

*CHILD PROTECTION
(OUT OF HOME CARE) BILL:*

*WHAT PROTECTION FOR
UNACCOMPANIED ASYLUM-
SEEKING CHILDREN?*

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Child Protection (Out of Home Care) Bill: What Protection for Unaccompanied Asylum-Seeking Children?

In the Project, '*Supporting the Fulfilment of Rights of Specific Asylum-Seeking Groups*' with the support of the Voices Foundation.



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aditus foundation is an independent, voluntary and non-profit organisation (NGO) established with a mission to monitor, act and report on access to fundamental human rights in Malta.

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I N T R O D U C T I O N & B A C K G R O U N D

In March 2014, the Minister for the Family and Social Solidarity presented a new *Child Protection (Out of Home Care) Bill* to Parliament¹, proposing a significant reform of Malta's system of care for children, including for unaccompanied asylum-seeking minors (UAMs)². At the time of presenting this document, the Bill is in its second reading.

As a human rights organisation actively working with migrants, asylum-seekers and refugees, we are committed to monitoring new legal and policy instruments with a view to reporting on their levels of human rights access. It is our mission to provide the technical input we feel could contribute to the strengthening of human rights protection in Malta, input based on a reading of the relevant international, regional and national obligations within which the Maltese authorities are bound, and called to operate.

This technical input is produced in the context of a two-year project implemented by **aditus foundation**, thanks to the financial support of the VOICES Foundation. The project, 'Supporting the Fulfilment of Rights of Specific Asylum-Seeking Groups'³ is targeting the needs and rights of two groups of asylum-seekers: unaccompanied minors and lesbian, gay, bisexual, transgender and intersex (LGBTI) asylum-seekers. It is a combination of direct services, strengthening the capacity of existing service-providers and the drafting of detailed and analytical expert reports.

Although the *Child Protection (Out of Home Care) Bill* was not originally envisaged in our project design, its publication represents an important development in the legal framework offering protection to UAMs, positioning it within our project's terms of reference. Originally intended as part of our technical report on the situation and treatment of unaccompanied minors in Malta, the input on the Bill is here being presented as an independent document.

We nonetheless encourage readers to view this document in conjunction with the report, soon to be published.

We are extremely happy to present input, in the hope that we are contributing to an improvement in the quality of protection offered to children reaching Malta's shores in search of hope and safety⁴.

aditus foundation would like to thank Pauline Hilmy (Project Officer) and Hanna Rancke (Research Assistant) for their excellent work in researching, analysing and commenting on the Bill.

¹ Bill No. 45, An Act to replace the *Children and Young Persons (Care Orders) Act*, to establish Child Court Services, to introduce child protection orders, to provide for special care and protection for children removed or separated from their parents and placed in out-of-home care, 2014, available at <http://www.parlament.mt/billdetails?bid=469&legcat=13> [last accessed 27 May 2014].

² In this document the following terms are used interchangeably: unaccompanied minors, separated children.

³ http://www.aditus.org.mt/aditus_foundation/VOICES.html

⁴ Also read our other reports and contributions on this specific topic: *Joint Submission on the draft National Children's Policy (2012)*, *Joint Submission to the UN Child Rights Committee on the rights of children in international migration (2012)*, *Joint NGO Submission to the UN Child Rights Committee for Malta's review session (2013)*, all available at http://www.aditus.org.mt/aditus_foundation/Publications.html.

A D I T U S F O U N D A T I O N P R O F I L E

aditus foundation is a young, independent, voluntary, non-profit and non-governmental organization established in 2011 by a group of young lawyers dedicated to ensuring human rights access in Malta. **aditus'** Director is Dr. Neil Falzon, and the current board is composed of Dr. Nicola Mallia (Chairperson), Dr. Michael Camilleri and Dr. Michael Ellul Sullivan.

Named for the Latin word meaning 'access', **aditus foundation's** mission is the attentive analysis of access in Malta to human rights recognition and enjoyment. In practical terms, **aditus** was established to *monitor, report* and *act* on issues of fundamental human rights access for individuals and groups.

aditus foundation was founded on the principles of the universality, interdependence and indivisibility of all fundamental human rights, and we strive to promote their understanding and application. Being a generic human rights NGO, we work to adopt a broad perspective for human rights in Malta, identifying themes such as discrimination and access to effective remedies. Furthermore, while focused on Malta, we work towards highlighting the regional and international implications of local obstacles to human rights access.

Our main activities include the identification of priority areas, formulating advocacy strategies and working towards improvement in legal and administrative standards. This includes offering pro bono legal information and advice. We focus primarily on the government of Malta (through participation, for example, in a series of meetings with the Office of the Prime Minister on the subject of refugees). We do also address the EU institutions, the UN, the Council of Europe and other relevant agencies. We remain in constant communication and cooperation with governmental, intergovernmental and non-governmental entities to maintain a comprehensive approach in our activities.

aditus is committed to engaging the general public in a human rights discourse that is well informed, unbiased and effective, through press statements and television and radio appearances. Further, **aditus** makes full use of the Internet to disseminate information, raise public awareness, gather advocacy support and establish contact with individuals and networks. We have a comprehensive website and a busy Facebook page and Twitter account. **aditus** also blogs about the European Asylum Support Office (EASO) to provide updated information and commentary on its activities.

We firmly believe that professional research is a necessary advocacy tool and encourage its use by policy-makers in formulating national strategies and action plans. Accordingly, we prepare reports for various national, regional and international entities on the local human rights scenario, violations, law and administrative policy and practice.

One example is *Fleeing Homophobia: Seeking Safety*, an EU-wide research project identifying best practices for LGBTI asylum cases and making EU-policy recommendations. Another important example is our collaboration with other Maltese NGOs to draft a report on LGBTI children, children with disabilities and migrant children in Malta, for submission to the United Nations Committee on the Rights of the Child.

We organise training projects regularly, targeting a variety of actors. One such project is *Our Voice*, aimed at enhancing the integration of Malta's refugee and migrant communities, to foster a sense

of active social participation, support the creation of refugee and migrant networks and organizations and to develop strategies for funding future programmes.

A second training project is our *Stakeholder Training Sessions*, designed to give core information to those public and private service-providers that have direct and frequent contact with refugees. The project works to help identify the specific challenges, opportunities and best practices associated with their work. Lastly, we insist on striving to improve our own capacity to address lapses in human rights access: as part of that effort, we participate in training, workshops and conferences with local and international colleagues.

aditus is the Secretariat for the Platform of Human Rights Organisations in Malta (PHROM), Malta's first and only national coalition of human rights NGOs.

Apart from being registered with the Malta Commissioner for Voluntary Organisations, **aditus** has affiliations and memberships with the International Detention Coalition (IDC), the Platform for International Cooperation on Undocumented Migrants (PICUM), the European Council on Refugees and Exiles (ECRE) and the Anna Lindh Foundation.

We are also members of the Consultative Forum of the European Asylum Support Office, and of the Fundamental Rights Platform of the European Union Agency for Fundamental Rights.

For more information on how you can follow and/or support our advocacy activities:

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M A I N O B S E R V A T I O N S

In principle, we welcome the Bill as a potential milestone in the establishment of clear, strong and effective protection mechanisms for children reaching Malta unaccompanied by any parent or legal guardian. To date such protection has been largely based on slightly tweaked legal provisions and an institutional framework that, whilst generally operating at the best of its potential, has repeatedly suffered from a number of shortfalls.

We were also extremely happy to be invited to join the consultation process preceding the Bill's presentation in Parliament, during which process we acted in representation of ten civil society organisations working closely with and for migrants, refugees and asylum-seekers. During this consultation we were given the opportunity to share with the Ministry for the Family and Social Solidarity the experiences and expertise of all ten organisations, with the ultimate aim of ensuring a sound legal and policy framework offering maximum levels of human rights respect, protection and fulfilment to unaccompanied asylum-seeking children.

Yet despite the above, we do have some serious concerns with the Bill's content and also with the on-going consultation process. In terms of the latter element, whilst we readily and happily accepted the Ministry's invitation to contribute time and resources to a consultation process, we noted that the Bill and an accompanying report were finalised and launched without prior information to stakeholders. We feel that a Bill of such national importance should have been developed in close liaison with the various stakeholders involved in ensuring the well being of children in Malta.

This observation is particularly relevant in a context where aditus foundation, and several other stakeholders, were happily participating in a formal consultation process that came to a sudden and abrupt end with the presentation in Parliament of the Bill. To date, the impact and outcome of the hours dedicated to the consultation process, as well as its future, remain unclear.

O U R I N P U T O N T H E B I L L

The Bill introduces a number of positive reforms to the system as it relates to UAMs. It expressly mainstreams UAMs into the general out of home care system in Malta, and places oversight of the out of home care system within the Family Court.⁵ The Bill also creates a number of new positions/actors with various responsibilities toward a minor, including a Child Advocate and a Guardian.

It also seems to provide that a Child Protection Order should be issued, and a UAM should come under the responsibility of the out of home care system, prior to age verification, and that age assessment procedures and other assessments of the child's needs should occur in a residential assessment centre (RAC).

aditus foundation has identified a number of key concerns with the *Child Protection Bill* in respect of its application to UAMs and proposes a number of recommendations as follows.

Mainstreaming might ignore the specific needs of UAMs

The Bill expressly mainstreams UAMs into the general out of home care system for other minors in Malta.

The express mention of UAMs in the Bill is a positive step, however **aditus foundation** is concerned that the particular needs and vulnerabilities of UAMs are not sufficiently provided for and the asylum context is not fully taken into account in the design of certain procedures.

The Bill does not contain sufficient provisions and safeguards to ensure UAMs have access to the full package of rights they are entitled to as children refugees (particularly those contained in the below recommendations).

The definition, and therefore the scope, of terms is unclear and limited

The Bill does not clearly define 'unaccompanied asylum-seeking children', with Article 5(d)(v) referring to "*unaccompanied asylum seeking children in terms of the Refugees Act.*"

The *Refugees Act* does not specifically use the term 'unaccompanied asylum seeking child.' In Article 2 it defines an 'unaccompanied minor' in accordance with EU law as "*a person below the age of eighteen years who arrives in Malta unaccompanied by an adult responsible for him whether by law or by custom, for as long as he is not effectively taken into the care of such a person and includes any minor who is left unaccompanied after he has entered Malta.*"

The Act does not define 'asylum-seeker' but rather defines an 'applicant for asylum' as "*a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken,*" and an 'application for asylum' refers to an application made as a "*request for international protection under the [1951 Refugee] Convention.*"

⁵ For instance, under the Bill it is no longer the Ministry for the family and Social Solidarity but rather the Court that is responsible for issuing Child Protection Orders (Art. 5), including specifically Care Orders for UAMs (Art.5(d)(v)). Art. 12 grants the Court exclusive jurisdiction "*to hear and determine matters relating to the issuing of review, termination and all other ancillary matters concerning child protection orders.*"

The *Reception Regulations*⁶ uses the term ‘asylum-seeker’ and defines it in Article 2 to mean “a person who has made an application for a declaration under article 8 of the *Refugees Act*.”

The *Refugees Act* incorporates Malta’s obligation under the EU asylum Directives (Art. 3), and the Qualification Directive (recast) defines ‘applicant’ as “a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken,” and ‘international protection’ refers to “refugee status and subsidiary protection status” as defined in the Directive.

The term ‘unaccompanied minor’ in the EU Directives refers to all unaccompanied minors who arrive on the territory of a Member State unaccompanied by an adult responsible for him or who is left unaccompanied after entering the territory, and is not limited to minors who have applied for international protection.

The meaning of an ‘unaccompanied asylum seeking child’ within the frame of the Bill is therefore ambiguous. As stands, it is unclear whether it is meant to include minors who have applied for other forms of international protection than refugee status provided for under Maltese law, i.e. subsidiary protection.

aditus recommends including under Article 2 a clear definition of both ‘unaccompanied minor’ and ‘applicant for asylum’ or ‘asylum-seeker’, to ensure protection to all children for whom the Bill is actually intended.

‘Unaccompanied minor’ should be defined in accordance with the *Refugees Act* and EU law to mean “a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States.”

‘Applicant for asylum’ or ‘asylum-seeker’ should be defined in accordance with EU law as “a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken.”

In addition, care should be taken to ensure that the provisions of the Bill apply to all unaccompanied minors, including those who may not apply for international protection. The vast majority of unaccompanied minors arriving to Malta do in fact apply for international protection in practice, however the Bill should ensure no gaps in coverage in case such a situation should arise in the future. This would also take into account the understanding that most, if not all, UAMs arriving to Malta might seek international protection not necessarily on the basis of their actual protection needs but as a means of obtaining earlier release from a detention centre.

Furthermore, many provisions of Maltese and EU law relate to unaccompanied minors generally, and not only to unaccompanied minors seeking asylum.

⁶ Legal Notice 320 of 2005.

aditus foundation therefore recommends of the use of the term ‘unaccompanied minor’ throughout.

At which point is the Bill triggered?

The Bill places the responsibility of applying to the Court for a Child Protection Order with the Child Protection Services (CPS). Minors are first reported to CPS by third persons, as follows:

- Any person who has reason to believe that a child is in need of care or protection shall report the circumstances on which the belief or suspicion is based to the CPS or the Executive Police (Art. 3(1)). Where a person comes into such contact with a child in the course of his or her work, whether paid or voluntary, that person shall, without delay and not later than two days, report to CPS or the Executive Police (Art. 3(2)).
- The Bill provides in Article 6(3) that as part of the Emergency or Care Order, the Court shall order CPS to carry out an assessment of the child’s needs in a residential assessment centre (RAC) so to determine the most suitable out-of-home plan for the child. In the case of UAMs, this RAC shall address issues relating to health, psychosocial and age assessment procedures that may apply to the child.

As Article (6)(3) states that age assessment procedures are to be addressed by the CPS following issuance of the Emergency or Care Order, it follows that UAMs must be reported to Services prior to age assessment. Within the arrival context, this would mean that referral should be made by any of the persons who come into contact with a UAM upon arrival or in detention, including the Immigration Police, Detention Services staff, NGO workers, UNHCR, RefCom, etc.

The Bill does not however specify what constitutes “*reason to believe that a child is in need of care or protection*” in the asylum context. The provision could be interpreted to mean when a person claims to be a minor, or when a third person discretionarily thinks he/she has reason to believe a person is a minor. The provision should also enable referrals in instances where a minor claims to be an adult – which in our experience is not uncommon.

To avoid any confusion, we recommend the inclusion of a provision with the following effect:

“In the case of unaccompanied minors, a person’s claim to be a minor shall in itself constitute reason to believe the child is in need of care or protection. In addition, a person may also have reason to believe than an applicant for asylum claiming to be an adult may be a child in need of care or protection.”

The Bill’s timelines could lead to excessive – and illegal – detention of children

After referral to CPS, CPS is responsible for assessing the report and deciding whether to apply to the Court for further action, including an application for issuance of a Child Protection Order. Relevant provisions are as follows:

- Article 4(4) states that CPS is required to keep a Child Protection Register (CPR) of all reports (Art. 4(3)) and shall assess each report expeditiously and shall initiate action without delay and by not later than two days (Art. 4(4)).
- After having assessed the report, and by not later than 30 days, CPS may *inter alia* apply to the Court for further action or dismiss the report where it has been determined that there are no grounds for further action. (Art. 4(5)). The assessment or a decision to dismiss the report may be appealed by any interested party before the Court (Art. 4(5)).
- Where it appears further action needs to be taken by CPS, Article 4(5) provides that such action shall include *inter alia*:
 - listening to the child;
 - arranging for provision of support services for the child, taking into account the special needs of the child, including the services of the social worker;
 - filing an application in Court for any one or more of the Child Protection Orders, where appropriate;
 - identifying the provision of out-of-home care
- If CPS concludes *prima facie* that the child is in need of care and protection, it shall file an application to the Court to issue an Emergency Order (Art. 4(6)). Where CPS determines that the child is in danger of significant harm, it shall proceed immediately with the appropriate intervention without the Emergency Order provided that it informs the Court within 24 hours and requests it to issue an Emergency Order. (Art. 4(6)).
- An Emergency Order is valid for a maximum of 15 days and may be renewed (Art. 4(7)).
- The Court may issue a Care Order where the child is a UAM (art. 5(d)(v)).
- The Bill provides in Article 6(3) that as part of the Emergency or Care Order, the Court shall order CPS to carry out an assessment of the child's needs in a residential assessment centre (RAC) so to determine the most suitable out-of-home plan for the child. In the case of UAMs, this RAC shall address issues relating to health, psychosocial and age assessment procedures that may apply to the child.
- Article 5(a) defines an Emergency Order to mean an "*Order which is issued for the immediate removal of the child from the person(s) having the legal or actual care of the child where that child is in danger of significant harm.*"
- Article 5(d)(v) states that a Care Order may be issued "*where the child is an unaccompanied asylum seeking child in terms of the Refugee Act.*"

aditus is concerned that the timeframe prescribed by the Bill does not sufficiently take into consideration the asylum context and will result in unacceptable delays and periods in detention for UAMs.

It is also unclear why Article 5(d)(v) adopts the 'may' formulation with regarding to a Care Order being issued for UAMs, when a 'shall' formulation might be more appropriate.

Applicable law:

- The *Reception Conditions Directive* (recast) states very clearly that “minors shall be detained only as a measure of last resort” and “such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.”⁷ Article 11(3) states that “all efforts shall be made to release the detained unaccompanied minor as soon as possible.”
- The *Convention on the Rights of the Child*, as well as the *International Covenant on Civil and Political Rights* obliges States Parties to separate adults from children in detention,⁸ and the *Committee on the Rights of the Child* reinforces that this obligation specifically applies to migrant children in detention.⁹
- The European Court of Human Rights held in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* that the prolonged detention of an unaccompanied child jointly with adults amounted to inhuman or degrading treatment, in part because such detention conditions were not adapted to the extreme vulnerability of the unaccompanied child, causing “considerable distress” and “serious psychological effects.”¹⁰
- The Committee on the Rights of the Child stresses that a competent guardian must be appointed as expeditiously as possible, and that this serves as a key procedural safeguard to ensure respect for the best interests of the unaccompanied child.¹¹ The *Procedures Directive* (recast) and the *Receptions Conditions Directive* (recast) state that Member States shall as soon as possible take measures to ensure that a representative represents and assists the UAM.¹²

Within the context of Malta’s mandatory detention policy, UAMs spend the period prior to issuance of a Child Protection Order in detention with adults. In the past, the issuance of a Child Protection Order was conditioned on completion of age verification, and minors were detained for anywhere from several days to 4-5 months. AWAS’ new age assessment procedure aims to limit the duration of age assessment to 10 days in most cases.

Furthermore, we are keen to witness the implementation of the recent announcement by the Prime Minister that no child will be placed in a detention centre.

The Bill states that UAMs may be issued a Care Order (Art. (5)(d)(v)). The Bill allows for a delay of 30 days between the referral of a UAM to CPS and the application for a Care Order. Furthermore, the provisions do not set a time limit by which the Court must issue the Care Order, which could result in still further delays. Thus, the Bill currently allows for a delay of over a month between referral of a UAM to CPS and issuance of a Care Order. This also effects when the minor will be appointed a guardian.

⁷ Reception Conditions Directive (recast), Art. 11(2).

⁸ CRC, Art. 37(c), ICCPR, Art. 10(b). The CRC only allows the joint detention of children and adults if it is in the child’s best interest. Ibid.

⁹ “Special arrangements must be made for living quarters that are appropriate for children and that separate them from adults[.]” CRC, General Comment No. 6, para. 63.

¹⁰ European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Application no. 12178/03), Judgment of October 12, 2006, available at <http://www.unhcr.org/refworld/docid/45d5cef72.html>, paras. 58, 103.

¹¹ CRC, General Comment No. 6, para. 21.

¹² Reception Conditions Directive (recast), Art. 24(1); Procedures Directive (recast), Art. 25(1)(a).

The Bill states that a guardian will only be appointed following application by CPS to the court for a Child Protection Order. Under the current time frame in the Bill for Care Orders, UAMs may remain more than a month without an appointed guardian.

It is unclear whether UAMs may also be eligible for an Emergency Order, which involves shorter timeframes and could result in a UAM spending only a few days in detention, depending on how the provisions are applied. The Bill provides that CPS shall file an application for an Emergency Order if CPS concludes *prima facie* that the minor is in need of care and protection and shall intervene immediately prior to issuance of an Emergency Care Order if CPS determines that *“the child is in danger of significant harm.”* However it is unclear whether UAMs would be considered *prima facie* in need of care and protection and whether UAMs would qualify for such early intervention.

aditus finds that the timeframe set by the Bill as applied to UAMs may result in unacceptable delays in contravention of international and regional standards. UAMs have particular vulnerabilities and rights as asylum-seekers, and these must be taken into account in the procedure created by the Bill.

aditus recommends either the inclusion of a separate provision relating to UAMs establishing a timeline in accordance with international and regional standards, and/or the inclusion of the following additional clauses to Article 4(6):

“For purposes of this provision, unaccompanied minors shall be considered to be prima facie in need of care and protection and shall be considered in danger of significant harm.”

Information requirements are generally impossible in an asylum context

Article 19(1) details the information CPS must provide to the Court in submitting an application for a Child Protection Order. Article 19(1) states that *“the application . . . shall include the name and identity card number or other identification number of the child together with the name, address, identity card number or other identification number and all known contact details of the parents, person or persons having, or who might have, the legal or actual custody of the child and shall contain all relevant submissions together with all documents supporting such application.”*

aditus is concerned that with regard to UAMs, these requirements are not only unrealistic, but some are in practice impossible to satisfy.

Most UAMs arrive to Malta without any form of documentation or personal identification, or with documentation that may require validation. The contact details of the parents may not be known, and minors may be reluctant to provide this information for fear it may place them and/or their family members in danger. In addition, by this stage of the procedure (according to the Bill) UAMs have not yet been assigned a legal representative, guardian or other representative with legal or actual custody of the child (as discussed in further detail below).

aditus recommends adding the following to Article 19(1):

“With regard to unaccompanied minors, these requirements shall only apply to the extent to which the information is available, and taking into account the best interests of the child as a primary consideration.”

The ‘best interests of the child’ principle is weakened

Article 9 relates to the application of the principle of the best interests of the child and states that *“all decisions taken in connection with the child protection orders listed under this Act shall be motivated by the best interests principle.”*

The Bill provides a lesser standard for application of the principle of the best interests of the child than that prescribed by international and EU law.

The CRC (Art. 3) requires that the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

The EU Fundamental Rights Charter states in Article 24(2) that *“in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.”*

EU asylum legislation also requires that the best interests of the child be a primary consideration in their application.¹³

In addition, the Bill’s phrase *“in connection with the child protection orders”* is ambiguous, and it is unclear what counts as *“decisions in connection with”* as opposed to not. For instance, does this include the assessment conducted by CPS prior to application for a Child Protection Order? Does it include age assessment in the RAC? Does the term ‘decision’ include all procedures, processes and other actions under the act that concern children?

The wording of Article 9 should be revised to state *“the best interests of the child shall be a primary consideration in all actions concerning children undertaken within the frame of this Act.”*

Age assessment is almost ignored by the Bill

The only mention of age assessment procedures in the Bill is a passing reference in Article 6(3).

- Article 6(3) provides that as part of the Emergency or Care Order, the Court *“shall order CPS to carry out an assessment of the child’s needs in a residential assessment centre (RAC) so to determine the most suitable out-of-home plan for the child. In the case of UAMs, this RAC shall address issues relating to health, psycho-social and age assessment procedures which may apply to the child.”*
- Article 9 relates to the application of the principle of the best interests of the child states that *“all decisions taken in connection with the child protection orders listed under this Act shall be motivated by the best interests principle.”*

The Bill does not include adequate provisions on and regulating age assessment.

¹³ Procedures Directive (recast), Recital 33; Receptions Conditions Directive (recast), Recital 9; Qualification Directive (recast), Recital 18; Dublin Regulation, Recital 13.

Article 6(3) implies that age assessment will take place after issuance of a Child Protection Order and in the RAC. WE welcomes this change, which in practice should mean that age assessments will no longer take place within the detention context. However, we recommend that the timing of age assessment be expressly stated in a provision of the Bill, as opposed to implied, so as to avoid any confusion or ambiguity in its application.

aditus reiterates its recommendation under Comment 3 above, which would help clarify any ambiguity with regard to the timing of age assessment.

As discussed above under Comment 6, Article 9 on the application of the principle of the best interests of the child is ambiguous as to its scope of application and creates a lesser standard than that prescribed by international and EU law. Article 6(3) of the Bill states that age assessment is ordered by the Court *“as part of”* the Emergency or Care Order. However, it is unclear whether age assessment falls within the scope of ‘decisions’ intended by Article 9 of the Bill as it currently stands.

Age assessment constitutes an action within the scope of CRC Article 3, and the principle of the best interest of the child should be a primary consideration in the conduct and application of age assessment procedures.

aditus reiterates its recommendation above to modify the wording of Article 9 in order that it includes all actions concerning children in accordance with international and EU law.

Alternatively, a separate provision on age assessment should be included in the Bill.

Provision of specialised care for traumatised children

With respect to the provision of psycho-social care for UAMs, the Bill states in Article 6(2) that *“all efforts shall be made to reduce any additional trauma to the child by requiring that the child receives appropriate psycho-social care even prior to the issue of the [Child Protection] Order but always immediately on issue.”*

Article 23(4) of the recast Reception Directive states that *“Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.”*¹⁴

As it stands, the language of Bill provision is ambiguous. On the one hand, it requires that a UAM receive appropriate care prior to the issue of a Child Protection Order. The use of *“but”* however suggests that this is optional, and the child is only required to receive such care immediately upon issue of a Child Protection Order.

The provision should be revised to ensure compliance with relevant standards and, importantly, to guarantee full protection to traumatised children.

¹⁴ See also CRC, Art. 39.

A guardian should be appointed as soon as possible

The Bill contains several provisions relating to the assignment of a guardian and other persons with responsibilities and duties toward the minor.

- After CPS files an application requesting the Court to issue a Child Protection Order, Article 19(2) states that the Court “*shall appoint such application for hearing within five working days and notify the parents and person having the legal or actual custody of the child, where applicable. The child shall be invited to be present at all stages of the proceedings as of right. The Court shall also ensure that a child protection mediator is asked to attend the first hearing.*”
- Article 19(3) states that where, during the first hearing, the Court determines that there are *prima facie* grounds for the proceedings to continue, it shall appoint a Child Advocate and a Guardian to represent and assist the child from the Child Court Services.
- Prior to appointment of a guardian and child advocate, the Bill provides for the UAM to have interactions with several other actors with various responsibilities toward the minor. These include CPS. In addition, if CPS decides to apply for a Child Protection Order, Article 4(5) provides that further action by CPS shall include:
 - listening to the child;
 - arranging for provision of support services for the child, taking into account the special needs of the child, including the services of the social worker;
 - filing an application in Court for any one or more of the Child Protection Orders, where appropriate.

aditus has a number concerns with regard to how this will apply within the asylum context.

First, it is important to stress that within the asylum context, unlike in the case of a Maltese minor, the placing of a UAM under the care of the State is not about transferring responsibility, but rather about assigning responsibility. In the case of a UAM, there is no person with parental responsibility toward the minor in Malta until such a person is assigned.

The Committee on the Rights of the Child stresses that a competent guardian must be appointed as expeditiously as possible, and that this serves as a key procedural safeguard to ensure respect for the best interests of the unaccompanied child.¹⁵ The Procedures Directive (recast) and the Receptions Conditions Directive (recast) state that Member States shall as soon as possible take measures to ensure that a representative represents and assists the UAM.¹⁶

The Bill does not clearly identify or assign parental or comparable responsibility to any person until after a first hearing, at which point the Court shall appoint a guardian and child advocate (Art. 19(3)).

The Bill does provide that prior to the appointment of a guardian and child advocate, the minor will have interactions with CPS and may receive support from a social worker (Art. 4(5)). However, neither of these persons is clearly assigned the duties and responsibilities of a guardian or legal representative, even temporarily.

¹⁵ CRC, General Comment No. 6, para. 21.

¹⁶ Reception Conditions Directive (recast), Art. 24(1); Procedures Directive (recast), Art. 25(1)(a).

As the Bill currently stands, a UAM will arrive in Malta, potentially spend a month waiting for CPS to assess their referral (see Comment 3 above), and then be called to a hearing after five working days – all of which without a guardian or legal representative.

The delayed assignment of a guardian also raises concerns with regards to the minor's right to express his/her views freely as provided for in Article 12 of the CRC, in particular with regard to attending the hearing. Article 12 CRC states that *"that the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body."*

The Committee on the Rights of the Child further specifies that the decision of how to be heard – either directly or through a representative or appropriate body – should be made by the child.¹⁷

Who will assist the child in the asylum procedure?

The Bill does not provide for the assignment of a representative to assist the child throughout the asylum procedure as required by international, EU and Maltese law.

- Article 19(3) states that where, during the first hearing, the Court determines that there are *prima facie* grounds for the proceedings to continue, it shall appoint a Child Advocate and a Guardian to represent and assist the child from the Child Court Services.
- Article 20 explains the role and responsibilities of the guardian.
- Article 23 explains the role and responsibilities of the child advocate.

Children who are the principal applicants in an asylum procedure are entitled to a legal representative¹⁸ whose role is to support the child throughout the asylum procedure.¹⁹ Article 15(a) of the Maltese Procedural Regulations²⁰ (transposing the Qualification Directive 2004/83/EC and Procedures Directive 2005/85/EC) states:

"It shall be ensured that the appointed representative of the unaccompanied minor is given the opportunity to inform the [UAM] about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself for the interview. The representative shall be present at the interview and may ask questions or make comments within the framework set by the person who conducts the interview."

The recast Procedures Directive and Receptions Conditions Directive specify that the representative *"shall have the necessary expertise"* to perform his duties in accordance with the best interests of the child.²¹ EU law further states that individuals or organisations whose interests conflict or could potentially conflict with those of the minor shall not be eligible to become representatives.²²

¹⁷ CRC, General Comment No. 12, para. 35.

¹⁸ ExCom Conclusion No. 107, para. (g)(viii).

¹⁹ UNHCR, Guidelines on International Protection No. 8, para. 69.

²⁰ Procedural Regulations, Legal Notice 243 (Laws of Malta 2008), Art. 15.

²¹ Procedures Directive (recast), Art. 25(1)(a).

²² Procedures Directive (recast), Art. 25(1)(a); Reception Conditions Directive (recast), Art. 24(1).

According to the Committee on the Rights of the Child, codes of conduct should be developed for representatives who are appointed to represent the child's views,²³ and representatives must have sufficient knowledge and understanding of the various aspects of the asylum decision-making process.²⁴

Under the current system in Malta, lack of clarity in law and policy as to who is assigned the responsibilities of a representative for UAMs has resulted in severe deficiencies in practice. The role is officially assumed by a social worker who has numerous additional duties and responsibilities and must rely extensively on the support of NGOs working in the open centres.

aditus stresses the critical importance of including a provision in the Bill which clearly identifies who will be assigned the duties and responsibilities of a representative to support the minor in the asylum procedure as required by international, EU and Maltese law.

The provision should specify the role and responsibilities of the representative, as well as the requirement that the representative have the necessary expertise to perform his duties in accordance with the best interests of the child.

Asylum-related training is not specifically mentioned

The Bill includes numerous provisions requiring training of the different actors involved in the new out-of-home care system. However, none of these specifically mention training or expertise on asylum-related needs, rights and procedures.

Article 24 of the Reception Conditions Directive specifies *“those working with [unaccompanied minors] shall have had and shall continue to receive appropriate training concerning their needs.”*²⁵

aditus recommends including a specific provision in the Bill that expressly specifies that *“those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs.”*

No provisions on family tracing and family reunification

The Child Protection Bill contains no provisions with respect to family tracing and family reunification.

Under the CRC, Malta has an obligation to commence tracing activities as soon as possible,²⁶ and where possible and if in the child's best interest, reunify separated and unaccompanied children with their families as soon as possible.²⁷

The Dublin Regulation (recast) also requires that where a UAM has lodged an application for international protection, the Member State shall as soon as possible take appropriate action to

²³ CRC, General Comment No. 12, para. 37.

²⁴ CRC, General Comment No. 12, para. 37.

²⁵ Reception Conditions Directive (recast), Art. 24(4).

²⁶ CRC, arts. 22(2), 9(3) and 10(2); CRC, General Comment No. 6, para. 31(E).

²⁷ CRC, General Comment No. 6, para. 13.

identify the family members, siblings or relatives of the UAM on the territory of the Member States.²⁸

The Reception Conditions Directive (recast) also requires Member States to start tracing as soon as possible after an application for international protection whilst protecting the UAM's best interests.²⁹

aditus recommends that the Bill expressly specify who is responsible for tracing activities and these must commence as soon as possible.

Is 'parental responsibility' lost?

Responsibilities of the Guardian:

- Article 2 defines parental responsibility as *"that responsibility which one or both of the parents or any person having care of a child may require in order to promote the well-being of the child;"*
- Article 37 states that where a child has been removed from the care of the parents and placed in out-of-home care, the State *"has a responsibility to ensure that the child receives special care and protection for that child's well being."*
- Art. 37 then states that the responsibility of the State *"shall be vested in the guardian appointed according to the provisions of this Act."*
- The present *Care Orders Act* states that the Minister has the *"same powers and duties with regard to his care and custody as the parents or guardian of such child or young person would"* (Art. 11, *Care Orders Act*).

The Bill removes the 'parent' wording from the description of the guardian's duties, possibly reducing the level of protection offered to the unaccompanied child.

²⁸ Dublin Regulation (recast), Art. 6(4).

²⁹ Reception Conditions Directive (recast), Art. 24(3).