussions on diverse forms of relationships and sexual orientations. Some Maltese schools have also requested books to assist teachers in their work, and child-appropriate booklets regarding LGBTI issues. However, we are concerned that such activities are not regularised or structured on a national level, mainly depending upon a school's initiative.

Recommendations

- We recommend that the Anti-Bullying Policy in Malta be further broadened and enhanced in order to ensure reference to homophobic and transphobic bullying;
- We recommend that diversity awareness and education in Maltese schools is specifically included in the national curriculum, to be coupled with specific activities promoting respect for LGBTI students.

Intersex and Transgender Children

The Maltese residential care system, such as orphanages and shelters, are in most cases segregated by the child's officially recognised gender once the child reaches the age of nine years. This recognition is largely based on the sex assigned to a person at birth on the basis of primarily physical characteristics. In public schools, children are gender-segregated at the age of eleven. Such division also exists within Corradino Correctional Facilities, and also within its section for the detention of minors, 'Youth Offenders Unit Rehabilitation Services' (Y.O.U.R.S.).

Segregation by the child's officially acknowledged gender raises several concerns with regard to transgender children. Issues faced include problematic use of toilets and changing rooms, the child's name, uniforms, etc. Many of the *"negative attitudes towards trans and intersex people are directly correlated to the importance that a determinate society place on the binary gender model and the level of gender stereotypes, sexism and gender inequalities that exist within it"*³⁴.

Regrettably, institutional segregation on the basis of the child's officially-recognised gender rather than on that with which the child truly identifies often results in transgender children often feeling that they simply do not fit in, negatively impacting their educational, emotional, social and development processes. We believe that transgender children should be permitted to attend school, and be treated by the school, in accordance with the gender they identify with. We also identify the need for further education and awareness, in order for society and other children to be more inclusive and for teachers and institutions to be better equipped to comprehend and deal with such issues.

We are concerned that such a rigid approach to child registration and treatment in school often leads to transgender children dropping out of school. Due to the nature of the right to education, its limitation or deprivation could readily result in increased risks of unemployment and homelessness, and in several cases engagement in illicit activities to ensure livelihood. In the case of transgender persons, this causal link between limited access to education and eventual social exclusion, poverty, exploitation and abuse is crudely evident.

³⁴ European Commission, 'Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression', 2012.

In view of these serious short-comings, we are concerned that such inadequate solutions could result in Malta's failure to adhere to the duties established in Convention Article 28: mainly a failure to ensure that education is available and accessible to all, and a failure to take measures to encourage regular attendance at schools and reduce drop-out rates.

Negative impacts of a this automatic registration and treatment based on official documentation may be seen through in case of a transgender teenager (female) at the Youth Offenders Unit Rehabilitation Services' (Y.O.U.R.S.). Such teenager had not undergone sex reassignment surgery, and was unable to rectify her personal documentation to reflect her female identity. She was consequently treated as being male, resulting in:

- Placement in the male section, leading to humiliation, bullying, verbal abuse, insults and jeering;
- Denial of permission to possess bras, resulting not only in physical discomfort but in a physical appearance that attracts further degrading and humiliating comments and behaviour;
- With regard to body searches and other security measures, the 17-year old was regularly searched by male security officers;
- She was regularly singled-out and excluded from activities conducted in the yard and other areas, on the pretence that she saunters around and attracts vulgar comments and behaviour;
- She was not granted permission to be in possession of items other girls are authorised to keep, such as hair clips, make-up and particular items of clothing;
- We are concerned that a teenager who experienced above-average stress levels due to personal factors is unnecessarily exposed to an environment that further exacerbates feelings of exclusion, lack of physical protection, loneliness and discrimination;
- It seems like no clear, objective and non-arbitrary rules exist for procedures and decisions on clothing, personal possessions, etc. Instead, decisions seem to be taken on an individual and discretionary basis. This lack of transparency, clarity and accountability should be avoided.

Health Care

"In Malta, one baby a year is born with ambiguous genitalia, throwing parents into a quandary as to the sex of their child and how to bring it up. The victim of the condition known as intersex (or hermaphrodite) is also plunged into a state of confusion, mental and emotional torment"³⁵.

In Malta, when a child is born intersex, the relevant doctor either chooses the sex of the child immediately if he/she deems the allegedly proper sex of the child obvious, or establishes the sex of the child upon further tests being carried out. The parents are often consulted with regards to the matter, however it is most likely that at such a stage they will follow the doctor's recommendations, especially considering the state of shock they may be in, and lack of knowledge available regarding the matter. Should the child grow up and associate with a gender identity different to the sex assigned at birth,

³⁵ The Times of Malta, 'Pink on intersex and stalking', 18th May 2007.

he/she will be treated as a transgender person. A child who is assigned a sex he or she does not identify with suffers life-long damage³⁶.

Furthermore, this fails to respect a child's right to choice and to develop one's own identity, a choice that may at times stand somewhere in between 'male' and 'female'. The importance of the views of the child is acknowledged in several other areas of Maltese legislation. As established through the '*Malta State Report – The Second period report of States Parties due in 1997*', the importance of the views of the child can be seen in various areas of legislation, such as that of adoption and international child abduction. Such legislation seeks to ensure that children of a certain age and maturity are given a choice with regard to important decisions in their life. We submit that this approach should be further transposed into the area of gender identity, in view of the gravity of any decisions – and their implications – taken in this regard.

It is appreciated that at times medical procedures could be necessary to sustain the physical health of the intersex child, however we believe that such decisions and considerations on these medical procedures should be approached with extreme caution. We acknowledge that intersex children may pose particular challenges to parents, yet maintain that 'normalising' surgery should not be viewed as the solution for such distress. We believe that intersex new-borns should be given the time and opportunity to decide which gender they belong to, if at all, and that decisions of a particularly long-term or irreversible nature be taken with due consideration to this decision. The same cautious approach should be followed in regard to transgender children; surgery should never be a requirement for acknowledgment of such child's gender identity, nor should it be viewed as a solution to possible any distressed caused.

The Maltese authorities need to ensure that appropriate procedures, systems and stakeholders are established to respect, protect and promote the child's physical and psychological integrity. As established by the Intersex Society of North America (ISNA), "*Genital 'normalizing' surgery does not create or cement a gender identity; it just takes tissue away that the patient may want later*"³⁷. Surgery should only take place either once a child is mature enough to make an informed decision for herself or himself or where the child's parents/guardians are in a position to take such a decision on behalf of the child.

Mainstream service-providers ought to be resourced and mandated to allow them to provide aid and support to the children and families through, *inter alia*, facilitating the creation of peer support groups and ensuring access to trained psychologists, social workers and other professionals.

Furthermore, we also note that specific policy and rules are required throughout the Maltese legal spectrum, for to date no legislation covers these issues. Indeed we support ILGA-Europe in requesting the Maltese authorities to "*depathologise intersex bodies and provide intersex people with due recognition*"³⁸.

³⁶ AlbertaTrans.org, '*Intersex is not to be Confused with Transgender Issues*', 30th September 2006.

³⁷ Available at <http://www.isna.org/faq/patient-centered>, accessed 24th October 2012.

³⁸ ILGA-Europe's statement on the occasion of the International Day for Trans and Intersex Depathologisation (20 October).

We also stress the need for a shift in policy approach towards the depathologisation of transgender and intersex persons, towards the understanding that transgender and intersex children are not suffering from any mental illness. We firmly support ILGA-Europe in their strong belief that this *“de-humanising classification has to end without further delay”*³⁹. In this respect, it is encouraging to see that the European Parliament adopted a clear position on the need for the World Health Organization to stop considering transgender people as mentally ill⁴⁰.

Such a stance needs to be reflected in both law and policy, so as to encourage a challenge of dominant social attitudes.

Recommendations

- The gender identity of the child is to be respected and that the child be treated in accordance to such identity. In practical terms this means allowing transgender children to be registered or treated in schools in accordance with their self-determined gender;
- Training of staff in order for them to be better equipped to deal with such issues;
- Law and policies ought to be established to respect, protect and promote the rights of intersex children. At a minimum, such laws and policies ought to consider that medical procedures should not be the automatic institutional response, unless necessary due to health reasons, and that the child’s views be given due consideration;
- All diversity campaigns and efforts should also refer to issues particular to intersex persons.

‘An Act to further amend the Civil code’ - Act XVIII of 2004

Act XVIII of 2004 of the Laws of Malta establishes a procedure in Articles 257A to 257D whereby a transgender person can file a case in court requesting an annotation to be made in their act of birth reflecting their affirmed gender and also their new name.

We wholly support the amendments brought about by this Act and acknowledge the benefits derived therefrom, however it is important to keep in mind that most transgender children depend on a parent/guardian to initiate the procedure.

A key obstacle for children to access the procedure laid down in Act XVIII of 2004, relates to the requirement of ‘permanence’ with regard to one’s affirmed gender. Consistent court practice has highlighted the impossibility of pre- and non-operative transgender persons to avail themselves of the procedure. We firmly believe that *“no one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity”*⁴¹, especially children. A state-imposed requirement for a person to undergo sex

³⁹ Ibid.

⁴⁰ See, <http://www.lgbt-ep.eu/press-releases/who-must-stop-treating-transgender-people-as-mentally-ill/>, accessed 24th October 2012.

⁴¹ Yogyakarta Principle Number 3.

reassignment surgery in order for the state to recognise their true gender runs “*counter to the respect for the physical integrity of the person*”⁴².

Moreover, sex reassignment surgery remains a highly risky intervention, may involve the removal of the person’s procreative organs and thereby effectively being a permanent sterilising procedure potentially having severe long-term health implications⁴³. It is incorrect to base gender recognition procedures on the presumption that transgender persons are able and willing to undergo such an intervention, for despite the fact that the majority of transgender persons view this treatment as necessary it would be incorrect to presume that all transgender persons feel so⁴⁴.

Additionally, sex reassignment surgery in children of a young age is not always possible, and in some cases also recommendable. Seen as a good practice, earlier this year Argentina adopted gender recognition legislation that does not require “*any medical or surgical requirements for the legal gender recognition of trans people. Additionally, this law guarantees a high standard of trans related healthcare to trans persons as needed*”⁴⁵.

The ECtHR has in a number of cases stated that the right to respect for a person’s private life as enshrined in Article 8 ECHR incorporates within it the right to respect for a person’s physical integrity, strengthening the notion of personal physical autonomy⁴⁶. Thus, for example, the Court concluded “*that the imposition of medical treatment without consent, including unwanted medication and psychiatric evaluation, raises serious issues...however slight the intervention*”⁴⁷. We submit that state-imposed sex reassignment surgery does in fact constitute an undue ‘interference’ in a person’s private life. Rendering gender recognition dependant on such interference, particularly in the case of children is tantamount to serious violations of the child’s rights.

Difficulty and failure by children to access such a procedure prevents a child from legally acquiring a certified gender that matches their gender identity, resulting in consequential violations of the child’s rights in relation to access to education, social care and other institutional support.

We therefore reiterate that transgender children, including pre- and non-operative transgender children, should be treated in accordance with their true gender identity rather than the sex established on their birth certificates.

⁴² Council of Europe, Commissioner for Human Rights, Issue Paper: *Human Rights and Gender Identity* (July 2009), available at http://www.coe.int/t/commissioner/Activities/IPList_en.asp, accessed 26th September 2010, pg. 18.

⁴³ MGRM, ‘*A Proposed Gender Identity Act for Malta*’, December 2010 (MGRM – Proposed Gender Identity Act) available at <http://www.maltagayrights.org/localcampaignsselected.php?title=Proposed%20Gender%20Identity%20Act%20For%20Malta>, accessed 24th October 2012.

⁴⁴ Ibid.

⁴⁵ ILGA-Europe Statement.

⁴⁶ See *X vs. Austria* No 8278/78 (1979) on blood tests; *Peters vs. the Netherlands* No 21132/93 (1994) on urine tests; *Pretty vs. the United Kingdom* (2002) on assisted suicide; *Glass vs. the United Kingdom* (2004) on medication interventions in the context of parental opposition; *Stork vs. Germany* (2005) on psychiatric treatment in an institution; *X and Y vs. the Netherlands* (1985) on an unwelcome physical attack; *Tysiack vs. Poland* (2007) on abortion in the context of related health risks; and *Evans vs. the United Kingdom* (2007) on decisions to have or not to have children; in Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, Oxford University Press, Second Edition (2009), pages 266-267.

⁴⁷ *Supra* at 32, pg. 366.

Recommendations

- Render the rectification of documentation accessible to pre- and non-operative transgender persons, thereby rendering the procedure accessible to children. This in line with MGRM, ‘A Proposed Gender Identity Act for Malta’⁴⁸, December 2010.

LGBTI families

Articles 257A to 257D of Act XVIII of 2004, outlined above, not only affect a transgender child’s right to be legally recognized in accordance with their self-determined gender identity, but also disrupts a child’s right to a family. We are concerned that the requirement by law⁴⁹ that a person be unmarried in order to access the court procedure negatively affects a child’s right under Convention Article 8.

This because the requirement to be unmarried renders a transgender parent *“subject(ed) to the conflict of deciding on either upholding the marriage, but thereby not obtaining legal recognition of his or her sexual identity, or of divorcing his or her partner against his or her own will, and hence not only accepting separation from him or her, but also losing the legal security that is associated with marriage”*⁵⁰. We point out that annulment or divorce proceedings may be very expensive, far from immediate and emotionally distressing to any immediate family members, including children. Indeed such proceedings raise many complicated emotional and legal issues.

In relation to children having same-sex parents, a number of concerns may be raised primarily in direct relation to Malta’s lack of legal recognition of same-sex couples. Unlike a child born or raised by a different-sex couple, generally enjoying two legally recognised parents, a child born to or raised by a same-sex couple (e.g. from a previous relationship, artificial insemination or adoption, etc.) may result in having only one legal parent.

“Where the child’s biological parent is in a same-sex relationship, the child enjoys no legal relationship with the biological or adoptive parent’s partner and the absence of such a relationship results in the child not enjoying the social, legal, material and affective benefits generally equated with parental responsibility.

In very practical terms this means that a gay man or lesbian woman in loving, caring and stable same sex relationship is not recognized by the law as having a legitimate interest in deciding or even contributing to deciding, what is and is not in the best interests of a child h/she could have raised since child birth. Instead, in the absence of the biological parent, the law would prioritise possible strangers

⁴⁸MGRM – Proposed Gender Identity Act.

⁴⁹Laws of Malta, Civil Code, Cap.16, Article 257A (2) *Before delivering judgment, the Court shall appoint experts to verify whether the person who has brought the action has, in fact, undergone an irreversible sex change from that indicated in the act of birth or has otherwise always belonged to such other sex.*

⁵⁰MGRM – Proposed Gender Identity Act.

*to the child's life: the law courts, the child's grandparents, aunts and uncles and in some cases, child care institutions*⁵¹.

In our view, this situation deprives the child of his/her fundamental human rights as enshrined in the Convention.

Indeed adoption of a child by the partner of the biological or adoptive parent is not currently possible, hence such partner has no parental responsibilities at law. We stress that this runs counter to any consolidation of the family unit and adversely equates "parental responsibility and authority being vested in the child's sole biological parent"⁵².

We further stress, as also established in *E.B v. France*⁵³, that adoption applications refused merely due to the sexual orientation of the applicant violate the principle of non-discrimination.

Lack of recognition of same-sex couples and parenthood in Malta also affects children of same-sex couples moving to Malta from a country that recognized the parenthood of same-sex couples. Maltese public policy and laws will only legally recognize one of such parents as the parent of the child. The child legally loses a parent upon migration to Malta.

We advocate marriage equality, or at least a form of legal recognition that acknowledges equal rights and obligations to same-sex couples, in this regard due to the related direct and indirect impact on any children involved in the relationship. ILGA-Europe report regarding, 'The Rights of Children raised in Lesbian, Gay Bisexual or Transgender Families: a European Perspective' establishes the following key issues⁵⁴:

- Unrecognized LGBT co-parents face severe difficulties on a daily basis in important matters affecting the child as, for example, schooling, travelling, medical treatment and religious affiliation. It is emphasized that the ultimate damage being done to the child's best interests;
- People who play an actual parenting role in the child's life should be able to exercise the child's legal representation;
- The invisibility of an LGBT co-parent could also lead to the related invisibility of the child's siblings;
- In the immigration context, unrecognized LGBT persons may be prevented from living in the same country as their families;
- The matrimonial home protection, and other property related protection regimes, denied to unrecognized LGBT families could endanger the child's physical security, particularly in the eventuality of the death of the person with whom the child's home is associated;
- Children are not automatically entitled to the inheritance of their unrecognized LGBT co-parent;

⁵¹ MGRM, 'MGRM's Position Paper on Marriage Equality. Advocating the Best options of legislating for same sex couples and Families in Malta', 2012 (MGRM – Marriage Equality Paper), available at <http://www.maltgayrights.org/latest.php?ref=localcamp04>, accessed 24th October 2012.

⁵² Ibid.

⁵³ ECtHR, Application No. 43546/03, 22nd January 2008.

⁵⁴ Available at http://www.ilga-europe.org/home/get_involved/your_space/resources/the_rights_of_children_raised_in_lesbian_gay_bisexual_or_transgender_families_a_european_perspective, accessed 24th October 2012.

- The legal framework that is triggered when marriages break down is also intended to offer maximum protection to the children. Unrecognized same-sex relationships do not trigger these protection mechanisms, leaving the children vulnerable to abuse and emotional turmoil;
- Having only one parent listed on the child's official documentation violates the child's right to his/her own private and family life.

We believe that any arguments deeming same-sex couples to be unfit parents, or any such similar study are based on a discriminatory approach to the LGBTI community. A key resolution adopted by the American Psychological Association Council of Representatives in July 2004 stressed the fact that the parenting skills of any individual are in fact wholly unrelated to his/her sexual orientation and that other elements are far more relevant and important in such analysis⁵⁵. The resolution stresses that *“there is no scientific evidence that parenting effectiveness is related to parental sexual orientation”* resolving that *“the APA supports the protection of parent-child relationships through the legislation of joint adoptions and second parent adoptions of children being reared by same-sex couples”*⁵⁶.

Recommendations

- Act XVIII of 2004 be amended in order to permit the transgender parent to access the process established therein and simultaneously respecting the unity and maintenance of the family. Divorce or annulment should not be the indirect result of a transgender parent wishing to affirm their gender identity;
- Malta should ensure a legal recognition of same-sex relationships that guarantees maximum levels of protection for children with same-sex parents;
- Adoption, including second parent adoption, by same-sex couples ought to be recognized and permitted in order for the child to benefit from all the legal implications of such persons being recognised as parents.

⁵⁵ MGRM, *‘MGRM’s Position Paper on Marriage Equality. Advocating the Best options of legislating for same sex couples and Families in Malta’*, 2012(MGRM – Marriage Equality Paper), available at <http://www.maltgayrights.org/latest.php?ref=localcamp04>, accessed 24th October 2012.

⁵⁶ American Psychological Association Council of Representatives, *Sexual Orientation, Parents, & Children*, 28th and 30th July 2004, available at <http://www.apa.org/about/governance/council/policy/parenting.aspx>, accessed 24th October 2012.

Migration/Asylum Perspectives

Positive Developments

We welcome the initiative of the draft National Children's Policy and that such policy has been developed on a rights-based approach.

We support the introduction of the right to review a person's detention under the Immigration Act whenever it is felt that the period of detention is unreasonable, established in the Amendments to the Refugees Act in 2004⁵⁷. However we remain concerned at the ultimate ineffectiveness of this remedy.

General Considerations

We would like to underline the need to adopt a horizontal reading of migrant child issues throughout national law and policy. We believe this is central to ensuring that all measures, policies, legal instrument and practices in national law are made equally applicable and accessible to all children, including migrant/asylum-seeking children, irrespective of their legal status and situation. Accessibility is essential to the success of any law; we therefore suggest that this be taken into consideration in the finalisation and implementation stages of any law, in particular respect to the draft National Children's Policy.

We would like to encourage the inclusion of migrant children within policy and legal discussions on themes affecting children, through methodologies that ensure the mainstreaming of migrant children issues at all levels of dialogue, adoption and implementation. The best interests of the migrant child would be best secured in national and local contexts already structured on the best interests principle.

Specific Considerations

Together with the above general recommendations recommendation regarding the horizontal mainstreaming of migrant children issues throughout the draft National Children's Policy, we have identified a number of specific areas that we feel should be taken into consideration when addressing the rights of the migrant child.

The asylum procedure

We welcome the fact that the Office of the Refugee Commissioner automatically grants Temporary Humanitarian Protection to all minor asylum-seekers, since this ensures their protection until they turn eighteen. Furthermore the recent efforts to organise information sessions by the Office of the Refugee Commissioner upon arrival, with specially conceived material and use of interpreters, represents a real improvement in the asylum procedure generally.

The legal challenges presented by asylum-seeking children may be of a highly technical nature, often requiring a particularly meticulous analysis of the refugee definition.

⁵⁷ UN, 'Second periodic report of States parties due in 1997 Malta', 5 May 2010

Furthermore, asylum-seeking children often also present logistical challenges in terms of the skills required to interview them in what is by definition a sensitive and unfamiliar context.

Regrettably, child-specific persecution remains a challenge for all States conducting refugee status determination proceedings, and we also note the difficulty in establishing the child's country of origin or of permanent residence due to elements such as lack of memory, lack of maturity, communication hurdles, limited documentation or registration possibilities, etc. Trauma related to events experienced in countries of origin and/or countries of transit further exacerbates these challenges, compounded with the need to ensure appropriate psychological, psychiatric or other services for the child's well being.

Yet in the above context we strongly reiterate the fundamental nature of the right of all persons to seek asylum, underlining the utmost importance we attach to ensuring that children – as adults – be granted access to a safe territory where their asylum claims will be heard in a fair and effective manner.

- Together with recommending that asylum procedures be child-friendly we reiterate the importance of respecting the procedural rights of an asylum-seeking child. Decisions often fail to provide sufficient reasons in fact and in law. Reasons for rejection may only be accessed, upon request by a legal assistant, for the short period of one hour, resulting in a hindrance in the ability to adequately appeal such decisions, where an appeal is necessary. A lawyer is ethically bound by his profession to keep information confidential, hence arguments based on the need to protect the privacy of the child concerned are not sufficient to justify such practice; If unaccompanied minors attend their interview with their legal guardian, several concerns surround this function by the absence of training of legal guardians performing this duty with unaccompanied migrants' children. It ought to be noted that one member of the Agency of Welfare of Asylum Seekers (AWAS) hold the function of legal guardian for all the recognised unaccompanied minors accommodated in their centres.
- The lack of legal assistance throughout this first instance interview does not provide sufficient guarantee in regard to special needs of unaccompanied minors. Contrary to point 202 of the report issued by the Maltese authority to the Committee, Jesuit Refugee Service is not supporting the unaccompanied minors in Dar is-Sliem. Within the limited capacity of the NGO, JRS is not able to provide information session and legal advice to all minors in the centres.
- Additionally, we express great doubt in the competence of the current Appeals Board in dealing with child specific persecution. The Appeals board must be composed of trained professionals who hold the expertise required to deal with such sensitive matters.

Recommendations

- Guardianship should be meaningful, individual and independent from an agency such as AWAS;
- Legal guardian should be efficiently trained for the particular situation and circumstances of unaccompanied migrant children;
- Free legal representation and provisions of legal advice should be systematically provided due to the special needs and vulnerable position of unaccompanied minors;

- All personnel of the Office of the Refugee Commissioner and of the Refugee Appeals Board should receive appropriate induction and on-going training in dealing with the specificities of asylum-seeking children;
- Due to particular challenges posed by migrant children, especially in forced migration contexts and/or when children are travelling alone, it is imperative that the recognition and enjoyment of children's human rights do not suffer due to limited technical capacity of relevant stakeholders.

Reception conditions

The best interests principle should also be the key consideration in all decisions relating to the reception conditions provided to migrant children, as established by CRC Article 37. In this regard, it is imperative to reiterate that the principle should be unaffected by the child's manner of entry or stay in a country, and that reception conditions – including those provided in administrative detention centres – should be provided in a manner that not only does not violate the Convention provisions but which, more importantly, promotes and facilitates the child's physical and psychological well-being. They must therefore be child-friendly with due account being taken of the child's rights to civil, political, economic, social and cultural rights as, for example, the right to food and water, health, education, legal recognition, etc.

We welcome that the draft National Children's Policy outlines that children, including those entering Malta in an irregular manner should be provided with adequate ambience and accommodation (p.26). We also believe that the Policy should emphasise its extension and applicability to the reception conditions in which children entering Malta in an irregular manner are detained.

Furthermore, whilst acknowledging the great efforts by the Agency for the Welfare of Asylum Seekers (AWAS) at accommodating children in appropriate facilities, we remain concerned at the use of facilities such as the Hangar Site Tent Village in Hal Far to house families with children or unaccompanied minors that will soon turn 18 years of age.

Recommendations

- Improved reception conditions for migrant children, including the avoidance of their detention and of accommodating them in sub-standard reception facilities.

Administrative detention

We believe that the detention of migrant children is unacceptable and that alternative accommodation measures can and should be resorted to. We strongly support the Committee's *General Comment Number 6(2005)* establishing that the underlying approach should be one of care and not of detention, and that detention is never to be justified on the basis of the child being unaccompanied or separated, or on their migratory or residence status or lack thereof. Hence we further support the draft National Children's Policy in adopting such an approach and clearly confirming that detention of minors is unacceptable and that alternative methods should be resorted to

(p.26 and p.43). Asylum seekers as a whole should be accommodated in open rather than closed centres⁵⁸.

In relation to current practice, it is to be noted that despite a policy affirming the non-detention of children, all minors entering Malta in an irregular situation are automatically detained⁵⁹. Accompanied minors are detained with their families until required medical clearance is obtained for the entire family and placement in an Open Centre is possible. The placement may take a number of days and, under certain circumstances, weeks or months. The waiting time should be in an environment safe to children.

Persons claiming to be unaccompanied minors or separated children are detained throughout the age assessment procedure, a process that may last up to a number of months. We would also like to note that throughout this procedure, the minors are not detained in segregated sections but are kept with adults. We are concerned at the safety risks presented by this joint accommodation of adults and persons claiming to be minors.

- Unaccompanied minors often report to be bullied in detention by their fellow adult detainees. More than once, minors claimed that their food or toiletries were stolen by adults and threats forced them to abstain complain. In another occurrence, a minor that suffered mental health issues during his stayed was labelled as “mad” and therefore suffered discrimination and isolation from other detainees.
- It has been reported that in one occurrence, three unaccompanied minors started a protest by climbing on the top of the six-meter barbed wire fence threatening to jump if no answers regarding their age assessment was given to them five months after their arrival. The other detainees joined their protest after tear gas was spread in the compound and the protest was later jugulated with geared up soldiers, tear gas and rubber bullets. We were informed by the authorities that a number of recognise minors were still in detention, three weeks after being recognised because their care order was still to be issued.

Detained children are exposed to an environment that is not only an obstacle to their personal and social development but also of serious detriment to their physical and psychological well-being.

In most detention centre the access to fresh air is regulated to certain hours. In Lyster Barracks, each zone (of approximately 60 detainees) has access to one hour everyday in a yard surrounded by barbed wire and high fence. As the yard is just down the whole building which contains five zones, some detainees, particularly the women, are often reluctant to enjoy their sole hour outside, feeling uncomfortable to be so exposed to the male zones.

There are no activities available for recreation offered on a regular basis neither access to school is possible in detention. The diet is not age-sensitive and constant complains relate the meal as being repetitive, tasteless, over or under cooked. Family tracing is dependant of the Red Cross branches visits.

⁵⁸European Parliament ' *Report by the LIBE Committee delegation on its visit to the administrative detention centres in Malta*', Rapporteur: Giusto CATANIA, March 2006

⁵⁹ See, Human Rights Watch, report

Detained children should not be kept within confined spaces as they have a right to have access to fresh air, sunlight, recreation and an appropriate age-sensitive diet. The child is also entitled to privacy with his/her family. Friends, relatives, religious, social and legal counsel and guardians should be permitted regular contact and visits. Furthermore facilities should not be of hindrance to access to legal aid, they should provide for the child's right to education and should provide the opportunity for the child to receive all basic needs including medical and psychological counselling.⁶⁰

We would further like to add that delays have been noted between the decision on the minor age and the release of the child resulting in unnecessary duration in detention. Such delays could be related to the provision of required medical clearance, the issuing of a care order and the lack of availability of place in an Open Centre.

As established in the Committee's General Comment 6(2005) we recommend that release from detention and placement into appropriate accommodation ought to be a priority for all stakeholders. However we also acknowledge that such placement may take time particularly when the influx of migrants and asylum-seekers poses severe logistical challenges to the competent authorities, either due to their numbers, manner of entry or other aggravating factors. In such circumstances, we urge that the time spent waiting to be placed should be in an environment that is safe and appropriate for children.

Recommendations

- Stricter compliance with human rights standards to secure children from being detained;
- Minors should not be placed in detention – not even for a shorter period of time.

Age assessment

All migrants claiming to be minors are processed by an Age Assessment Panel established by the Agency for the Welfare of Asylum Seekers (AWAS), with a view to determine whether the applicant is in fact a minor or otherwise. Persons found to be minors are released upon attainment of the required medical clearance and issuance of a care order from the Ministry.

In our view, the age assessment procedure is characterised by a lack of transparency and accountability, as well as a lack of consistency:

- The Age Assessment Panel is not regulated by publicly available, written rules including core issues such as procedural timelines, assessment criteria, Panel composition, etc. In fact, the panel composition is very variable and subject to internal arrangement;
- The procedural information provided to persons undergoing assessment is extremely limited. Written decisions (all provided in English ***when*** they are provided) are never supported by reasons, with no real possibility of appeal or

⁶⁰ Committee's General Comment 6 (2005)

- review. The person concerned can only ask for it to be reviewed, but do not have a guarantee for revision;
- There is no real possibility of any form of professional assistance or representation and inadequate guarantees of independence and impartiality.
 - Interpreters are rarely professionally trained and too often, fellows' detainees are chosen for their apparent skill in the English Language, therefore lacking of cultural or gender sensitivity as well as confidentiality;
 - Some alleged unaccompanied minors openly changed their declaration regarding their date of birth to be considered as adult and not have to wait for the assessment which can very much take longer time than the asylum procedure, often leaving children behind in detention, while adult granted protection would be released.

With regard to the quality of the assessment, we are concerned that assessment is conducted on the basis of purely subjective methods of assessment and of medical tests, i.e. the wrist x-ray, which is notoriously unreliable in this context; even conservative sources estimate that there is a margin of error of at least two years in either direction.⁶¹

Although we do not have access to proper statistics, quite a number of claims to minor age are rejected (or accepted) simply on the basis of an interview. Credibility assessment obviously plays a large part in determinations made on the basis of one interview, and here the standards applied are anything but clear.

Moreover, we are concerned that the agency conducting the age-assessment is the same one requesting the child's release, accommodating the child once released, and providing legal guardianship, leading to potential conflicts of interest.

Recommendations

- The Policy should include clear guidelines on the implementation of age assessment procedures for persons claiming to be minors;
- Following the publication of policy guidelines, we further recommend the formalisation and publication of the age assessment procedure, containing clear statements on core elements such as the procedure's intended duration, panel composition, assessment criteria, appeal and review criteria and procedure, representation and assistance, conduct of the assessment, relevance of documentation, etc.;
- All applicants should be duly informed, in a language they understand, of all aspects of the procedure, including information on their relevant rights and duties;
- All decisions should be provided in accordance with administrative requirements: clear, intelligible, motivated and reasoned;
- The persons concerned should be given the benefit of the doubt, as age assessment is by definition imprecise;
- Distinction in personnel between the persons carrying out the assessment of vulnerability and requesting for the child be released. An establishment of an independent body would be preferred.

⁶¹ ILPA (2007) *When is a child not a child?* p. 29

Care Order and guardianship

It is suggested in the draft National Children's Policy (p.44) that the care and custody of children, including unaccompanied children, should be the responsibility of a Board of Professionals instead of the Minister. We would like to stress the importance that such a board has a multidisciplinary competence in order to secure the most appropriate decisions for children with different needs, such as refugee children, children with disabilities, etc.

The highly technical issues related to children in a migration context further stress the importance of this multidisciplinary approach, particularly in view of issues such as: child-related persecution, child soldiers, FGM, culture sensitivity, etc.

Closely linked to the care and custody of the unaccompanied child, is the notion of legal guardianship. We note that this is not referred to in the draft National Children's Policy.

The legal guardianship of an unaccompanied migrant child should in our view be a one-to-one relationship, where the guardian has the responsibility of the well-being of the child. The guardian's role should also extend to offering support to the child in the asylum procedure so as to ensure the full effectiveness of the refugee status determination process. Several best practices may be observed in a number of EU Member States. In Denmark, for example, the Danish Red Cross⁶² functions as the coordinator of a corps of guardians (most deployed on voluntary basis, with some professionals). The Red Cross carries out the recruitment, training and referral of guardians to unaccompanied minors and seeks to match the guardian and the minor. The role of the guardian is primarily to offer support to the unaccompanied minor in the asylum procedure including contact with authorities, planning social activities and provision of general support.

In this regard, we are concerned that the current arrangements fail to ensure the appointment of legal guardians with sufficient expertise in asylum issues. Furthermore, since the legal guardians are also the social workers responsible for the children, we feel that the necessary distinction between the two roles is blurred. Whilst appreciating the resource limitation, it is also of concern that each legal guardian is responsible for a relatively large number of minors, with a possible negative impact on the quality of the service offered.

We would also like to express our concern at situations where unaccompanied migrant children travel abroad with the consent of the authorities, but never return to Malta. We understand the wish of providing the right of the minors to visit family/friends in other Member States, but are concerned at the possibility of the situation being classified as one of a missing child. In this regard, we would like to highlight the vulnerability of such children to human rights violations such as trafficking, child prostitution, slave labour, etc.

Recommendations

⁶² In Denmark, the Danish Red Cross is hired by the State to operate most of the asylum centres, including the centres for unaccompanied minors.

- The suggested Board of Professionals should have a multidisciplinary composition;
- The Policy should contain clear policy guidelines on a system of legal guardianship for unaccompanied minors;
- Procedures should be established to ensure that every unaccompanied child does not go missing, locally or overseas.

Trafficking in children

As the draft National Children's Policy mentions there are a number of legal instruments issued to protect children from exploitation (p.42). However, we would like to add that the identification of potentially-trafficked children remains a concern, particularly in relation to migrant children. We are also concerned at the possibility of migrant children being vulnerable to being trafficked following their release from detention, primarily owing to their social, legal and economic vulnerability

Recommendations

- Procedure for identification of victims of human trafficking should be implemented;
- Implementation of a risk-analysis for assessing the elements that could lead migrant children to being trafficked.

**NGO SUBMISSIONS TO THE
UNIVERSAL PERIODIC REVIEW (UPR) OF MALTA,
DURING ITS 17TH SESSION (2013)**

SUBMITTED BY THE FOLLOWING ORGANISATIONS:



aditus foundation (2011) is an independent, voluntary and non-profit NGO established with a view to monitor, act and report on access to fundamental human rights. We believe in the universality, interdependence and indivisibility of all human rights.

www.aditus.org.mt

aditus coordinated this joint submission & contributed to all sections.



Integra

Integra foundation (2004) is a non-profit organisation based in Malta, operating independently of any political, economic or religious affiliation at a global level. The Foundation's vision is that of supporting inclusive, non-discriminating and non-disabling societies, where all individuals have the right to human dignity, freedom, respect and social justice.

www.integrafoundation.org

Integra contributed to the General and the Migration/Asylum sections.



The **Jesuit Refugee Service Malta (1993)** is the Malta branch of an international Catholic organisation working in 57 countries around the world. JRS Malta seeks to accompany, serve and defend the rights of asylum-seekers and forcibly displaced persons who arrive in Malta.

www.jrsmalta.org

JRS contributed to the General and the Migration/Asylum sections.



KOPIN (2000) is a voluntary, autonomous, non-profit and non-governmental organisation based in Malta working in the field of North-South cooperation and global education.

www.kopin.org

KOPIN contributed to the General and the Migration/Asylum sections.



Equal Partners Foundation (1999) is a parent-run, non-profit foundation providing individualised support programmes to over 250 children and adults with disabilities and/or learning difficulties and their families.

www.equalpartners.org.mt

Equal Partners contributed to the General and the Disability sections.

This is a Joint NGO Submission, with each organisation's substantive contribution made clear above. The organisations wish to note that the views of one organisation are not necessarily shared by the other contributing organisations.

March 2013

EXECUTIVE SUMMARY

1. This Joint NGO Submission is presented thematically, with concerns and recommendations divided into key sections also representing the areas of operation of the contributing organisations. We also hope that such thematic division will facilitate reading and referencing.
2. In each section, keywords are presented in **bold**.
3. The first section present **General** observations made by the contributing organisations, mainly about the absence of an accredited national human rights institution in Malta. We are also highlighting the fact that no national structured communication platform is available for civil society in its broadest form to engage in effective dialogue with the governmental authorities. Although *ad hoc* initiatives are seen at agency or department level, human rights dialogue remains a struggle for civil society, particularly for those working in the area of advocacy.
4. In the area of **Disability**, our concerns relate primarily to the educational system and how an inappropriate approach is preventing students with disabilities from successfully entering the labour market and achieving any degree of self-reliance. We are also flagging physical accessibility issues, also in relation to public transport as a key tool for persons with disabilities to engage in employment and also social activities.
5. A key area of concern in this section relates to sexual and reproductive health, an area shrouded in taboo and misconceptions that yet again impedes the holistic development of persons with disability since it denies access to a series of rights, including freedom of expression, to marry and found a family, to physical and psychological integrity, and to privacy.
6. With regard to **Migration/Asylum**, our key areas of concern relate to Malta's mandatory detention policy, that applies to all persons apprehended whilst attempting to enter the island without due authorisation. The policy applies indiscriminately to everyone, including asylum-seekers and vulnerable individuals, and is implemented through the use of sub-standard detention centres that raise concerns regarding the disrespect of human dignity. Procedural concerns are also key, insofar as it is effectively impossible for any migrant to challenge the legality of his/her detention.
7. We are also expressing our concerns at the treatment of migrant children and at policies and laws that do not cater for increasingly large number of migrants left stranded in Malta with little social support or future prospects.
8. The **LGBTI** section is largely focused on transgender persons, to emphasise their status as one of Malta's most vulnerable categories of persons. Despite recent legal developments, transgender persons do not enjoy legal recognition of their affirmed gender and regularly face tough obstacles in exercising their most basic and core human rights such as education and social assistance. Due to these obstacles, they are socially marginalised, victimised, bullied and often victims of violence. Institutionalised refusal to acknowledge their affirmed gender further exacerbates this situation.
9. We also highlight the absence of any form of legal recognition for same-sex couples, with all the social and legal implications attached to this lacuna.
10. Finally, we also present concerns relating to LGBTI families insofar as children of same-sex parents are being denied their fundamental human rights in violation of the best interests of the child principle.

GENERAL

11. Malta has **no accredited national human rights institution (NHRI)**. Existing institutions (e.g. the Office of the Ombudsman, the National Commission for the Promotion of Equality, etc.) are not too effective and their mandates differ significantly. This leads to a fragmented approach with varying and inconsistent levels of protection for different themes, with some groups of persons having no specific agency mandated to protect their human rights.
12. Although judicial proceedings are available for human rights victims, we believe that a human rights agency should be mandated to operate in cases and areas without the need of individual victims, in order to adopt a general and flexible approach in line with the Paris Principles. Furthermore, **the judicial system is not necessarily the most accessible or effective means of redress for certain groups of victims**, as for example detained migrants and other victims requiring a more immediate form of redress.
13. Existing **institutions and measures to combat discrimination**, particularly that based on racial origin and sexual orientation/gender identity, are ineffective primarily due to the nature of the remedy offered, lack of trust of victims in the relevant procedures and agencies, and an environment of fear and disempowerment.
14. Malta has **no formal dialogue mechanism** to engage with civil society on issues pertaining to human rights. Whereas various agencies might have *ad hoc* systems, no nation-wide platform is available, rendering human rights monitoring and advocacy particularly challenging.

PERSONS WITH DISABILITIES

Positive Developments

15. We support the enactment of *Equal Opportunities (Persons with Disability) Act*, 2000 (Chapter 413 of the Laws of Malta) which provided for the establishment of the Kummissjoni Nazzjonali Persuni b'Dizabbiltá (KNPD, National Commission Persons with Disability). Further legal initiatives include: *Legal Notice 461 of 2004*¹ brought into force the *Equal Treatment in Employment Regulations*, which augmented protection against discrimination on several grounds including disability; and *Legal Notice 53 of 2007*² which refers particularly to the provision of suitable accommodation to persons with disabilities³.
16. We also welcome the establishment of the *National Minimum Curriculum*⁴.
17. Furthermore, the *UN Convention on the Rights of Persons with Disabilities* was ratified on 9th November 2012⁵, showing a greater commitment towards securing an improved quality of life for disabled persons, including children.
18. Other positive initiatives include:
 - a. The establishment of learning support in State mainstream schools, provided by

¹ Available at <http://justiceservices.gov.mt/LegalPublications.aspx?pageid=32&type=4>, accessed 8th March 2013.

² Ibid.

³ European network of legal experts in the non-discrimination field, 'Report on Measures to Combat Discrimination. Directives 2000/43/EC and 2000/78/EC. Country Report 2011 Malta. State of affairs up to 1st January 2012', available at <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination>, accessed on 6th March 2013.

⁴ Available at <http://www.curriculum.gov.mt/nmc.htm>, accessed 8th March 2013.

⁵ Times of Malta, 'Malta ratifies the UN 'disability' convention', 8th March 2013

- facilitators and other **Learning Support Assistants (LSAs)**⁶;
- b. Pre-schooling facilities offered at home for children with a disability who have not yet attained the age of four years;
- c. Mainstream schooling by peripatetic teachers to hearing-impaired children; and
- d. The establishment of the **Home-Teaching Scheme** of the Ministry of Education catering for the instruction of children who are housebound, through visits by a specially designated teacher⁷.

Issues and Considerations

19. Within the educational system, it seems that **student integration is prioritized over student inclusion**.
20. With regard to the above-mentioned LSAs, these are generally viewed as alternative teachers for the child with disability. The current model **highlights the child's exclusion** from the class setting, focusing on differences and the child's particular needs, rather than promoting empowerment through inclusion. We have received reports of children with disability being sent home whenever the LSA is not present or when exams are taking place, further highlighting a non-inclusive approach.
21. We are also concerned that the current required qualifications to become an LSA are far too low, not reflecting the highly technical and challenging tasks performed.
22. At primary, secondary and MATSEC⁸ level there is no established notion of **differentiated exam papers** to ensure proper and effective academic assessment and therefore appropriate continuing access to education. In several reported cases, children with disabilities were unable to sit for yearly or end-of-school exams, despite possibly spending the entire academic year engaged in intense academic efforts. The long-term impact of these obstacles is primarily noted with regard to onward difficulties accessing the labour market and achieving minimum levels of self-reliance.
23. Despite legal and institutional developments, **physical access** to several buildings, including those of a public nature, remains problematic. Such a hindrance may also be observed in relation to a number of public schools. We have received reports of children with disabilities not being able to pursue their studies (general or specific) due to classes being located on higher and inaccessible levels⁹.
24. Access to public transport is also greatly hindered since the vast majority of public buses are not equipped with the necessary access functionalities.
25. Of serious concern are reports of parents expressing a wish to sterilize their children as a perceived means to preventing grandchildren with disabilities, preventing possible sexual abuse of their children, or protecting their children from possible emotional turmoil. We underline that **forced sterilization** is a serious, permanent and very intrusive medical intervention and should only be considered in the context of serious medical needs, and as far as possible with the person's full and informed consent.

Recommendations

⁶ UN, 'Second periodic report of States parties due in 1997 Malta', 5 May 2010.

⁷ Ibid.

⁸ The Matriculation and Secondary Education Certificate (MATSEC) Examinations Board was established in 1991 by the Senate and Council of the University of Malta. The Board was entrusted with the development of an examination system to replace the GCE Ordinary and Advanced level examinations set by UK examination boards. The new board also took over the function of the Matriculation Board which also used to set examinations at Ordinary and Advanced level in a number of subjects.

⁹ See Committee on the Rights of the Child, 'General Comment' (2006) paragraphs 39-40.

26. Discourse and policy approaches should shift from an integration-based perspective to one focused on **inclusion**, in line with the overall spirit of the **CRPD**.
27. **Universal Design** (Article 2 of CRPD) should be adopted as a mainstream approach across all policy areas, and the private sector should be encouraged and supported to also embrace it.
28. Persons with disabilities should be **actively included** within policy and legal discussions on themes affecting them directly or indirectly, through process methodologies that ensure their effective mainstreaming at the local and national levels.
29. Broader **public consultation** with civil society is required. In this regard, we recommend the establishment of an appropriate coordinating mechanism between various government and non-governmental institutions.
30. Access to public transport services ought to be ensured, including accessible information at bus stops.
31. Implement a more inclusive approach ensuring full access to information by persons with disabilities on all existing organisations and services so as to ensure that decisions are informed and free.
32. Within public and private educational systems, implement a class model approach whereby the classroom's entire educational needs are taken into account, moving away from dealing with inclusion matters on an individual basis to a **truly mainstreamed and comprehensive approach**.
33. LSAs should receive on-going professional education, and the necessary qualifications to undertake LSA duties should be raised to guarantee a more professional approach.
34. Engage with persons with disabilities and their families on discussions about **sexual and reproductive health**.

MIGRATION & ASYLUM

Positive Developments

35. We welcome the introduction of the right to request a **review of a person's detention** under the *Immigration Act*, whenever it is felt that the period of detention is unreasonable, established in 2004¹⁰. We also welcome the extension of this possibility to review the legality of a person's detention. However we remain concerned at the ultimate ineffectiveness of this remedy, resulting in the effective impossibility of a detained person to challenge the legality of his/her detention.
36. Since Malta's membership of the European Union, it has **transposed all relevant legislation**, resulting in a marked improvement in the nature and quality of rights and procedures afforded to migrants, asylum-seekers and refugees. Yet we remain concerned at the stark gap between the law and the harsh reality faced by persons seeking refuge in Malta.
37. We welcome the fact that the Office of the Refugee Commissioner automatically grants **Temporary Humanitarian Protection to all minor asylum-seekers**, since this ensures their protection until they turn eighteen. Furthermore the recent efforts to organise **information sessions** by the Office of the Refugee Commissioner upon arrival, with specially conceived material and use of interpreters, represents a significant improvement in the asylum procedure.
38. The creation of the **Temporary Humanitarian Protection (THP) and Temporary Humanitarian Protection New (THPN)** statuses is a welcome introduction, although their definition and content remain undefined and discretionary.

¹⁰ UN, 'Second periodic report of States parties due in 1997 Malta', 5 May 2010.

39. We note with satisfaction efforts by authorities to improve the **living conditions** of persons detained in Lyster Barracks, largely funded by the European Union. This has been done through various renovation efforts, as well as through the organisation of a series of activity-based projects.
40. We welcome the introduction and implementation of a government policy whereby persons deemed to be **vulnerable** are kept in detention for as short a time as possible.

General

41. The **THP and THPN statuses** are not established by law, but are policy decisions without any legal definitions or criteria. For example, access to healthcare is uncertain.
42. Migrants released from detention but who have not been recognised as refugees or granted any form of protection, live in a **legal limbo**. Whereas they are granted the possibility to access regular employment and healthcare, they have little or no access to education and social welfare. Unable to be returned to their countries of origin, they have limited future possibilities, running the risk of becoming marginalised and excluded.
43. As highlighted in ‘*Access to health care and living conditions of asylum-seekers and undocumented migrants in Cyprus, Malta, Poland and Romania*’ (2011)¹¹ and ‘*Bridging Borders*’ (JRS, 2012), migrants face challenges when seeking to **access healthcare services**, including communication difficulties, lack of trust in the system, lack of understanding of the way the system works, lack of clarity regarding legal entitlements, poor living conditions, lack of cultural competence among staff and prejudice or hostility.
44. The legal entitlements of beneficiaries of subsidiary protection are vague and only guarantee a basic standard of living, with difficulty. The term “**core welfare benefits**” is not defined in national law and practice has revealed the severe limitations of current policy. Migrants with other statuses, excluding refugees, are in a more problematic situation due to the absence of policy and legal provisions regulating their situation.

Detention and Open Centres

45. Malta implements a policy of **mandatory and automatic migrant detention**, found to violate fundamental human rights by the European Court of Human Rights in *Louled Massoud v. Malta*¹². It is regrettable to note that since then no effective changes were made to the policy to bring it in line with human rights standards. Due to this long-standing concern, further applications were brought before the ECtHR, and are currently pending¹³.
46. The policy and its implementation raise a series of concerns¹⁴:

¹¹ Available here http://interwencjaprawna.pl/docs/wpdt2011_1_en.pdf, accessed on 10th March 2013.

¹² Available here <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100143>, accessed 10th March 2013.

¹³ *Ibrahim Suso Musa v. Malta* (42337/12), available here <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114705>; and *Aslyia Aden Ahmed v. Malta* (55352/12), available here <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114704>.

¹⁴ See Human Rights Watch, ‘*Boat Ride to Detention*’, 2012, available at <http://www.hrw.org/reports/2012/07/18/boat-ride-detention-0>, Council of Europe’s Commissioner for Human Rights, ‘*Report by Thomas Hammarberg following his visit to Malta from 23 to 25 March 2011*’, 2011, available at <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstraneImage=1858117&SecMode=1&DocId=1749792&Usage=2>, Council of Europe’s European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ‘*Report to the Maltese Government on the visit to Malta carried by the CPT from 19 to 26 May 2008*’, 2011, available at <http://www.cpt.coe.int/documents/mlt/2011-05-inf-eng.pdf>, International Commission of Jurists, ‘*Malta: not here to stay*’, 2012, available at <http://www.icj.org/malta-not-here-to-stay/>.

- a. **Appalling material living conditions.** Safi Barracks consists of two warehouses, where conditions are extremely poor. In Lyster Barracks, recently refurbished, conditions are still far from ideal. All centres are cold during winter months, with no systematic provision of warm clothing, with migrants often lacking basic items such as socks, closed shoes, underwear and soap for washing clothes. Although single women are no longer detained with men, couples are detained together without any provision for privacy or security;
 - b. Whilst we welcome the reduced duration of time spent **minors in detention**, they could still spend some two to three weeks awaiting the issue of necessary documentation and placement in a non-custodial facility. Unaccompanied minors whose age is disputed remain detained with adults throughout the age assessment procedure. The Committee on the Rights of the Child recently noted concerns with regard to these procedures;
 - c. Impossibility of effectively **challenging the legality** of one's detention;
 - d. Detention centres are run by either **army officers or retired security personnel**, mostly male. There are no caring professionals working in detention on a permanent basis;
 - e. Only very limited **training** is provided to Detention Service personnel;
 - f. Although instances of **violence and ill-treatment** have reduced significantly over the last five years, there are still occasional incidents where excessive force is used, at times with tragic results. Such incidents occur mostly in contexts such as protests or escape from detention, when force is used to assert control over detainees. The **deaths** of Mamadou Kamara (June 2012) and Christian Ifeanyi (April 2011) are two examples of such incidents. Other examples include the incidents occurring at Safi on 13th and 24th March 2008, and 16th August 2011. We further note that the findings of the inquiries into the deaths of the two migrants remain unpublished, with little or no visible action taken thereon;
 - g. Disciplinary rules in detention remain unclear, arbitrarily implemented with no mechanism in place for the systematic review of the conduct of Detention Service personnel;
 - h. The Board of Detention Visitors, mandated to **monitor conditions** in detention centres, has an extremely limited mandate without the necessary resources to implement its monitoring duties. Furthermore, its establishing law does not grant it sufficient authority to have any real impact;
 - i. Detained migrants requiring in-patient treatment for **mental illnesses** are accommodated in Ward 8B at Mount Carmel Hospital. Conditions in this ward are extremely harsh, described in detail by the Council of Europe's Committee on the Prevention of Torture in its report following its 2008 visit to Malta.
47. Conditions in government-run accommodation centres (**Open Centres – OCs**) differ. In the smaller centres, most of which house families or unaccompanied minors, conditions are acceptable and the level of care provided is adequate. In the larger centres, conditions are **generally poor** and the small staff to resident ratio means that the level of care and support provided is very low. The creation of a Care Team within the Agency for the Welfare of Asylum-Seekers (AWAS) to provide support to OC residents who need support is a positive step, however more needs to be done to ensure that the needs of residents in OCs are adequately catered for.
48. To date Malta has no policy on **integration** – this is true for all categories of migrants. This, coupled with the fact that there is no one single authority charged with dealing with issues relating to integration means that legal and policy questions take much longer to be addressed and are rarely dealt with in a holistic and coordinated manner.

Recommendations

49. As a matter of urgency, **improve material living conditions** in administrative detention centres
50. **Revise the mandatory detention policy** to bring it in line with international and regional human rights standards regarding deprivation of liberty;
51. Actively explore the possibility of resort to **alternatives to detention**, particularly in the case of children;
52. Revise the Open Centre system so as to shift towards a **community-based approach** that promotes and supports the integration of refugees and migrants and offers protection services to those who might require them;
53. Revise the mandate of the Board of Detention Visitors for it to effectively monitor detention centres in line with **UN CAT** and other relevant instruments;
54. Engage in **constructive dialogue** with all relevant stakeholders, including NGOs and migrant and refugee groups, to regularly revisit and revise laws, policies and practices.

LGBTI

Positive Developments

55. We welcome the adoption in 2012 of **hate crime legislation** that extended the scope of existing legislation from race and creed to also include sexual orientation and gender identity¹⁵. We are pleased to acknowledge that the changes were brought about as an immediate political and legal reaction to a violent incident against two young girls earlier in 2012¹⁶.
56. We also welcome the extension of the remit of Malta's main **equality body**, the National Commission for the Promotion of Equality, to include sexual orientation and gender identity, albeit within limited spheres of activity¹⁷.
57. We also welcome the position taken by the MEP's in support of a resolution to condemn homophobic laws and discrimination in Europe adopted by the European Parliament¹⁸.
58. Act XVIII of 2004 of the Laws of Malta amended the *Civil Code* to establish a procedure whereby a post-operative **transgender** person may file a case in court requesting an annotation to be made in his/her act of birth reflecting the affirmed gender and also the new name.

LGBTI Youth in Education

59. The **Malta Gay Rights Movement's (MGRM)** survey on sexual orientation and gender identity discrimination against lesbian, gay, bisexual and transgender persons in Malta in 2006-2008¹⁹ found that 73.8% of the respondents felt the need to conceal their orientation

¹⁵ Laws of Malta, *Criminal Code*, Cap 9.

¹⁶ See Times of Malta, 'MGRM welcomes approval of hate crime law', available at <http://www.timesofmalta.com/articles/view/20120620/local/mgrm-welcomes-approval-of-hate-crime-law.425092>, accessed 7th March 2013.

¹⁷ Malta Independent, 'NCPE with an extended remit', 5th August 2012, available here <http://www.independent.com.mt/articles/2012-08-05/news/ncpe-with-an-extended-remit-314147/>, accessed 11th March 2013.

¹⁸ Times of Malta, 'Gay lobby welcomes resolution', 27th May 2012, available at <http://www.timesofmalta.com/articles/view/20120527/local/Gay-lobby-welcomes-resolution.421429>, accessed 12th November 2012.

¹⁹ Available at <http://www.maltgayrights.org/publicationsselected.php?title=LGBT%20Discrimination%20in%20Malta>, accessed 7th March 2013.

- from other students. Indeed, the survey also found a positive correlation between the degree of **concealment** of one's relationship and one's level of education, with respondents having tertiary education tending to conceal their relationship more than others.
60. Furthermore, 78.6% of the respondents said they concealed their sexual orientation and/or gender identity from teachers, the most common reason being fear that the teacher will not be sympathetic, possibly indicating that teachers might not project themselves as being open to LGBT students. Due to this fear, it seems that LGBT children who experience **homophobic and transphobic bullying** are not willing to turn to teachers for support and the matters go unreported.
 61. The report further found that 16.7% of those who were subjected to physical violence experienced **violence by fellow students** at school, 11.3% of all respondents were harassed at an educational institution, and an alarming 53.3% of those who were under 18 years of age reported at least three incidents of **psychological harassment** by fellow students. The ages of the perpetrators varied, and included children less than 12 years of age for 6 respondents, yet in most cases it involved fellow students in their age group.
 62. All this indicates that **homophobic bullying** at Maltese schools is rife and needs to be addressed with urgency.

Recommendations

63. Broaden and enhance the **national anti-bullying policy** to ensure inclusion of a specific reference to homophobia and transphobia. Alternatively, introduce specific anti-homophobic and anti-transphobic bullying policy.
64. We recommend that **diversity awareness** and education in Maltese schools is specifically included in the national curriculum, to be coupled with specific activities promoting respect for LGBTI students.

Intersex and Transgender Persons

65. With regard to the above-mentioned court procedure whereby post-operative transgender persons may have their personal documentation rectified to reflect their affirmed gender, local jurisprudence has underlined the impossibility of pre- and non-operative transgender persons to avail themselves of this procedure. We submit that a state-imposed requirement for a person to undergo sex reassignment surgery in order for the state to recognise their true gender runs ***“counter to the respect for the physical integrity of the person”***²⁰. Furthermore, a number of serious implications are witnessed due to the required that transgender persons undergo this serious surgical intervention to have their gender recognised at law.
66. In several public institutions, **gender segregation** is the preferred policy and practice approach. The residential care system, including orphanages and shelters, is in most cases segregated by the child's officially recognised gender once the child reaches the age of nine years. This recognition is largely based on the gender assigned to a person at birth on the basis of primarily physical characteristics. In public schools, children are gender-segregated at the age of eleven. Such division also exists within Corradino Correctional Facilities, and also within its section for the detention of minors 'Youth Offenders Unit Rehabilitation Services' (Y.O.U.R.S.).
67. Negative impacts of this automatic registration and treatment based on official documentation may be seen in the cases of four pre-operative transgender women

²⁰ Council of Europe, Commissioner for Human Rights, Issue Paper: *Human Rights and Gender Identity* (July 2009), available at http://www.coe.int/t/commissioner/Activities/IPList_en.asp, accessed 26th September 2010, pg. 18.

- (including one teenager) **aditus foundation** met with at Corradino Correctional Facilities, together with the **Malta Gay Rights Movement**. The four women were treated as men, resulting in a series of harrowing experiences and violations of their personal dignity:
- a. Placement in the male section, leading to **humiliation, bullying, verbal abuse, insults and jeering**;
 - b. Denial of permission to possess bras, resulting not only in physical discomfort but in a physical appearance that attracts further **degrading and humiliating** comments and behaviour;
 - c. Absence of any clear, objective and non-arbitrary rules for procedures and decisions on clothing, personal possessions, etc. Instead, decisions seem to be taken on an individual and discretionary basis. This lack of transparency, clarity and accountability should be avoided;
 - d. With regard to **body searches** and other security measures, the four women, including the teenager, were regularly searched by male security officers;
 - e. Regularly singled-out and excluded from activities conducted in the main yard and other areas, on the pretence that they ‘saunters around and attracts vulgar comments and behaviour’;
 - f. Denial of permission to possess items other female inmates are authorised to possess, including hair clips, make-up and particular items of clothing.
68. We are concerned that any person experiencing these above-average stress levels is unnecessarily exposed to an environment that further exacerbates feelings of exclusion, lack of physical protection, loneliness and **discrimination**. In the case of minors, our concerns are clearly aggravated by the person’s increased vulnerability.

The case of Joanne Cassar vs. Malta at the European Court of Human Rights

69. The human rights challenges faced by transgender persons may be seen in the on-going case of Joanne Cassar²¹. Ms. Cassar is a post-operative transgender woman who underwent the above-mentioned court procedure, in terms of Maltese civil legislation, to rectify all her personal documentation and be recognised as a woman. She and her then partner applied for marriage banns as they intended to marry. Following a series of challenges in the local courts, including at the Constitutional level, Ms. Cassar was denied her right to marry on the ground that the law would not recognise her as a woman but retain the acknowledgement and recognition of the gender assigned at birth – male. The Courts argued that the *Civil Code* procedure was only intended to avoid public embarrassment for post-operative transgender persons and not to provide **comprehensive legal recognition** of one’s affirmed gender. Ms. Cassar filed an application before the European Court of Human Rights claiming a series of violations of her human rights.
70. In July 2012, **aditus foundation** and the **Malta Gay Rights Movement** submitted a third party intervention²² in support of Ms. Cassar’s application wherein we highlighted the human rights concerns raised by the national procedure for transgender persons to rectify their documentation. All these concerns are further contained in a comprehensive

²¹ Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111018>, accessed 8th March 2013.

²² <http://aditus.org.mt/aditus/Documents/JoanneCassar3rdPartySubmission%28July2011%29.zip>, accessed 11th March 2013.

- report²³ urging the Malta to revise its gender identity legislation in order to bring it in line with international and regional human rights standards. Main concerns include:
- a. A court procedure is often expensive, public & intrusive;
 - b. The *Civil Code* provisions require that the transgender person presenting the application be unmarried, thereby limiting its accessibility to unmarried persons or, indirectly, coercing persons to **terminate an existing marriage**. The latter scenario is particularly harrowing for persons who ‘come out’ as transgender at a late stage in their lives, possibly after having married and formed a family;
 - c. As mentioned above, the requirement to undergo **permanent sterilisation** by way of sex reassignment surgery, is a very serious violation of a person’s right to physical integrity, to form a family, to freedom of expression and to personal privacy;
 - d. The Court procedure does not seem to have any legal value, other than that of amending the applicant’s documentation. **No legal recognition** is formally granted to the affirmed gender for purposes of, for example, marriage, pensions, social welfare, etc.
71. Furthermore, we are also concerned that the requirement to undergo sexual reassignment surgery prior to having one’s gender acknowledged has a severe impact on transgender children and youth. **aditus foundation** is aware of situations of young children being **denied access to public schooling** due to Malta’s refusal to recognise their gender, as being different from that assigned at birth. In such cases, the bests of the child principle seems to be disregarded in the overriding interest of public policy.

Recommendations

72. Revise current legislation to ensure that transgender persons are treated by the law as members of their affirmed gender without the requirement to undergo sex reassignment surgery, which is equal to forced and permanent sterilisation;
73. Ensure respect for the **best interests of the child** principle in situations of transgender children.

LBGTI Families

74. Malta offers absolutely **no form of legal recognition** of same-sex relationships. Beyond denying the right to marry and found a family to persons living in Malta, this legal vacuum is also problematic in the context of non-Maltese couples within a form of legally recognised relationship and travelling to Malta, where their relationship and acquired rights and obligations are effectively nullified.
75. With regard to children having same-sex parents, Maltese law only recognises the biological parent as the legal parent of the child, with consequences on the exercise of parental authority as well as on possible eventual termination of the parental relationship. One of the persons in a same-sex couple moving to Malta with children will be effectively stripped of all **parental rights and obligations**. Further child-specific issues include:
 - a. Unrecognized LGBT co-parents face severe difficulties on a daily basis in important matters affecting the child as, for example, schooling, travelling, medical treatment and religious affiliation. It is emphasized that the ultimate damage being done is in fact to the child’s best interests;

²³ Malta Gay Rights Movement, ‘A *Proposed Gender Identity Act for Malta*’, December 2010, available at http://www.maltagayrights.org/cms/pdfs/A%20Proposed%20Gender%20Identity%20Act%20for%20Malta_web.pdf, accessed 24th October 2012.

- b. People who play an actual parenting role in the child's life should be able to exercise the child's legal representation;
 - c. The invisibility of an LGBT co-parent could also lead to the related invisibility of the child's siblings;
 - d. In the **immigration** context, unrecognized LGBT persons may be prevented from living in the same country as their families;
 - e. The **matrimonial home protection**, and other property related protection regimes, denied to unrecognized LGBT families could endanger the child's physical security, particularly in the eventuality of the death of the person with whom the child's home is associated;
 - f. Children are not automatically entitled to the inheritance of their unrecognized LGBT co-parent;
 - g. The legal framework that is triggered when marriages break down is also intended to offer maximum protection to the children. Unrecognized same-sex relationships do not trigger these protection mechanisms, leaving the children vulnerable to **abuse and emotional turmoil**.
76. It is not possible for same-sex couples to **adopt**. Maltese adoption legislation limits adoption to either married couples or to single persons, supporting the awkward policy approach that a single person is *ab initio* a better parent than a homosexual couple. Furthermore, adoption of a child by the partner of a biological or adoptive parent is not currently possible, denying this partner parental rights and responsibilities at law.

Recommendations

77. Introduce **marriage equality**, recognising the full equality of all persons irrespectively of their sexual orientation. This measure would also regulate the several forms of existing LGBTI families, thereby ensuring legal protection for all individuals including children and vulnerable adults. Being a marriage regime, it would be based on the principle of mutual recognition and also impact ancillary areas such as fiscal obligations, migration, inheritance, etc.