

**Concerns and Proposals of the Office of the
Commissioner for Children forwarded to the
Commission on Justice Reform**

May 2013



Uffiċċju tal-Kummissarju għat-Tfal

Office of the Commissioner for Children

Introduction

The law offers the highest form of protection of human rights through the administration of justice, on a national, community and international level, by the government.

The protection of the rights of children is afforded and guaranteed through strong laws and policies which safeguard such rights, as laid down in the United Nations Convention on the Rights of the Child. Thus, this document offers an overview of the present legal state, and addresses what is lacking and therefore required, in order to strengthen the protection of children's rights. This document is not nor is it intended to be exhaustive, in its analysis of the present scenario concerning children's rights, and the legal remedies required.

Proposals for Legal Amendments:

A. Civil Code

i. Article 86 'Acknowledgement of children conceived or born out of wedlock'

Removal of the first proviso to article 86, namely:

"A child conceived or born out of wedlock may be acknowledged by the father and the mother, either jointly or separately:

Provided that where the person acknowledging himself to be the father of the child is a minor the acknowledgment is null."

ii. Article 285 'Children Born at Sea'

To be amended so that children of immigrants born at sea on unregistered vessels are registered at the first port of call.

iii. Article 272 'Persons bound to give notice of birth of child'- Enforcement of registration of children

"In the case of every child born, it shall be the duty of the father and the mother, and in default of both, of the physician, surgeon, midwife, or any other person in attendance at the birth, or in whose house the birth has taken place, to give, within fifteen days of such birth, notice thereof to the officer charged with the duty of drawing up the act of birth".

In the event of failure of registration, such persons who are legally obliged to do so, should face legal consequences.

iv. 'The right to be heard'

- Article 6A. (1) "In case of any disagreement either spouse may apply to the competent court for its assistance and the presiding judge, after hearing the spouses and if deemed opportune any of the children above the age of fourteen years residing with the spouses, shall seek to bring about an amicable settlement of such disagreement".

Article 6A should be reworded to include **all** children capable of understanding the meaning of what they are saying.

- Article 66 I (2) OF DIVORCE 'Powers of the Court'

"...the court may, where it considers it necessary to do so, either on its own initiative or upon the request of the mediator or of one of the spouses:

- (a) appoint a children's advocate to represent the interests of the minor children of the parties, or of any of them; and
- (b) hear the minor children of the parties, or any of them, where it considers it to be in their best interest to do so"

Article 66 I (2) should be reworded in order for the right of the child to be heard in all cases that concern him or her - such as disputes concerning parental authority, separation or divorce of parents – to be automatic and independent. Such right to be heard should not depend on the discretion of the court, or the request of the parents or mediator.

- Article 56 'Custody of the children after separation'

Also in the case of separation, Article 56 speaks of decisions by the Court being taken based on the "paramount consideration being the welfare of the children", but no mention is made of the child having an automatic right to be directly heard in court.

The child should be given the right to request a child advocate and the role and office of the child advocate should be further strengthened.

While children should not be given incentives to go to court, their participation is crucial in the case of proceedings in which they are involved.

This amendment would further respect the principles of the UNCRC on the right of the child to 'be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child...' (Article 12 UNCRC).

v. Shift of focus from Parental Authority to the concept of Parental Responsibility.

Maltese laws are very much based on Parental Authority, and the Office of the Commissioner for Children would like to see a shift of focus from Parental Authority to Parental Responsibility.

vi. 'Reasonable chastisement', Article 154 (1) (a) – When parent may be deprived of parental authority

Article 154 (1) (a): "if the parent, exceeding the bounds of reasonable chastisement, ill-treats the child, or neglects his education".

The term 'Reasonable chastisement' should be qualified for the purposes of this article, so as not to include corporal punishment, or any other act referred to in the Domestic Violence Act (Article 2, Chapter 481 Laws of Malta).

vii. Adoption

The Office of the Commissioner for Children feels that children above the age of 14 should be given the option to request information about their biological parents, even in cases where there is no consent given by the adoptive parents.

B. Criminal Code

i. Minimum Age Criminal Responsibility (MACR)

Article 35 'Minors under 9 years' to be amended, so that minors MACR is 14, as held in Bill 97, the Various Laws (Criminal Matters) (Amendment) Act, 2011.

"Without prejudice to the powers of the Minister under the Children and Young Persons (Care Orders) Act, a minor under fourteen years of age shall be exempt from criminal responsibility for any act or omission."

Article 36 'Minors under fourteen but over nine years acting with discretion' to be deleted, as held in Bill 97, the Various Laws (Criminal Matters) (Amendment) Act, 2011.

ii. Mischievous Discretion

Article 37 to be substituted as follows as held in Bill 97, the Various Laws (Criminal Matters) (Amendment) Act, 2011.

"37. (1) The minor under sixteen years of age shall also be exempt from criminal responsibility for any act or omission done without any mischievous discretion.

(2) In the case where the act or omission is committed by a minor who is aged between fourteen to sixteen years of age with mischievous discretion and in the case where the minor is aged between sixteen and eighteen years, the applicable penalty shall be decreased by one or two degrees."

iii. Article 17 'Concurrent offences and punishments'

Article 17(b) which concerns the computation of punishment for concurrent offences should not be invoked in cases involving the commission of an offence involving minors, on more than one minor on a repeated basis, such as carnal knowledge with violence, indecent assault, defilement of minors, or inducing persons under age to prostitution, among others.

The commission of the offence of carnal knowledge with violence for instance committed on one child is clearly not the same as having the offence committed on more than one child on separate occasions and on a continuous basis. The Office proposes a change to the law, similar to the recent legal amendment made in the case of traffic accidents.

iv. Article 247A 'Ill-treatment or neglect of child under 12 years'

Article 247A (2) "For the purposes of subarticle (1), ill-treatment includes neglecting the child's need for adequate nutrition, clothing, shelter, and protection from harm, persistently offending the child's dignity and self-esteem in a serious manner and persistently imposing upon the child age-inappropriate tasks or hard physical labour".

Article 247A (2) should be amended to add education as a ground of ill-treatment, together with neglecting clothing, nutrition, shelter, protection from harm, among others, in the case of a person having the responsibility of a child under 12 and if found guilty is liable to imprisonment for a term not exceeding 2 years.

The Office of the Commissioner for Children would also like to change the age of 12 to at least 16, to reflect compulsory school age. As things stand today, when children of compulsory school age do not attend school without a just reason, their

parents or guardians are summoned to appear before a tribunal and are fined if they are found to be in breach of their legal obligation to send their child to school. However, if such persons fail to appear before the tribunal, or if the fine remains unpaid, no further legal action is taken.

Furthermore, the Office of the Commissioner for Children does not believe that a good solution lies in tying this to the children's allowance, as this will only result in having poorer children in our society, as they will suffer more in the long run.

v. Article 203 (3) 'Complaint of injured party' – in the case of Defilement of Minors to institute proceedings

The Office of the Commissioner for Children proposes the removal of the complaint of the injured party to institute proceedings in the case of defilement of minors.

vi. Of the Powers and Duties of the Executive Police in respect of Criminal Prosecutions (Book Second. Part 1, Title 1)

In view of the fact that that the Office advocates for minors not to stand as co-accused before the ordinary court, but rather before the Juvenile Court (as explained hereunder in further detail in Section C), an amendment should be made for the Executive Police to be stripped of their authority to summon minors to appear before the ordinary court when they are co-accused with adults, for the sake of compilation of evidence.

vii. Article 355AT 'Right to Legal Advice'

The Office would like to propose an amendment in the case of minors when arrested and held in police custody at a police station or other authorised place of detention. Such minor shall, if he so requests, be allowed as soon as practicable to consult privately with a lawyer or legal procurator, in person. Thus, in the case of minors it is imperative that legal consultation is done in person and not by telephone. Furthermore, in the case where more than one minor is arrested, the minors should be given legal advice by separate lawyers and not at the same time.

viii. Article 574A 'Proceedings where a person is first brought before Court of Magistrates.

In the case of a minor who is charged or accused, and is brought before the Court, a provision should be made so that minors are to be granted bail. It should also be made mandatory in the law, for charges in the name of minors to be accompanied

by a tailor-made report concerning the psycho-social conditions of the accused minor, which is drawn up by professionals in the field.

C. Juvenile Court Act (Cap.287)

i. Article 2 Definition of “child or young person”

The definition of child or young person presently reads a person under the age of 16. This should be amended to read 18 to be in conformity with the definition of child or minor contained in other Acts.

ii. Minors who are co-accused should be heard before the Juvenile Court.

To delete Article 6 (3):

“the Juvenile Court shall not be competent to hear charges against, or other proceedings relating to, a child or young person who is charged jointly with any other person not being a child or young person”.

This amendment implies that minors should NEVER stand as co-accused.

D. Children and Young Persons (Care Orders) Act (Cap.285)

This needs to be wholly and closely examined, updated and re-worded, to include wider child protection measures. Such areas which require attention, are for instance the provisions that are now covering children in out of home care to also include voluntary placements.

Children under a care order should not be placed under the responsibility of the Minister, but rather under the responsibility of a specifically entrusted and designated body.

Furthermore, children under the age of 5 not living with his or her biological parents, should be placed in foster care, rather than in an institution, as research shows, such as that commissioned by the Office of the Commissioner for Children, titled ‘Children in Out-Of-Home Care in Malta’, written by Prof. Angela Abela *et al.*

E. Arms Act (Cap. 480)

i. Addition of new article 55A:

'55A. (1) No person shall sell, or offer for sale, toys in the shape of firearms, arms proper, ammunition or knuckle dusters.

(2) Whosoever shall contravene the provisions of sub-article (1) shall, on conviction, be liable to a fine (multa) of not less than twenty-five euro and not more than four hundred and fifty euro.

(3) The provisions of article 41 and 64 shall not apply in relation to offences under this article.'

As provided for in Bill 45, the Various Laws (Criminal Matters) (Amendment) Act, 2010.

F. Malta Armed Forces Act (Cap. 220)

Article 6 (4) "appropriate minimum age" means the age of seventeen years and six months.

This should be amended to read 18 years to meet UN international requirements, namely the Optional Protocol on Children in Armed Conflict which Malta ratified on the 9 May 2002.

G. Protection of Minors (Registration) Act (Cap. 518)

The Office of the Commissioner for Children believes that the law should also include a provision concerning foreign convicted offenders , who are placed on such a register in their own country of residence, and who intend on or have taken up residence in Malta, so as to also have these individuals added to the Offenders Register.

Following the enactment of this law, the Office of the Commissioner for Children has received a number of requests from foreign jurisdictions concerning foreign convicted offenders intending to reside in Malta, and the law is silent on who should be informed and on the procedure of how such an offender is to be placed on the register.

With regards to voluntary workers, it is unclear whether student workers, who for instance are offered a placement over the summer periods, are to be included. The law is also silent on the vetting of the employer himself.

The Office is also concerned that the law is not retroactive and that the Court has too much discretion when choosing whether to insert an offender on the register or not.

H. Code of Police Laws (Cap. 10)

Minors and Alcohol

Article 316F is to be amended, so that the legal age to consume alcohol is raised to 18 in line with most other countries.

An amendment should also be made so that the sale of Butane Gas to minors is made illegal. Butane Gas, which is often sold in a canister form, is commonly abused of as an inhalant/recreational drug among minors.

Furthermore, minors are NOT to stand as co-accused in a trial before the court.

I. Bring into force of Teen Parties Regulations and amendments to Subsidiary Legislation 10.40 (Maintenance of Good Order at Places of Entertainment), as drawn up under the direction of the Office of the Commissioner for Children.

J. Incorporation of UNCRC into Domestic Law

The Office of the Commissioner for Children calls for the incorporation of the United Nations Convention on the Rights of the Child into domestic legislation. A draft Act and memo had been presented to the Minister in 2012. Advice from AG is still pending.

K. Employment

To consider inserting a provision in the Employment and Industrial Relations Act with regards to the minimum age of employment. The Office of the Commissioner for Children believes that rather than stating that education is compulsory until the age of 16, and thus by default the minimum age of employment automatically kicks in at 16, there should be a new provision stating that a minor when employed should have at least completed Form V.

L. The Commissioner for Children Act (Chapter 462 Laws of Malta)

This should be reviewed after having been in force for the past ten years.

M. Press Act (Chapter 248 Laws of Malta)

Provisions are to be added for the protection of minors, as found in the Broadcasting Code for the Protection of Minors (S.L. 350.05).

N. General Concerns:

Furthermore the Office of the Commissioner for Children calls for a more age appropriate and child-friendly manner by which children are heard in court.

All professionals dealing with children should receive professional training.

The requirement of Mediation should be eliminated if it is proved that parties have been separated de facto for a substantial number of years and there is no hope that they will get back together.

Police interrogations involving minors should be as brief as possible so as not to be intimidating or cause further trauma or anxiety to the child. It is to be guaranteed that a parent/guardian/social worker is present to ensure that the best interest of the child is respected.

Development of clear guidelines in cases where parental consent is required or not in medical cases, as well as cases where consent of one parent is sufficient.

The Department for Social Welfare Standards (DSWS) is to be given legal personality to be able to enforce standards related to all services for children.

The standards concerning the safety of children in play areas, as established by the Malta Competition and Consumer Affairs Authority, should be incorporated in a legal vehicle.

With regards to unaccompanied migrant children, the Office of the Commissioner for Children advocates for the introduction of a legal provision so that all children, whether their age has been verified or whether they are still awaiting assessment for such age verification, are to be kept in a child friendly environment, separate from adults.

Conclusion

In conclusion, the Office of the Commissioner for Children will be pleased to meet the Commission on Justice Reform to discuss the issues highlighted in this document further.
