



CHILDREN BELOW THE AGE OF CRIMINAL RESPONSIBILITY IN
MALTA: MEASURES, RIGHTS, PROCEDURE, PARTICIPATION

National Report for AIMJF's Comparative and Collaborative Research.

Niños por debajo de la edad de responsabilidad penal en Malta: medidas, derechos,
procedimiento, participación

Informe nacional para la investigación comparativa y colaborativa de la AIMJF

Enfants n'ayant pas atteint l'âge de la responsabilité pénale à Malte: mesures, droits,
procédure, participation

Rapport national pour la recherche comparative et collaborative de l'AIMJF

Judiciary of Malta

Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on children below the age of criminal responsibility. The article explains the applicable measures and the procedure adopted, the child's rights and his or her participation in the Protective and Justice System in Malta.

Resumen: El documento es parte de una investigación colaborativa organizada por la Asociación Internacional de Juventud y Familia (AIMJF) sobre niños por debajo de la edad de responsabilidad penal. El artículo explica las medidas aplicables, el procedimiento adoptado, los derechos del niño y su participación en el sistema de protección y de justicia en Malta.

Résumé: Le document fait partie d'une recherche collaborative organisée par l'Association Internationale des Magistrats de la Jeunesse et de la Famille (AIMJF) sur les enfants n'ayant pas atteint l'âge de la responsabilité pénale. L'article explique les

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mesures passibles d'application et la procédure adoptée, les droits des enfants et leur participation dans le système de protection et de justice à Malte.

Introduction

The International Association of Youth and Family Judges and Magistrates (IAYFJM or AIMJF, in the French and Spanish acronym) represents worldwide efforts to establish links between judges from different countries, promoting transnational judicial dialogue, in order to provide better conditions for a qualified attention to children based in a human rights approach.

To do so, AIMJF organizes research on international problems facing the operation of the courts and various laws relating to youth and family and training programs.

The aims of this research are to identify similarities and discrepancies among countries and to develop a cartography of measures, procedure, rights and participation of children below the minimum age of criminal responsibility.

This national report is based on a questionnaire prepared by AIMJF.

QUESTIONNAIRE:

1. general information

1.1. What is the minimum age of criminal responsibility in your country (the **age of criminal responsibility** is the age below which a child is deemed incapable of having committed a criminal offence, it can also be referred as **age of accountability**, **age of**

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responsibility, and age of liability for children and it is different of the age when a person becomes an adult)?

Answer: The age of criminal responsibility in Malta is 14. Anyone below that age cannot be prosecuted.

1.2. Is there more than one minimum age of criminal responsibility? Which one? Is it possible to apply the ‘doli incapax rule’ in your country (possibility of demonstration that the child is sufficiently mature and capable to understand that the behavior was an offense and therefore could be criminally responsible)?

Answer: There is only one age of criminal responsibility which is the age of 14. However, in terms of Article 37(1) of the Criminal Code a minor under sixteen years of age shall also be exempt from criminal responsibility for any act or omission done without any mischievous discretion. This means that in relation to minors between 14 and 16 the Prosecution have the additional ‘burden’ to prove mischievous discretion - though it needs to be said that this additional burden in reality does not usually pose a problem to prove.

2. age assessment

2.1. In case of application of the ‘doli incapax rule’, how is this assessment made?

Answer: This is based on age – anyone below the age of 14 at the time of the crime is not prosecutable.

Is there a specific methodology for this evaluation?

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Answer: Age is an objective criterion – if at the time of the offence the minor was 14 and over he/she would be prosecutable. If not, the doli incapax rule would apply.

A protocol on how to evaluate?

N/a

Who assesses the child?

N/a

Is the child heard in this procedure?

Answer: if the minor above the age of 14 is the accused, he has the right but not the obligation to testify since as an accused he also has the right to silence.

Does the child have legal assistance in this situation? Answer: All accused persons have the right to be legally assisted and if he/ she cannot afford private legal assistance, the State provides Legal Aid for free.

Is it possible for the child to challenge the of this assessment? Answer: As an accused he/ she would have the right to cross-examine and rebut all witnesses and evidence brought forward by the Prosecution.

2.2. In case of necessity of age assessment (due to a lack of birth registration), how is this assessment made? Is there a procedure? Is the child heard in this procedure?

Answer: Upon disembarkation, AWAS personnel are present to conduct an initial screening, primarily to identify minors and other vulnerable individuals. This early-stage filtering serves to distinguish genuine unaccompanied minors from those falsely claiming minor status, thereby ensuring the protection of actual minors from being placed alongside adults. The safeguarding of minors remains a top priority, and similar attention is given to individuals who claim to be adults but are suspected of being underage. In the

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case of those identified as minors or potential minors, AWAS will immediately alert the Directorate for Child Protection Services and request a provisional protection order.

Age Assessment Procedures are based on European Union Agency for Asylum (EUAA) and Council of Europe Guidelines which are carried out by AWAS. The Age Assessment Tool and Procedure were updated last in 2022 with the EUAA support. Age Assessments are carried out by a team of professionals in instances whereby the unaccompanied minor's age is doubtful; thus, not each claiming minor undergoes an age assessment. The assessment explores diverse factors holistically considering the minor's journey, physical features, education, employment and considering any documents available such as passports. In case a decision is not reached by the panel about the applicant's age, a more in-depth assessment is carried out and the possibility of undergoing a medical examination, which is an X-ray of the wrist, is explored. The medical examination is usually used as the last resort given that EUAA Guidelines deem this procedure as invasive.

Throughout the assessment process, the claiming minor is supported by a social worker, who ensures the minor is fully informed and that their best interests are safeguarded.

Information pertaining to the assessment is provided to the claiming minor by the social worker who is also present during the assessment to safeguard their interests. Claiming minors who are visibly underage are accommodated in Hangar Initial Reception Centre (HIRC) whilst they await to be medically cleared. Upon medical clearance, they are accommodated in Dar Liedna (DIL) the centre for unaccompanied minors. Individuals who appear older but are still undergoing the age assessment process are accommodated

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at a closed centre operated by the Detention Services Agency (DSA). These individuals are also monitored and supported by AWAS social workers throughout their stay.

Does the child have legal assistance in this situation?

Answer: Even though the minor would not necessarily be considered as an accused at this stage, he/she would be deemed to be at the very least a ‘suspect’ and consequently he/she would have the right to be legally assisted and if he/ she cannot afford private legal assistance, the State provides Legal Aid for free.

Is it possible for the child to challenge the conclusions of this assessment?

Answer: yes

3. police intervention

3.1. In case a child under the minimum age of criminal responsibility commits an act considered as a crime, is he/she brought to a police station?

Answer: The police might do so to further investigate and to verify if the act was committed by the minor alone or with the help/aid of third parties for example. Since the minor cannot be prosecuted in any way due to his/her age, the minor would be at liberty to give the police all the necessary information without self-incrimination.

Is it mandatory to do so? If not, in which situations is it necessary to be brought to the police station?

Answer: This will depend on the particular circumstances of the case and the police investigation. If the Police deem it necessary to, then yes statements are conducted at the Police Station.

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3.2. In case the child is brought to the police station, what is expected from the police to do?

Answer: The minor would have to be accompanied by an adult (usually the parents or the person trusted with his/ her custody or parental authority). No statement of a minor can be taken without the presence of an adult accompanying the same said minor. Though strictly speaking anything said by the minor cannot be used against him/her due to the age and therefore anything that can be said cannot lead to a prosecution, it is still advisable (and it is common practice) for the police officers to inform the said minor of his/her right to be legally assisted by a lawyer. This is especially significant in the context where a minor would be divulging information which could potentially lead the Police to close the case, arrest a third party or solve another crime.

What are the legal guarantees for the child in this context? Is it possible, in any circumstance, that the child be imprisoned, even for a very short time? In this case, how long is it possible for the child to be deprived of liberty? Answer: No child under the age of 14 who has committed a crime can be sent to prison since a minor child under that age cannot be prosecuted.

4. measures

4.1. In case a child below the minimum age of criminal responsibility has committed an act considered as a crime, is it possible to impose any kind of measure? Which one?

Answer: The only possible action (barring any civil action for example for damages against the parents or the person who has parental authority over the child or a Correctional Order given by the Juvenile Court (Civil Capacity) which is discussed further on) would be that under Article 35(2) of the Criminal Code which gives the power to the Court, on the application of the Police, to require the parent or other person

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responsible with the upbringing of the minor to appear before it, and, if the fact alleged to have been committed by the minor is proved and is contemplated by the law as an offence, the court may bind over the parent or other person to watch over the conduct of the minor under penalty for non-compliance of a sum of not less than one hundred euro (€100) and not exceeding two thousand euro (€2,000), regard being had to the means of the person bound over and to the gravity of the fact.

4.2. Is it possible to impose an out-of-home placement (such as alternative care, in institution or foster family; in health facilities, for instance)? in which circumstances? For how long?

Answer: These are available options which however do not fall within the realm of the Criminal Court but under the Civil, Juvenile Court. The Juvenile Court (Civil Section) has the power to remove a child from his/her parents/ custodians if it is deemed to be in the child's best interests to do so. It also has the power to issue a Correctional Order on the minor which means that the minor's liberty would be restricted, he/she is sent to a Youth Prison where he/she is followed by a team of professionals with the aim of helping him/her to be good citizen and conform to society's rules and regulations. Time will depend on the particular circumstances of the case. A Correctional Order is the only instance where a child who's not subject to criminal charges is placed in prison due to his/her behavioral issues and or other serious problems which are deemed to be so severe to warrant such an order.

5. procedure

5.1. Who imposes such measures?

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Answer: the Juvenile Court (as a Civil Court) has the power to remove a child from his/her home and is placed in foster care or alternative care if The Court is satisfied that that decision is in the child's best interests.

5.2. Is there a legal procedure for the determination of these measures? What is the nature of these procedures? Can you describe it shortly?

Answer: Yes there is a specific legislation in relation to minors who require the State/ Court's intervention in their best interests, that is, the Minor Protection (Alternative Care) Act (Chapter 602 of the Laws of Malta). Procedures are of a civil nature where the child is ALWAYS represented in the proceedings through the appointment of a Child Advocate in order for the Court to be informed of the child's wishes, concerns and any additional information that might be useful for the Court in its judgement or any decisions that might need to be taken during the course of the proceedings. Decisions are based on the child's best interests principle.

5.3. Is it possible to adopt alternative resolution mechanisms in these situations, such as mediation or restorative justice?

Answer: Yes that is always an option. For example children with behavioral problems or with drug addictions are encouraged to go for rehab programs. Minors who have attained the age of 16 years and are deemed to be eligible (they must necessarily be free of any drug-addiction or consumption) might be given a community service order - that is service in the community for a fixed number of hours without any form of remuneration. Such orders serve as restorative justice and to help the minor understand concepts such as 'responsibility', 'duty' and the 'greater good' with the ultimate aim of teaching such minors how to properly behave and live in society.

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In addition to such orders, Court also has the power to issue Treatment orders aimed at helping the minor child to attend sessions with various professionals or to kick a habit such as drugs, gambling, gaming and alcohol in the hope that the said child learns how to be an independent and decent adult. Needless to say, if the minor does so voluntarily and has the real will to help himself/ herself, then the likelihood of a more positive outcome is increased.

6. assessment

6.1. Is there any kind of assessment of the child for the imposition of such measures (on vulnerabilities, risk, rights violations)? **Answer: yes** Who assesses the child?

Answer: Usually there's either a probation officer/supervision officer appointed in criminal cases or a social worker in civil proceedings who would be aware of the problems at hand and would inform the Court about the number of professionals already following the minor. Such professionals would include psychologist, psychiatrists and councilors who would as a team try to help the minor in the best way possible to lead a good and positive life.

Is there a protocol or guideline on how to assess the child? Can you please share it? **Answer:**

These protocols and guidelines are set by the professionals themselves, depending on the age of the minor and problems at hand.

7. legal and procedural guarantees

7.1. What are the rights of the child in this procedure (legal and procedural guarantees)?

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Answer: Children in Alternative Care cases (which as stated above are civil cases) are always represented by a child's Advocate who reports to the Court as to the child's wishes, concerns and information which might be useful for the Court to reach its ultimate decision. Minors who are accused of a crime Need to be legally assisted and be accompanied by an adult.

7.2. Does the child have the right to refuse any of these measures?

Answer: The Child Advocate in Civil Matters and Legal assistance for a minor who's accused of a crime are a necessity.

Or to challenge in court any of these measures? Answer: Yes these measures can be contested through the appropriate channels and through the Child's Advocate or Legal counsel.

7.3. What happens if the child does not fulfill the obligations inherent to these measures?

Answer: If the obligation on the minor child emanates from Civil proceedings, then enforcement of the Court order can still be ensured through the proper procedure and through the person under whom the care and custody/ parental authority is vested. Needless to say, Court orders are to be adhered to and failure to do so might lead to further proceedings for failure to comply to a Court order. If the obligation emanates from a Criminal Court then the failure to abide to the same order would amount to yet another crime and the minor would be prosecuted once again for such a failure.

8. the role of the justice system

8.1. Is it possible in your country that the justice system gets involved in these situations? In which situation (vg. to impose the measure or to review it, in case of resistance by the child or his/her family, or to impose some child protection order)? For

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what purpose? Which branch of the justice system is involved (youth court, family court, child protection court, criminal court...)?

Answer: As explained above, alternative care decisions are taken by the Juvenile Court (Civil Section). Children may need protection if they're deemed to be in danger, if they're neglected or if being used or abused so in such cases (and others) the Court is requested by the Directorate for Child Protection Services to protect the minor by issuing for example:

1. a removal order for the child from his/her home
2. or to protect the minor by issuing a Supervision Order (which means that the child will still live with his/her relatives but the said Directorate will monitor and conduct surprise visits to ensure that the child is safe and protected
3. or in rare circumstances to issue a Correctional Order which is issued when the child is deemed to be impossible to control and/or discipline that the Court's intervention to have the minor placed in a controlled environment that limits his/her liberty is the only solution. During this time, the minor is given the professional help required (tailored for his/her own needs) and depending on the progress the minor will be allowed back to society.

8.2.. In case of involvement of the justice system, can you briefly describe the procedure?

Answer: See above

8.3.. What are the rights of the child in this procedure? Does the child have the right to legal assistance? The right to appeal against any kind of decision?

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Answer: The Child will have a Child's Advocate appointed, his/her wishes are brought forward to the Court's attention and all decisions are taken in the child's best interests. There is a right of appeal.

9. assistance or support

9.1. Besides the measures imposed to children, are there other kind of assistance available on a voluntary basis (social, psychological, medical)?

Answer: Yes social, psychological, medical assistance is available at all times and is free of charge.

10. child participation

10.1. Is the child heard in this procedure? By whom? At which stage of the procedure?

Answer: In Alternative care cases the child is always heard through the appointment of the Child Advocate whose role is to update the Court with all the relevant information on the said child, to ensure that the child's wishes and concerns are brought to the Court's attention and to request anything that the minor child would require and that it would necessitate the Court's intervention. On top of this, there are cases when the the minor child is heard directly as well – this is done in chambers and the minor would not testify in the Court room.

10.2. Is the child heard more than once in this procedure? How many times?

Answer: If the minor's role is to simply testify (for example as an alleged victim) then the testimony takes place once. If the proceedings are about that child, his/her wishes are expressed through the Child's Advocate who then reports back to Court.

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10.3. Is there a protocol or guideline on how to hear the child in this situation? Can you please share it?

Answer: Children are heard from the Court's private chambers (not from the Court room) through video-conference or from the Children's House (in the presence of an adult) depending on the case. Children are to be made at ease, they are explained the procedure in very simple terms. If they are testifying in criminal proceedings, they do not physically meet the alleged aggressor or accused (though they would need to identify him/her virtually).

11. legal implications

11.1. Is there any record of legal infringement committed by children below the age of criminal responsibility? When the child reaches the age of criminal responsibility, are these records taken into consideration?

Answer: Children under the age of criminal responsibility are not prosecuted which necessarily means that there's no record of their 'crime' on their criminal conviction sheet. There could be a police report filed by third parties or by the alleged victim which mentions the minor as the potential aggressor/accused but a police report which mentions a suspect does not amount to real evidence as to who actually committed the crime. It merely mentions a suspect.

11.2. In case of damages, what kind of rights and remedies does the victim have regarding the child and the family?

Answer: If the minor who committed the crime is over the age of 14 and is consequently prosecutable, the victim can claim damages in the Criminal Court should the accused be found guilty for the offence he/she is charged with. The victim consequently wouldn't need to file separate civil proceedings for the reimbursement of

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the damages ensued. If the perpetrator is a minor under the age of 14, the only plausible option for the victim to be paid is to institute civil proceedings.

Besides financial reparation, does the victim have the possibility to have a say on the measures applied to the child?

Answer: If a pre-sentencing report is ordered by the Court, then the victim would be allowed to say what his expectations from the proceedings are and what he would like the Court to impose. Sometimes victims do state that they forgive the aggressor or that since payment has been affected, they are not particularly interested in the outcome of the criminal proceedings and these are aspects that the Court might (but not necessarily) take into consideration when delivering judgement.

12. reforms in progress

12.1. Are there ongoing reforms on this subject?

Answer: There are three (3) major reforms that have been debated over the years:

1. The need to have a Therapeutic and Secure Centre which the law speaks about in the Minor Protection (Alternative Care) Act (Chapter 602 of the Laws of Malta) - the purpose of which would be to hold minors with serious behavioural difficulties in a safe and adequate place so that they be given the required therapy and assistance in order to return to society and participate in it in an appropriate manner. Unfortunately this centre does not exist as yet and consequently When the Court issues a Correctional Order the Only possible available place is the Youth's Prison;

2. The discussion to either lower the age of sexual consent from 16 to 14 due to the promiscuous life minors lead or to de-criminalise sexual acts between minors under the age of consent who however fall within the same age group. This is due to the fact that in Malta there's no what is called the 'Romeo and Juliet clause' – that is sexual

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activity between minors below the age of 16 (for example two 15 year olds having ‘consensual’ sexual acts) is still considered as illegal and is a prosecutable offence;

3. Have a structured bootcamp for minors with behavioural issues and empower the Courts to be able to impose such a bootcamp on the minors who in turn, instead of being sent to prison learn what discipline is, what respect is and what living in society requires of them.

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