

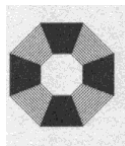
**SUBMISSIONS TO THE
COMMITTEE ON THE RIGHTS OF THE CHILD**

(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

Table of Contents

INTRODUCTION	4
NOTE FROM THE CONTRIBUTING ORGANISATIONS.....	4
<u>DISABILITY PERSPECTIVES</u>	<u>5</u>
POSITIVE DEVELOPMENTS.....	5
GENERAL CONSIDERATIONS.....	5
SPECIFIC CONSIDERATIONS.....	6
ACCESS	6
EDUCATION	7
HEALTH.....	8
INCLUSION.....	9
<u>LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX (LGBTI) PERSPECTIVES....</u>	<u>10</u>
INTRODUCTION.....	10
POSITIVE DEVELOPMENTS.....	10
GENERAL CONSIDERATIONS.....	10
SPECIFIC CONSIDERATIONS.....	11
BULLYING IN SCHOOLS.....	11
INTERSEX AND TRANSGENDER CHILDREN	13
HEALTH CARE.....	14
'AN ACT TO FURTHER AMEND THE CIVIL CODE' - ACT XVIII OF 2004.....	16
LGBTI FAMILIES	18
<u>MIGRATION/ASYLUM PERSPECTIVES.....</u>	<u>21</u>
POSITIVE DEVELOPMENTS.....	21
GENERAL CONSIDERATIONS.....	21
SPECIFIC CONSIDERATIONS.....	21
THE ASYLUM PROCEDURE.....	21
RECEPTION CONDITIONS	23
ADMINISTRATIVE DETENTION	23
AGE ASSESSMENT	25
CARE ORDER AND GUARDIANSHIP	27
TRAFFICKING IN CHILDREN	28

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), 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'Diżabbiltá (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 give 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/Ativities/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.