

# MALTA

## Child-friendly justice

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## **1. The child's legal capacity**

### **1.1 Minimum age at which a plaintiff can bring a case to court in their own right**

In Malta the minimum age of criminal responsibility is 14. For all matters, the minimum age at which a plaintiff can bring a case to court in their own right is 18.

## **2. Access to adapted proceedings**

### **2.1 Specialised institutions and competent authorities**

#### **2.1.1 Criminal justice**

##### **2.1.1.1 Juvenile Offenders**

The specialised Court dealing with minors in the Criminal field is the Juvenile Court. This court is regulated by Chapter 287 of the laws of Malta. A child or young person is defined as being a person under the age of 16, although the general definition of a 'minor' under Maltese law sets the age capping at 18. To protect the minors who are themselves part of criminal proceedings, the Juvenile Court sittings are held in a separate building and locality from that of the Law Courts' main building.

The Juvenile Court actually consists of a Magistrate and assisted by another two persons, one of which must be a woman as stated in Article 4(2) of Chapter 287.

Moreover, the court room used for the juvenile court has a different format in that the room is set in the form of a "U". The aim behind this is to make the minors feel comfortable.

The identity of the minor appearing before the Juvenile Court is protected by the same law by actually specifying who can be present for the proceedings and that if any person publishes a photo or the particulars of the said minor is liable to a fine and to a possible detention for infringing such law.

The minor has a right to a legal aid lawyer who is appointed by the same court from the list of legal aid lawyers available for anyone who declares that he does not have sufficient means to pay for his own lawyer.

##### **2.1.1.2 Child Victims**

A child victim can give evidence at any age because there is no minimum age stated in the law and it is not a ground which can be used for inadmissibility. The important thing is that the witness understands that it is wrong to give false testimony.

When the minor is the victim of abuse, the situation is slightly different because the case is actually heard in the main building of the Law Courts, but in this case the minor passes through a secondary door to the building and the minor is heard through a video link. Thus, the minor does not see the perpetrator and does not hear the questions posed by the lawyer of the Defence or of the Prosecution. The latter would be able to see and hear everything through a monitor in the Court Hall. The magistrate hears their questions through the headphones. In this way the magistrate can ask the questions posed to the child in a manner which is more tactful and easier for a child to understand. This means that the minor will only hear the voice of the magistrate. The environment for the child is kept as informal as possible to help the child feel at ease while giving evidence.

The minor gives the evidence in a room which is secluded and in the presence of the magistrate hearing the case (in Malta it is one specific magistrate who hears these cases unless the magistrate has to abstain from the case before her), the deputy registrar and a psychologist or psychiatrist depending on the case. The psychologist or psychiatrist is usually present when there is an inquiry and the said professionals would have already met with the child and can thus be of help for both the child and the magistrate.

The main aim of all this is so that the minor never comes into contact with the accused person.

The child can only be asked to give evidence once, thus any cross-examination must be carried out there and then. The video link is both transcribed and recorded on DVD for any further reference needed by the parties to the case. This is to avoid that the child suffers any further traumas.

If a child is found to be suffering from an abuse in his/her own family, the child is taken away from his/her residence immediately and then taken to an orphanage which can lead to a possible fostering.

To protect the identity of the child, these cases are heard behind closed doors (*in camera*), thus, the public and press are prohibited from attending the sitting. Moreover, when the judgment is delivered any reference to the child is kept in an anonymous manner to safeguard the identity of the child.

### **2.1.2 Civil justice**

Minors under the age of eighteen cannot sue or be sued except through a parent, tutor, curator or guardian. Therefore, in order to institute civil proceedings minors need someone to act on their behalf. There are no specialist institutions dealing with children who initiate civil judicial proceedings. However, in the case of court cases dealing with personal separation or divorce, there are special provisions in the Civil Code, Chapter 16 of the laws of Malta, stating that during the proceedings the court shall always consider the best interests and welfare of the minor children in its decision. This also includes the appointment of children's advocates to represent the interests of minor children of the parties. Children's advocates may also make submissions on behalf of minors during the mediation process in Family Court cases.

### **2.1.3 Administrative justice**

The following are administrative judicial proceedings involving children:

#### **2.1.3.1 Child Protection**

A decision on whether a child is to be removed from the carer and be placed into care on grounds that the child is subject to harm or not is to be primarily reviewed by the Juvenile Court (described above). The applicable law is Chapter 285 of the laws of Malta, the Children and Young Persons, Care Order Act and this law provides the procedural guarantees for the minor and for the parents who contest the order for the children to be removed. A care order may be issued when a child or young person under the age of sixteen years is in need of care, protection and guidance which he or she is unlikely to receive from his or her parents. Moreover, in terms of the Refugees Act, a care order may be issued vis-a-vis any child or young person below the age of eighteen years who is found under circumstances which clearly indicate that he or she is in need of care.

The key institution involved in child protection is *Aġenzija Appoġġ*, which is the agency that makes a recommendation so that an Order for Care is issued by the responsible local authority (currently the Ministry for the Family and Social Solidarity). Such a decision is reviewed by the Juvenile Court as explained in the previous paragraph.

Chapter 285 of the laws of Malta vests an entity, called the Department for Social Welfare Standards, with the power to inspect the premises/facilities in which the children are kept if such child is boarded out in a home for minors.

#### **2.1.3.2 Adoptions**

The Adoption Administration Act, Chapter 495 of the laws of Malta establishes the Adoptions Board whose function is to assess the suitability of parents and determine whether adoption is in the child's best interest. A child may be freed up for adoption in different ways as provided in the Civil Code (Chapter 16 of the laws of Malta). Another entity which is a key player in adoptions is the Central Authority (also established by the same Act) which accredits and regulates private agencies which facilitate adoptions.

When the minor to be adopted is the natural offspring of one of the adoptive parents, then the administrative process is avoided.

Under any circumstance giving rise to a case for adoption, the decision on whether an adoption is to be carried out is taken by the Court of Voluntary Jurisdiction which is asked to issue a decree upon a request for an adoption to be carried out.

A prospective adoptive parent who is aggrieved by the decision of the Adoption board may challenge the decision before the Adoption Appeals Board.

#### **2.1.3.3 Fostering**

The Foster Care Act, Chapter 491 of the laws of Malta establishes the Foster Care Board which determines the suitability or otherwise of a prospective foster carer. The same act provides for the establishment of a Central

Authority for foster care which accredits and monitors foster care agencies, whose role will be to match children who are in need of foster care with prospective foster care parents.

A prospective foster care parent who is aggrieved by the decision of the Foster Care board may challenge the decision before the Foster Care Appeals Board.

#### **2.1.3.4 Unaccompanied asylum seekers and children in asylum proceedings**

In accordance with the Refugees Act, Chapter 420 of the laws of Malta, minors who are seeking asylum and are unaccompanied will be treated with a Care Order and hence they will be under the care of the Ministry for the Family and Social Solidarity.

The Office of the Refugee Commissioner within the Ministry for Home Affairs and National Security is responsible for receiving, processing and determining asylum applications at first instance. When an unaccompanied person under the age of eighteen makes an asylum application, the Office refers this person to the Director of Social Welfare Standards and to the Agency for the Welfare of Asylum-Seekers. Such applications are kept on hold until a decision is reached by the Age Assessment Team (AAT) to confirm that the person is a minor or otherwise. Once it is confirmed that the person is a minor then a legal guardian is appointed. The Office of the Refugee Commissioner can only proceed with the asylum application of an unaccompanied minor asylum-seeker after a legal guardian has been appointed. The latter has to be present during the asylum interview. Contrarily, when it is concluded by the AAT that the alleged minor is an adult the Office proceeds with the asylum interview as per normal procedure. Applications are also received by accompanied minor children (when accompanied by their parent/s or a close relative).

Unaccompanied minors who are over 14 years of age are generally interviewed by a trained caseworker in the presence of their legal guardian. Unaccompanied minors, who are of a tender age, are not interviewed directly but the asylum procedure is conducted by compiling the information about the minor from his/her legal guardian. Thus, in the best interest of the child, the interview may be omitted and a decision be taken on the information provided by the minor/legal guardian.

This Office takes into account child specific aspects when determining if a child faces a real risk of suffering persecution or serious harm. If an unaccompanied minor does not meet the criteria to be recognised as a refugee or to be granted subsidiary protection then he/she is granted Temporary Humanitarian Protection (THP). This is a national form of protection renewed on a yearly basis until the minor reaches adult age (18 years of age).

## **2.2. Legal and policy measures in place to avoid undue delay in the handling of cases involving children**

### **2.2.1 Child as a Victim**

Cases involving minors who have been abused or defiled are assigned to one particular magistrate so that there is consistency in the judgments and so that the magistrate can concentrate on these cases. In this way the magistrate can give these delicate cases a priority and deliver the relative judgments without undue delay so that justice can be carried out in an expedient manner and hopefully keep the negative emotional and psychological effects to a minimum for the child. Moreover, this enables the magistrate to specialise in these painful and distressing cases. The child, as a victim, would only have to testify once.

### **2.2.2 Child as an Offender**

We also have one magistrate focusing on the Juvenile Court, having regular sittings and deciding the cases before it in an efficient, fair and just manner focusing on both the needs of the young person accused and the young person or adult wronged. Moreover, Chapter 285 of the laws of Malta (Children and Young Persons Act) also establishes a maximum of 21 days from the date of the first sitting for a decision to be reached by the Juvenile Court.

### **2.2.3 Civil justice**

Generally, cases involving children are not fast-tracked with the exception of appeal cases from Family Court which are fast-tracked. However, during proceedings in general and especially in family cases, the Courts can make provisions in the best interest of the child.

### **2.2.4 Administrative justice guidance**

Cases concerning minors when care orders are issued are brought before the Juvenile Court which is a specialised court, hence all such cases are given a priority in this sense. There is no mechanism to monitor the implementation of urgency principle in respect of proceedings involving children; however the welfare agency or entity which is conducting proceedings may bring these matters to the attention of the court so that the court would give priority to such matter.

## **2.3 Child-specific support mechanisms and procedures**

### **2.3.1 Protection against discrimination**

There is no overarching rule in Maltese law which specifies the conditions in which a vulnerable child is to be heard during all the different criminal or administrative proceedings that exist. There are laws found in different statutes and procedures applied by the judicial or quasi-judicial bodies that make the respective administrative and criminal proceedings in line with Article 12 of the UNCRC.

There are rules in place to ensure that public officials do not discriminate and these rules are equally applicable to public officials when dealing with children in criminal and administrative matters. Albeit there is no specific law prohibiting discrimination by public officials amongst children in matters such as age, capacity, social background and race, all public officials are bound to observe the regulations of the Public Administration Act (Chapter 497 of the laws of Malta).

This act establishes a procedure to review the conduct of public official when an allegation is made that an official acted against the Code of Ethics, which code prohibits various forms of discrimination. Chapter 497 also draws reference to disciplinary regulations which may ensue following such misconduct.

An individual who believes that any public official or public entity unjustifiably discriminated against a child or a group of children can also ask the Office of the Ombudsman to investigate. Where it results that such an injustice took place the Ombudsman will ask the public administration to remedy the situation and may also bring the matter in parliament if the matter is a serious enough.

### **2.3.2 Criminal Proceedings**

When a child is subject to criminal proceedings the child sits around a table with the adjudicator and other assessors so that child feels more comfortable and hence the child will be in a better position to speak to the adjudicator, as described in the first question on Juvenile Offenders.

#### **2.3.2.1 Criminal responsibility**

There are various definitions of what the law deems as a 'child' across the Maltese legal framework for example in the Victims of Crime Act (Chapter 539 of the laws of Malta) and in the Commissioner for Children Act (Chapter 462 of the laws of Malta) the minor is defined as a person of either sex who has not attained eighteen years of age. However, in other legal instruments a child is at times defined as a person who is under 16 years of age. This however does not mean that the law allows room for any kind of discrimination between a child and an adult because all the rights envisaged for an adult are also available to minors. In fact, the position of the child as a suspect, as a witness or as a victim is similar to that of adults involved in criminal proceedings.

According to Article 35 of the Criminal Code (Chapter 9 of the laws of Malta) '...a minor under fourteen years of age is exempt from criminal responsibility for any act or omission'. However, the Court may after the application filed by the Police require that the parent or any other person charged with the upbringing of the child to appear before it.

Moreover, Article 37 of the Criminal Code states that a minor under sixteen years of age shall also be exempt from criminal responsibility for any act of omission done without mischievous discretion. On the other hand, if such mischievous discretion is proven by the prosecution and the minor is aged between fourteen to sixteen years of age or between sixteen and eighteen years the penalty shall be decreased by one or two degrees. Thus, mischievous discretion must be proven for a minor to be found guilty of an act or omission.

The Criminal Code clearly states that the minimum age of criminal responsibility is 14 at present. This has been recently amended as previously a child could be found guilty and liable before the Juvenile Court from the age of 9 years. Every person, thus every child is entitled to legal representation. The Juvenile Court in Malta has competence to hear cases of children up to the age of 16, although a minor under Maltese law is defined as a person under the age of 18. At the age of 16 a child is tried before the Criminal Court (court with superior

jurisdiction) or the Court of Magistrates (court with inferior jurisdiction) depending on the crime which the minor is accused of. However, the Juvenile Court Act provides that the Juvenile Court with the discretion to determine whether to proceed with the hearing and determination of the case or whether to adjourn the case and refer it to the competent Court of Magistrates to proceed with the hearing and determination of the case in the case that the proceedings commence before reaching the age of 16 but determination of the case is not concluded when the minor reaches such age.

The Office of the Commissioner for Children has regularly and repeatedly stressed the importance for the Juvenile Court to extend its competence to hear cases involving minors up to the age of 18. Moreover, it is important that children are directed towards diversionary informal settings rather than be exposed to formal criminal proceedings. This would certainly enhance the delivery of child friendly justice. Another important recommendation this office has repeatedly made is for minors who stand as co-accused with adults not to be heard before the Criminal Court or the Court of Magistrates but before the Juvenile Court. At present, if a person is 14 years of age and is co-accused together with an adult they are both heard before the Criminal Court or the Court of Magistrates. A social worker and a probation officer are assigned to every child and services are offered as required through *Aġenzija Appoġġ* as the national welfare agency.

#### **2.3.2.2 Child abuse**

When there is a suspicion that a minor is being abused of, the prosecuting officer reports this to the inquiring magistrate so that a psychologist is immediately appointed to verify such allegations and all the necessary arrangements for the well-being of the child are made by a close coordination between the Executive Police and the agency offering services to ensure the best interests of the child.

With regards to confidentiality the case is heard behind closed doors and only the prosecuting officer, the parents or legal guardians and lawyers of the child and the accused and his/her lawyer are present. Once the judgment is delivered the name of the child is removed from the copies of the judgment so as to protect the vulnerability of the same.

#### **2.3.2.3 Children giving evidence**

The law does not indicate any particular age for which the evidence given by a minor is deemed to be admissible or otherwise. In fact, any child can take the witness stand; it is however essential for the court to be satisfied that the child witness understands that it is wrong to give false testimony. There are no statutory limits for a child to express views.

The minor will be required to give evidence in Court through a video link and indicate the perpetrator as explained above and will be represented by his/her lawyer. Any act which is presented before the relevant court must be done through the child's legal representative.

#### **2.3.3 Migrant Children Refugee, asylum seeking children, unaccompanied children**

As regards migrant children, Malta established the Agency for the Welfare of Asylum Seekers whose role is to assist in the implementation of national legislation and policy concerning the welfare of refugees, persons enjoying international protection and asylum seekers.

In accordance with the Refugees Act (Chapter 420 of the laws of Malta) a child who is an unaccompanied minor will:

- a) be assisted by a representative (as specified in the Refugees Act) when the minor will make an application for asylum; and
- b) be treated as a child who is in need of care for the purpose of Chapter 285 of the laws of Malta and hence the minor will be subject to a care order. Hence the child will be placed under the care of the local authority.

In addition to this, the Office of the Refugee Commissioner adopts a number of measures to ensure that the voice of the child is heard. Asylum Procedure: During the asylum procedure, the unaccompanied minor is given the opportunity to present his/her case fully. Unaccompanied minors who are over 14 years of age are generally interviewed by a caseworker in the presence of their legal guardian. Unaccompanied minors, who are of a tender age, are not interviewed directly, but the asylum procedure is conducted by compiling the information about the minor from his/her legal guardian. Thus, in the best interest of the child, the interview may be omitted and a

decision be taken on the information provided by the minor/legal guardian. Prioritisation of cases: the Office tries as much as possible, in the best interest of the child, too prioritise cases of unaccompanied minors. Experienced and specialised trained caseworker: the Office assigns the most experienced and trained case workers to lead interviews with unaccompanied minors. Such caseworkers would have been trained under the European Asylum Support Office (EASO) training module on interviewing children. Atmosphere of trust: an atmosphere of trust is created during the asylum interview to help the child feel at ease during the asylum procedure.

#### **2.3.4 Children in the care of state**

A child will be placed in state care once a Care Order is issued in accordance with Chapter 285 of the laws of Malta. After the Care Order is served a 'key social worker' will be assigned to work with the child and the duties and functions of this person are specified in Article 7 of Subsidiary Legislation 285.01. One of the specific duties of such social worker is to meet with the child at regular intervals and help the child at regular intervals and draw up the necessary reports for the Children and Young Persons' Advisory Board. In this way the wishes of the child on the important decisions are heard and brought forward to the decision maker.

### **3. Multidisciplinary aspects**

#### **3.1 Coordination of their activities by relevant organisations**

##### **3.1.1 Criminal cases**

With reference to the above, to protect the right to private and family life of the child involved the hearings are heard behind closed doors and there are serious repercussions for anyone who divulges the particulars of the minor to the media.

##### **3.1.2 Family Court cases**

The Judge may appoint experts (psychologists or social workers) to draw up a report in relation to a minor. Once each expert submits his report, then the court will decide on the matter.

### **4. Training for professionals**

#### **4.1 Vetting of professionals**

This is ensured through Chapter 518 of the laws of Malta, the Protection of Minors (Registration Act). The registrar of the Civil Courts and Tribunal maintains a register describing the name of any person convicted of an offence which constitutes a threat or a danger to the education, care, custody, welfare or upbringing of minors. Employers recruiting professionals to work with children may file an application before the Court of Voluntary Jurisdiction to verify whether these are listed in the register.

#### **4.2 Cooperation with other MS on training**

The Maltese Judicial Studies Committee (JSC) is in strong collaboration with EJTN (European Judicial Training Network) in relation to training. This is the main training body of the European Union specialised in providing training to the judiciary in the different Member States. The Maltese members of the judiciary regularly attend seminars abroad organised by the EJTN.

### **5. Monitoring and enforcement of decisions in proceedings involving children**

#### **5.1 Criminal justice**

##### **5.1.1 Provision of information**

No specific measures are aimed at ensuring that a child effectively receives relevant information after judicial proceedings were initiated.

##### **5.1.2 Sentencing**

The punishments that can be imposed on adults can also be imposed on children. Certain reductions may be applied in favour of children depending on their age, for instance, where children are aged between 14 and 18 years, the punishment applicable to the offence is diminished by one or two degrees.

Some special measures apply to the sentencing of child offenders and are described below. These measures benefit mainly children under 16 years of age. Children between 16 and 18 years of age are in most aspects treated in the same way as adults.

### **5.1.3 Care orders**

Care orders are available for children under 16 years of age but are not available for children between 16 and 18 years of age.

Where a child under 16 is found guilty of an offence, the court can issue a care order under the Children and Young Persons (Care Orders) Act. This is possible where, in the court's opinion, the other methods for dealing with the case are not suitable and the child or young person needs care or control which s/he is unlikely to receive unless the court makes a care order.

The court may, instead of sentencing the child or young person to imprisonment or dealing with her/him in another manner available according to law, make an order committing the child to the care of the Minister responsible for social welfare for a period between one and five years. Unless it has ceased to have effect earlier, a care order ceases to have effect when the child or young person turns 18 years old.

The Minister can also remove a child or young person from prison and take the child into his care. This may occur where the Minister is advised by the Children and Young Persons Advisory Board that it is in the interest of the education or welfare of a child or young person to do so. This option is not available if the imprisonment sentence is for wilful homicide.

In essence, the Minister has the same powers and duties with respect to the care and custody of children and young persons in her/his care as the parents or guardian would have but for the order. The Minister has a general duty to further the best interests of the child or young person and to afford her/him the opportunity for the proper development of her/his character and abilities. Nevertheless, the Minister can act inconsistently with this general duty if necessary for the protection of the members of the public.

Children under care orders are placed in residential homes, hostels or similar institutions or boarded out with a suitable person or private care institution. The Minister can make other suitable accommodation and maintenance arrangements. The Minister can also allow children below the age of 16 in state care to be placed under the charge and control of a parent, guardian, relative or friend.

If a child under 16 absconds from where s/he is required to live or is absent at an unpermitted time, s/he may be apprehended without warrant by the police and taken back to such premises. Anyone who compels, incites, assists, aids or abets in absconding or being absent, is guilty of an offence and liable to up to six months' imprisonment or a fine (*multa*) not exceeding EUR 232.94 or to both.

### **5.1.4 Probation orders**

Another alternative to imprisonment are probation orders under the Probation Act, Chapter 446 of the laws of Malta. Instead of sentencing the offender (adult or child), the court can make a probation order placing the offender under the supervision of a probation officer for a specified period of not less than one year and not more than three years.

Before making a probation order, the court explains to the offender, in ordinary language, the effect of the order and that if s/he fails to comply with it or commits another offence, s/he can be sentenced for the original offence. If the offender is over 14 years of age, the court will not make the order unless the offender expresses her/his willingness to comply with its requirements.

Probation orders are served on the probationer and the Director of Probation Services who will assign a probation officer to supervise the probationer. If the probationer is under 18 years of age, a copy of the probation order will also be furnished to the parent or person charged with her/his upbringing.

Where possible, the Director of Probation Services assigns a probation officer experienced in dealing with children or young persons to supervise offenders who are under 16 years of age. This does not apply in the case of children between 16 and 18 years of age.

### **5.1.5 Deprivation of liberty**

Although there are no legal impediments for the police to hold anyone under the age of 16 under arrest it is not normal practice to do so. Those between the age of 16 and 18 are treated in the same way as adults but are kept separate from mainstream detainees in order to avoid any possible worsening of a situation. Social workers may



be involved to work with the family and help maintain family ties.

The main prisons in Malta form part of the Corradino Correctional Facility. In addition, there are other locations that are considered by law as places of custody (see section 2.3.4 above). According to the Prisons Regulations when allocating prisoners to different prisons, the judicial and legal situation of offenders must be given due account. With specific reference to children, due distinction must be made, as far as practicable, between prisoners under 21 years of age and prisoners over that age. Moreover, prisoners under 21 years of age must be kept under conditions that take account of the needs of their age and protect them from harmful influences. Training programmes provided in prisons, work within the prison, and food provided in prison must take into account the age of the prisoner.

One of the departments at the Corradino Correctional Facility is YOURS (Young Offenders Unit Rehabilitation Services). This facility is meant to cater for young inmates but is nevertheless situated on the same site as the prison for adult offenders. There are currently plans to restructure YOURS. These plans include relocating the facility beyond the precincts of the mainstream correctional facility and enhancing the educational and therapeutic components of the section's programme. According to the Office of the Commissioner for Children, this change would mean that child prisoners will no longer be vulnerable to the stigma and negative influences associated with Corradino Correctional Facility.

### **5.1.6 Alternatives to imprisonment**

The main alternatives to imprisonment are care orders (for children under 16 years of age) and probation orders (available to both adult and child offenders) as described here [Include link to 6.1.3 and 6.1.4).

In addition, the Restorative Justice Act, Chapter 516 of the laws of Malta, provides for the eligibility to parole. As a general rule, the parole eligibility date of a prisoner serving an imprisonment sentence for a term of one year and not more than two years is calculated at 33 percent of the term of imprisonment and in the case of an imprisonment sentence of more than two but less than seven years at 50 percent of the term of imprisonment. In the case of imprisonment sentences of more than seven years it is calculated at 58 percent of the term of imprisonment. In its judgment, the court can include an earlier parole eligibility date for offenders under 16 years of age at the time the offence was committed. This last measure is thus not available to children between 16 and 18 years of age.

### **5.1.7 Criminal records**

The criminal record of a person regarding convictions is never cleared. All convictions are recorded and maintained in police records. However, certain convictions are not entered in conduct certificates as regulated by the Conduct Certificates Ordinance. In this respect there is a special measure for children: if the person convicted of a crime was at the time of its commission under 18 years of age the conviction will not be entered in the conduct certificate.

Conduct certificates can only be issued at the request of the person to whom they refer or upon an order of a court. In addition, a number of competent national authorities can request a complete record of criminal convictions from the Commissioner of Police. The written consent of the person to whom the record relates is necessary and the request must be connected with the recruitment or continued employment of a person or the issue or renewal of a licence or permit.

## **5.2 Civil justice**

### **5.2.1 The child as a plaintiff/defendant**

Decisions involving children as plaintiffs or defendants are enforced in the same way as decisions involving adults as plaintiffs or defendants. Presumably the child will be informed about the decision of the court and the enforcement of such decision through his/her lawyer or other representative. Judgments of the courts of Malta are executive titles and the rules of the Code of Organisation and Civil Procedure (COCP), Chapter 12 of the laws of Malta apply with respect to their enforceability. There are no measures in place to ensure that decisions which concern children specifically are directly or immediately enforceable. However it is relevant to note that some judgments may be enforced after the lapse of 24 hours from delivery, including judgments ordering the supply of maintenance. Any other definitive judgment which condemns a debtor to pay a liquidated sum, or to deliver up or surrender a specific thing, or to perform or fulfil a specific act or obligation, may be enforced after two days from the day of its delivery. Nevertheless, in urgent cases, the court may order the enforcement of any

judgement even before the expiration of these times. The order for such enforcement may be made in the judgment itself.

There are no established procedures as to how the child's lawyer or legal representative is to communicate and explain the given decision or judgment to the child. There are no requirements at law that the language used should be adapted to the child's level of understanding.

In cases involving domestic violence, the court may issue a protection order or a restraining order in order to protect the best interests of the child or children. The objective of a protection order is to provide safety for the injured party from the aggressor while the alleged offender is being tried for an offence. Restraining orders on the other hand, are aimed at protecting the victim after the accused is found guilty of an offence. While the objective of the protection order is to protect the victim during trial, the objective of a restraining order is to protect the victim after trial.

In the case of decisions issued against a child defendant, enforcement will take place against the person who is in charge of the child. Any person in charge of a child is liable for any damage caused by the child if s/he fails to exercise the care of a bonus paterfamilias in order to prevent the act. Persons with a mental disorder or other condition, which renders them incapable of managing their own affairs, children under nine years of age, and, unless it is proven that they have acted with a mischievous discretion, children under 14 years of age, cannot be bound to pay the damage caused by them. The injured party may however take action against the person in charge of the child. Nevertheless, where the party injured cannot recover damages from such other persons, either because they are not liable or because they have no means, and the said party has not, through his/her own negligence, want of attention, or imprudence, caused the damage, the court may, having regard to the circumstances of the case and to the means of the party causing the damage and of the injured party, order the damage to be made good, wholly or in part, out of the property of the child.

From the laws examined and research carried out for the purposes of this study no measures were identified that would allow the winning party to seek the detention of a child defendant as a means of enforcing a judgment.

### **5.2.2 The child as a witness/in any other role**

The law (Article 564 of the COCP) provides that whatever may be the age of the witness whom it is intended to produce, he is admissible as such, provided he understands that it is wrong to give false testimony. No additional relevant rules have been identified specific to child witnesses and children in other roles.

## **5.3 Administrative justice**

### **5.3.1 The child as a plaintiff/defendant**

According to Maltese law, children cannot sue or be sued, except in the person of the parent exercising parental authority, or, in the absence of such parent, of a tutor or a curator (see Section 2.6 for further details).

Children cannot start a legal action, including an appeal to a court against an administrative decision, by themselves. A parent can represent the child as long as the parent's interests do not conflict with the child's. A curator can also be appointed to represent the child. The child himself/herself can file an application for a curator to be appointed.

The curator ad litem may also be appointed by the court before which the action has been brought, or is about to be brought to protect the interest of the child in that specific proceeding, upon the application of any interested person. The application for the appointment of a curator to represent a child wishing to sue may be made by any person. The court will refuse an application for the appointment of a curator if the person in respect of whom such appointment is applied for is already represented by a tutor or a curator, unless the action is against such tutor or curator.

If the parent exercising parental authority, owing to absence or for other reasons, is unable or refuses to appear for the child, or is unable or refuses to give his/her assent for the child to sue, the requisite authority may be granted by the court of voluntary jurisdiction. In these cases the court of voluntary jurisdiction can grant the child a general authorisation to sue or be sued in any action which may be pending at the time, or which may thereafter be brought. The court may grant such authorisation under such conditions as it deems proper, according to circumstances. Therefore, the court has a degree of discretion to grant dispensation to a child to

bring a case before a court. No legislation or other measures in relation to how a child would be assisted in obtaining this authorisation from the court was identified.

Any judicial act performed by, or against, any person who does not have the capacity to sue or be sued, and is not duly authorised for the purpose, is null. Nullity resulting from minority may only be alleged by the child him/herself or his/her heir. Any nullity from lack of the parent's assent, may only be alleged by the parent and only whilst the child is still subject to parental authority. The defect of nullity may be cured, if the parent exercising parental authority or the curator affirms the acts.

The law does not specify what happens when a child reaches the age of 18 during the proceedings. A person over 18 years of age is capable of performing all the acts of civil life. It would therefore seem that the child can continue with proceedings in his/her own right.

### **5.3.2 The child as a witness/subject of proceedings**

Children can participate in judicial proceedings as witnesses. In fact, all persons of sound mind can be admitted as witnesses, unless there are objections against their competency. There is no minimum age stated in the law and age does not constitute a ground of inadmissibility. The only requirement is that the witness understands that it is wrong to give false testimony. There is no provision stating that the agreement of the parent/guardian is necessary for the participation of the child in the proceedings as a witness. Nor are there special provisions for child witnesses.

Witnesses, including child witnesses, are examined in open court and viva voce (i.e. orally) and may not be assisted or advised by any person. Witnesses must answer any question allowed by the court and the court can compel them to do so by committing them to detention until they have sworn and answered. However, witnesses cannot be compelled to answer questions the answer to which may subject them to criminal prosecution. The court can also decide that a witness is not bound to answer a particular question on the ground that the answer might expose him/her to his/her own degradation. The law does not contain any statement, additional to these general rules, as to the conditions in which a child can refuse to be a witness.

As regards proceedings before the Administrative Review Tribunal, the Tribunal may summon any person, including a child, to appear before it and give evidence and produce documents and the Chairperson has the power to administer the oath.

In proceedings regarding objections to care orders, the Juvenile Court can require further evidence besides that submitted by the Minister for social welfare or the person objecting to the care order and for this purpose it may, ex officio, summon any person to give evidence and order any document to be produced. The Juvenile Court may not require any evidence that would otherwise be inadmissible in a civil court.

No other provisions regulating how a child may participate in proceedings in other roles are found.

### **5.3.3 Child protection cases**

Child protection cases can be started by the legal department of Aġenzija Appoġġ or by a private lawyer. Usually Aġenzija Appoġġ takes care of these matters and children are taken away from their home and a care order is issued by the Children and Young Persons Advisory Board.

## **6. Access to remedies**

### **6.1 Criminal justice**

#### **6.1.1 Right in law or policy for child victims in case of decision not to prosecute**

There is no specific right for child victims, this right emanates from the law itself and applies to all victims be it child or adult.

#### **6.1.2 Access to any complaint, legal appeal or judicial review mechanisms**

A child may access these through his custodian, guardian and anyone exercising parental authority on the child.

#### **6.1.3 Claiming for compensation**

As regards the right to compensation of victims of crime, no distinction is made between an adult and a minor in Article 698 of the Criminal Code.

#### **6.1.4 Statute of limitations**

As per article 2124 of the Civil Code prescription does not run against minors and persons interdicted.

#### **6.2 Civil justice**

A child can access any complaint, legal appeal or judicial review mechanism through a parent, tutor, curator or guardian. The parent, tutor, curator or guardian instituting proceedings on behalf of a child should always act in the best interest of the child. Such mechanisms are accessed after the child, through his parent, tutor, curator or guardian seeks legal advice from a legal professional. In Family Court cases, if there is a conflict of interest with his parents' interest, the court appoints a children's advocate to make submissions on their behalf.

Malta has ratified the UN Convention on the Rights of the Child (CRC) and enacted a number of laws intended to harmonise its laws with the CRC. However, there appears to be no legal basis for the enforcement of rights guaranteed by the CRC that are not protected under analogous implementing legislation. In case of a violation of child rights, claims on behalf of a minor can be brought before the court by a parent, or in the absence a parent, by a tutor. An application for legal aid can be submitted to Malta's Civil Court and an oral demand can be made to the child's advocate for Legal Aid. The Juvenile Court hears charges against, or proceedings relating to children, defined in Maltese law as a person who is under the age of sixteen years.

Civil proceedings are regulated by the Civil Code. The Family Section in the Civil Court First Hall is supported by the professional assistance of mediators and child advocates. Unfortunately, it is only upon the Court's discretion, that a child advocate is appointed to represent the interests of the child. Recommendations have been put forward for the child to be awarded access to legal representation independently. Currently, it is only in issues concerning parental authority and decisions affecting the 'best interests' of the child, that the Civil Court is compelled to hear the child if he/she has reached the age of fourteen. Through this provision, the child is granted the right to participation.

However, it is evident that the right of participation in matters concerning them should be bestowed to all children, irrespective of age. An exception to the above exists in Title III of the Civil Code which regulates Adoption, which was last amended in 2008. Following such amendments, Article 177 provides that the child has a right to have a child advocate prior to adoption. This right however is only applicable to children aged eleven and over, resulting in a number of other children who are not entitled to such right. Recommendations were made so that the right for the child to have a child advocate is not limited by age.

##### **6.2.1 Divorce proceedings**

More recently Article 66I (2) provides that in divorce proceedings instituted by either of the spouses, or by both spouses after having agreed that their marriage is to be dissolved, also where the spouses are separated by means of a contract or a court judgment, "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".
- (c)

Normally, the Child Advocate or the Judge would speak to the child privately (in camera).

This provision was introduced in 2011 following the introduction of divorce in Malta. Yet, in this scenario the right to be heard once again depends on the discretion of the court.

##### **6.2.2 Hearing of children**

The Civil Code regulates those instances where the child is heard in proceedings that concern him, such as in cases concerning parental authority, adoption and divorce as explained and discussed above in the reply to question 1. A child advocate is appointed to represent the interests of the child upon the court's discretion.

In issues concerning parental authority and decisions affecting the 'best interests' of the child, the Civil Court is compelled to hear the child if he/she has reached the age of fourteen. This is age tied as explained above.

In divorce proceedings, as explained above, the court either on its own initiative or upon the request of the mediator or of one of the spouses can appoint a children's advocate to represent the interests of the minor

children of the parties and hear the minor children of the parties, where it considers it to be in their best interest to do so. The Court is bound by the principle of the best interest of the child.

Malta's draft National Children's Policy supports the notion that children from a very young age are active subjects, capable of possessing and conveying views. For this to be possible however, appropriate means should be used to facilitate meaningful participation. Adults are not to inflict an age limit for participation, but are rather to encourage children to be effectively involved in the dynamics of society. This entails creating the appropriate means and space to facilitate engagement. It is, hence, recommended that the appropriate structures and means are developed so that adults are encouraged to listen to children, and the right atmosphere be created for children to be actively involved.

Recommendations have been made for Aġenzija Appoġġ, the national welfare agency, to strengthen its collaboration with the Court, enticing the justice system to ensure that the child is heard.

Social workers and child advocates should work together to safeguard the social, emotional and civic rights which the child is entitled to. Specific guidelines on the practices of the child advocate in court cases are to be established. Furthermore, it is to be ensured that court procedures involving children are more efficient, and that such cases are not prolonged.

Recommendations have also been made for further investment to recruit child advocates.

The Office of the Commissioner for Children above all insists and has recommended that the child should be given the right to ask, at his own discretion, to be represented by an advocate. Moreover, this right should not be restricted by age.

### **6.3. Administrative justice**

In view that all minors have to be represented by a parent, tutor, curator or guardian they cannot appeal against a court or an administrative decision. In such case the person or entity who exercises care and custody rights over the child will appeal against the court's decision.

During contentious proceedings between the parental rights holders before the Family Court a children's advocate may be appointed to represent the child's interest. The role of the advocate in such instance is however limited to the civil dispute between the parents and not administrative proceedings concerning the child. In deciding civil disputes the court is bound to take into account the best interest of the child as per Article 149 Civil Code. This article is restricted to civil proceedings and cannot be utilised during administrative proceedings concerning the care, custody and property of the child.

In adoption proceedings, if the child is 11 years of age and over, has a right to have a child advocate prior to adoption. The right to representation can also be conferred to the social worker in adoption proceedings.

## **7. Family life**

### **7.1 Procedure for adoption, including international adoption.**

An initial meeting with the prospective adoptive parent/s is held with a social worker from one of the Accredited Agencies<sup>1</sup> in Malta whereby the adoption process is explained. Interested parties will then fill in an application form and attend a 7 week course in preparation for the adoption. The course tackles various topics, including separation and attachment, loss, dual identity, trans-racial adoptions, as well as assist in understanding and dealing with possible past abuse. Helping the child/ren settle in and understanding adoption are topics also discussed in the course.

On completion of the course, a social worker from the adoptions team is allocated to the applicants. The applicants will then need to present documentation, including a police conduct certificate, income returns, financial situation, medical reports and a psychological assessment prior to the commencement of the home study report which will then be conducted by the assigned social worker. The home study report is an in-depth

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<sup>1</sup> The Central Authority of Malta has accredited the five Adoption Agencies: Aġenzija Appoġġ, Adoption Legal Services, Beyond Borders Adoption Agency, Aġenzija Tama and Adoption Opportunities. Only Aġenzija Appoġġ which is a national agency offers all its services free of charge.

assessment of the applicant/s as an individual and his/her relationship. The report, including documentation, is then submitted to the Adoptions Board for approval.

Upon board approval, the prospective adoptive parents (PAPs) will then decide which country they would like to apply to and compile documentation as required by the specific sending country. The dossier is then sent to the sending country of their choice. Matching is done by the sending country. The PAPs also have the option to be put on the local adoptions list. Matching is done according to the parent's preferences and the best interest of the child.

Adoptions in Malta are regulated by Title III ("Of Adoption") of Chapter 16 ("Civil Code of Malta) of the laws of Malta and the administration of adoption proceedings is regulated by Chapter 495 ("Adoption Administration Act") of the laws of Malta

### **7.2 Different types of adoption**

In Malta there are open<sup>2</sup> and closed adoptions. The Accredited agencies in Malta mainly deal with closed adoptions. An open adoption can only be granted by the court in the case of a child who has attained eleven years of age and if it is in his best interest<sup>3</sup>

### **7.3 Measures in place to ensure that the child's best interests are taken as the paramount consideration**

The whole process keeps the child's best interest in mind. The assessment process is quite in depth. Besides the social worker's assessment, the prospective adoptive parents are required to be assessed by a psychologist, present a health check by their GP, undergo medical tests, present their financial status and police conducts.

The Adoption Administration Act, Chapter 495 of the laws of Malta establishes a Central Authority whose function is to ensure that Malta complies with the Convention on Inter-Country Adoption. In order for there to be an inter-country adoption the parents must be first approved by the Adoption Board; which Board ensures that the prospective adoptive parents are fit to be adoptive parents and that an adoption is also in the best interest of the child (Article 4(1) (a) of Chapter 495). This exercise is carried out after social reports on the child and the home study report are carried out by social workers in different countries and submitted to the Adoption Board. Where more than one child is involved the report will either be jointly drawn or an individual report will be drawn up for each individual child. The decision on whether an adoption placement is carried out in the child's best interest is carried out by the Adoption Board which is composed of professionals representing different disciplines.

The Central Authority accredits adoption agencies which assist in finding children which are free for Inter-Country Adoption and assists in the matching process. The Central Authority closely monitors the way in which the adoption accredited agencies work so as to ensure that the way in which they deal and operate in third countries is not contrary to the Convention, including the best-practices guides established by the Hague Secretariat. All inter-country adoptions have to be approved by the Malta Central Authority and whenever the Central Authority determines that an individual seeks to adopt a child in contravention of these guidelines the Central Authority intervenes and does not approve such an adoption. Article 26 of the Adoption Administration Act makes it a criminal offence for an individual to adopt a child without the consent of the Central Authority. Moreover, Article 120 of the Civil Code states:

"Upon an application for an adoption decree of a person to be adopted, the court may on its own motion or on the application of an interested person, including the child to be adopted, appoint a child's advocate and, or a social worker to ensure that the child is adequately represented and his best interests safeguarded".

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<sup>2</sup> Article 2 of Chapter 495 of the Laws of Malta provides that " 'open adoption' means an adoption made in accordance with Article 22 of this Act and article 119 of the Civil Code, whereby a child maintains contact with his parents and, or natural family".

<sup>3</sup> Article 119(4) of Chapter 16, Civil Code of Malta, provides that "*In the case of a child who has attained eleven years of age and if it is in his best interest, the court may, in making the adoption decree, authorise an agreement of open adoption which has been approved by the Adoption Board, whereby the parents and, or the natural family shall maintain contact with the child; Provided that the court shall ensure that an agreement of open adoption was entered into after the child and the parties had given their consent thereto: Provided further that any amendments to the agreement of open adoption shall not have any effect before they are authorised by the Court*".

It is interesting to note that the law related to adoption however makes a provision that the right to representation can also be conferred to the social worker.

#### **7.4 Measures in place to respect the child's right to be heard in adoption cases**

The Civil Code establishes that the Maltese court may hear the child if minor to be adopted is of age 11 or over<sup>4</sup>. In practice the court will have before it the views of the child even if the such child is below the age of 11 since it is the practice of the court to require a social report prior to authorising an adoption. These social report would contain a report on all aspects of the family life of the adopting parents together with the views of the child on the prospective adoption.

#### **7.5. Which are the competent authorities for adoption (national/international)?**

- Central Authority – established under Chapter 495 of the laws of Malta the Central Authority's function is to accredit local bodies and ensure that all intercountry adoptions are carried out in accordance with the standards set in the Hague Convention on Intercountry adoption while taking into account the applicable guidelines.
- Adoptions Board – established under Chapter 495 of the laws of Malta, the primary objective of the Board is to determine whether a prospective adoptive parent is fit to be entrusted with an adopted child. The adoptions board will also in certain circumstances consider issues concerning the placement that is to be made.
- Accredited Agencies – are entities accredited by the Central Authority and carry out the administrative work behind adoptions, including the matching between the child and the parent.

#### **7.6 Possibility for an adopted child to have access to information held by the competent authorities on his or her origins**

Requests can be addressed to the tracing unit at the Central Authority within the Department for Social Welfare Standards (DSWS). Article 127 A of the civil code provides the procedure on how an adopter or an adopted child may obtain information about the adoption.

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<sup>4</sup> *Vide* for example Article 115(4)(d) of Chapter 16 of the Laws of Malta, the Civil Code.