



## SAVE THE CHILDREN COMMENTS ON THE REVISION OF THE RECEPTION DIRECTIVE

Save the Children (“SC”) is an international child rights NGO working in over one hundred countries worldwide. The SC Europe Group comprises the national SC organisations working in eleven European countries. SC, partner NGOs in 30 European countries and UNHCR work together in the Separated Children in Europe Programme (“SCEP”) – a programme to realise the rights of separated children within Europe, including in asylum seeking situations.

In the context of the European Commission’s preparation of a proposal amending Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereafter “the Reception Directive”), SC makes the following submissions, largely relating to those provisions which focus on the specific situation of children.<sup>1</sup>

SC is making further submissions in relation to the other three key asylum instruments under revision, namely, the Dublin Regulation, the Asylum Procedures Directive and the Asylum Qualifications Directive. Given that the four key instruments will work together to form the basis for the Common European Asylum System (“CEAS”), our comments on all four should be read together. We refer also to our response to the Commission Green Paper on the Future of the Common European Asylum System which discusses more generally SC’s positions on how the CEAS should be designed.

In the introduction in Section I below, this paper describes some of the general implications of the UN Convention of the Rights of the Child for the Reception Directive. Section II then summarises key revision needs, before proposing specific amendments to the existing Reception Directive.

### I. GENERAL INTRODUCTION

SC’s submissions derive from a child rights based approach rooted in the 1989 UN Convention on the Rights of the Child (and its Optional Protocols) (“UN CRC”). They also draw on a range of guidelines in the field, including General Comment No. 6 of the Committee on the Rights of the Child addressing the treatment of unaccompanied and separated children outside their country of origin and the Separated Children in Europe Programme Statement of Good Practice.

In particular, we draw the Commission’s attention to the fact that:

- (a) The UN CRC applies fully to all children within the jurisdiction of the Member States, including children outside their country of origin. From this perspective, Member States must have as their primary consideration the best interests of the child in all actions in their regard and must fully respect the principle of non-discrimination, the right of all children to life, survival and development and the right for children to have their views heard. These core principles, and the

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<sup>1</sup> Save the Children Europe Group would like to thank a range of organisations and individuals who have contributed their views to the discussions which informed Save the Children’s positions in this paper. These include, in particular, members of the SCEP Network and Blanche Tax of UNHCR Brussels Office.

general child protection system which they require, should inform EU rules on international protection (including the application of the Geneva Refugee Convention) as they apply to children.

(b) The EU asylum rules must anchor in provisions dealing with the treatment of all unaccompanied or separated children (and not just those who apply for asylum), given that these children have common and particular rights and needs in relation to reception and assistance, and that these rights and needs often arise before their international protection rights are known; indeed such reception and assistance conditions are often a precondition for separated and unaccompanied children being able to access the EU asylum system.

(c) Regional funding may be necessary to support those States who bear the largest burden in terms of addressing the situation of unaccompanied or separated children.

## II. PROPOSALS FOR SPECIFIC AMENDMENTS TO THE RECEPTION DIRECTIVE

### *Executive Summary*

The Reception Directive addresses, *inter alia*, the information and documentation to be provided to asylum seekers, medical screening, schooling and education, employment and vocational training, material reception conditions and health care, provisions for the reception of vulnerable persons including minors and unaccompanied minors and provisions relating to the reception of families.

SC's key submissions in relation to the revision of the Reception Directive are as follows:

- Detention of children must be avoided.
- The principle of non-discrimination under the UN CRC implies that children falling under the Directive have the same rights as citizen children, for example, in relation to access to health and education services. Children and asylum seeking families should also be entitled to access the same family services as citizen children and families in terms, for example, of childcare, child benefit payments and healthcare visitors.
- Education should be provided on a non-segregated basis within the community; it should also support the continuation of the study of the language of the country of origin, not least given a child's potential reintegration needs in the event of a return to their country of origin should his or her asylum application fail.
- The Directive should include better recognition of the need to preserve family unity and protect family life, including through the extension of the definition of family members.
- The Directive's provisions on unaccompanied minors, and in particular those dealing with screening, assistance and protective mechanisms, should apply to *all* separated or unaccompanied children outside their country of origin. Revisions to the Directive should include:
  - (i) a proper definition and identification mechanism for separated or unaccompanied children outside their country of origin;
  - (ii) an obligation to appoint a guardian for every separated or unaccompanied child, with a clear definition of the qualifications and the role of the guardian,
  - (iii) provision for an initial screening procedure to engage in a needs assessment and provision for ongoing monitoring of needs;
  - (iv) an obligation to provide legal assistance;
  - (iv) an obligation to provide interpretation assistance;
  - (v) increased standards in relation to the provision of proper accommodation in a protective environment;
  - (vi) bolstered family tracing obligations;

- (vii) leaving care and aftercare supports for aged out minors;
  - (viii) mechanisms to ensure that the child's views are taken into account; and
  - (ix) training of officials interacting with children.
- Child friendly mechanisms for appeals and complaints under the Directive should be established.
  - Member States should be obliged to compile uniform data in relation to the identification and assistance afforded to separated children; such data compilation would support proper planning, funding and regional cooperation in relation to the reception of separated children.

### *Specific Comments*

#### **Relationship of the Reception Directive with the Asylum Procedures Directive, the Qualification Directive and the Dublin II Regulation**

We understand that, through an amendment to the EU asylum instruments, the Commission intends to clarify that the conditions applicable under the Reception Directive (as amended) will apply across the entire asylum process, including during Dublin II procedures, during detention (if any) and during any appeal process (this should be linked with an amendment to the Procedures Directive ensuring that applicants are allowed to remain in the territory of a Member State pending appeal). We understand that, more generally, the procedural safeguards under the Procedures Directive (as amended) will apply in relation to matters falling under the Reception Directive. SC welcomes this clarification and notes that some of our comments below may ultimately be reflected in the amendments to those other instruments.

#### **Recitals**

The Recitals should make reference to the new EU objective, to be introduced by the Lisbon Treaty, to the protection and promotion of children's rights and to Article 24 of the Charter of Fundamental Rights of the EU which specifically addresses children.

*“Having regard to Article 2 of the Treaty on the European Union and more particularly the objective of the EU to promote and protect the rights of the child and Article 24 of the Charter of Fundamental Rights of the EU.”*

The Recitals should make a reference to the UN CRC and in particular to the key principles of best interests, right to life, survival and development, right to have their views heard and non discrimination. Each of these has a specific role in relation to the design of the reception conditions standards. For example, the principle of non-discrimination should imply that children falling under the Reception Directive should have the same rights as citizen children as regards, for example, accommodation, access to health and education services. The right to have their views heard means that Member States must ensure child friendly procedures are in place and that officials receive training.

*“This Directive seeks to ensure full respect for the 1989 UN Convention of the Rights of the Child and its four fundamental principles, namely, non-discrimination, the best interests of the child, the right to life, survival and development and the right of a child to express its views and have due account taken of them.”*

The Recitals should refer to Article 20 of the UN CRC which provides that *“a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”* In this regard, the Recitals might also refer to General Comment No. 6 of the Committee on the Rights of the Child on the treatment of separated or unaccompanied children outside their country of origin.

The Recitals should refer to Article 22 of the UN CRC which obliges States to take appropriate measures to ensure that a child who is seeking refugee status shall, whether unaccompanied or

accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the UN CRC and in other international human rights or humanitarian instruments to which the said States are Parties.

## **Article 2 Definitions**

### *Article 2: definition of a child/minor*

A definition of a child/minor is necessary as the Directive expressly applies to all minor asylum seekers yet it currently defines only an “unaccompanied minor” and a minor child of an asylum applicant. We recommend that the Directive uses the definition of a child set out in the UN CRC, taking account of Member State practice, namely that the age of eighteen typically constitutes the age of majority within the EU.<sup>2</sup>

*“A child or minor is every human being below the age of eighteen years.”*

### *Article 2: the definition of separated/unaccompanied children in Dublin II:*

We recommend that the Commission proposes the use of the term “separated children” throughout the asylum instruments. The use of a broader term emphasises that, although some children may appear accompanied, in practice the accompanying adult may be unable or unsuitable to assume responsibility for their care. Moreover, the definition of “separated child” which we propose<sup>3</sup> defines more clearly the type of responsibility (“legal or customary *primary* caregiver”) which should be borne by the accompanying adult for a child. The term ‘separated child’ is already used by the Committee on the Rights of the Child, UNHCR, the International Committee of the Red Cross, a range of international NGOs including Save the Children and in a variety of contexts in various Member States, for example by the Ombudsman for Children in Ireland.

*“Separated children are children under 18 years of age who arrive in the territory of the Member States separated from both parents, or their legal or customary primary caregiver, or who subsequently become separated.”*

In the event that the term unaccompanied minors is retained it should refer to an “*adult who is their legal or customary primary caregiver*”, instead of “an adult responsible for them whether by law or custom.

The Reception Directive should also include appropriate provisions for identifying separated children. Identification procedures must relate to both: (a) age and (b) whether the child is separated. These are discussed further below.

### *Article 2: definition of family member*

SC recommends removal of the phrase “insofar as the family already existed in the country of origin”, in particular as it relates to children.

SC also recommends reference to the national law of the asylum applicant as well as that of the Member State concerned.

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<sup>2</sup> The comparative overview of the implementation of the Directive 2003/09 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States notes that all Member States consider an asylum seeker under the age of 18 as a minor. Moreover, the Committee on the Rights of the Child has encouraged States to review the age of majority if set below 18 (for example, in the case of Saudi Arabia, Sri Lanka and the Dominican Republic).

<sup>3</sup> The definition of separated child which we propose is that set out in the SCEP Statement of Good Practice and General Comment No. 6 of the Committee on the Rights of the Child.

In subsection (ii) relating to minor children of couples, SC would suggest removing the term “dependent” and would suggest subjecting the term “unmarried” to the caveat that married children may be considered to be family members where this is in the best interests of the child and taking into account the views of the child. (For example, a married child may be separated from a spouse or may be involved in a forced marriage.)

SC also recommends extending the definition of family members to include (i) children for whom an asylum seeker bears legal or customary primary responsibility and (ii) in the case of a child asylum seeker also their minor siblings.

*“ Family members’ means the following members of the applicant’s family who are present in the territory of the Member States:*

*(i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of their country of origin or country of reception treats unmarried couples in a way comparable to married couples under its law;*

*(ii) the minor children of couples referred to in point (i) or of the applicant, regardless of whether they were born in and out of wedlock or adopted as defined under the national law, and the children for whom they bear legal or customary primary responsibility, on the condition that they are unmarried, save in the case of married children where it is in their best interests, taking into account their views, to form a family with their parents or legal or customary primary caregiver;*

*(iii) the father, mother or legal or customary primary caregiver when the applicant or refugee is a minor and on the condition that they are unmarried, save where it is in their best interests, taking due account of their views, to form a family with their parents or legal or customary primary caregiver. In addition, minor siblings accompanying the father, mother or legal or customary primary caregiver are also considered to be family members on the condition that they are unmarried, save where it is in their best interests, taking due account of their views, to form a family with their parents or legal or customary primary caregiver”.*

### **Article 3 Scope of the Directive**

#### *Dublin II*

We understand that the Commission intends to clarify that the conditions of reception under the Reception Directive will be extended to those persons whose cases are subject to a determination under the Dublin II Regulation of the Member State responsible for examining their asylum applications. SC would welcome this clarification.

#### *Appeals*

It should also be made clear that the Reception Directive applies through any appeal of the substantive asylum application

#### *Application to All Separated Children*

More fundamentally, we believe it appropriate to extend the conditions provided under the Reception Directive to all separated children outside their country of origin, pending the determination of a durable solution in each individual case (whether that durable solution take the form of asylum, another form of protection, transfer to another Member State or a third country or return to the country of origin).

As noted in our Submission on the Commission’s Green Paper on the Future of the Common European Asylum System, a general approach to, at least, the reception and assistance which should be afforded by Member States to all separated children outside their country of origin is necessary for a variety of reasons, including the fact that: (1) there is a common obligation to provide special assistance and protection to separated children under UN CRC; (2) separated

children have certain common needs, regardless of whether they are asylum seekers, economic migrants or trafficked children; (c) these needs often arise before the appropriate protection route is known; (d) children sometimes move between categories, i.e. economic migrants who are subsequently trafficked, or trafficked children who seek asylum; and (e) a comprehensive and integrated approach to the rights of separated children is necessary. We further note that, absent a common approach, there are a range of risks, including the possibility that separated children will not benefit from coherent and meaningful guidance on, and access to, the various different procedures that might apply to them (including asylum, amongst other options).

SC advocates a general EU instrument addressing the situation of all separated children of third country origin. Ultimately such an instrument could deal with broader grounds for international protection.

From an asylum law perspective, in the absence of such a general law, one route to ensure that there is meaningful access to the asylum processes in the EU is to provide certain basic identification, reception and assistance to *all* separated children. This access issue might be dealt with in the Reception Directive (or by a provision in the Procedure Directive) which includes an extension of the obligations in the Reception and Procedures Directive to all separated children. We note that Article 3 (4) of the existing Reception Directive already states that Member States may decide to apply this Directive in connection with procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for third-country nationals or stateless persons who are found not to be refugees.

Accordingly, in the absence of a general EU instrument addressing all separated children, we propose that a provision in Article 3 of the revised Reception Directive state that “*Member States must apply this Directive to all separated children from third countries from the moment of arrival to the moment of their qualification as a refugee or grant of subsidiary protection under the EU Qualification Directive, or the grant of some other form of humanitarian protection, or their transfer to a third country in accordance with their best interests, under national law*”.

In this instance, we would also propose a standstill clause which would serve to ensure that more favourable national law on treatment of separated children remains in place, post the revision of the Directive.

#### **Article 5 Information**

In line with Article 13 of the UN CRC, provision should be made for child friendly modes of communication of key information, in a language understood by the child.

*Amendment to 5(2) “Where appropriate, this information may also be supplied orally in a way that can be understood by the applicant. Member States should ensure child-friendly modes of communication of this information.”*

#### **Article 7 Freedom of movement**

The scope of Article 7 should be clarified, in particular Article 7 (3), on the possibility to confine a person to a “particular place”. Article 7 should include a prohibition of the detention of children falling under the scope of the Directive. To the extent that Article 7 permits restrictions on liberty falling short of detention, it would be useful to set out an exhaustive list of categories of restriction. SC would be happy to explore this further with the Commission in due course.

#### ***Ban on Detention of Children***

Under the current Procedures Directive, detention of a person for the sole reason that he/she is an applicant for asylum is prohibited. The asylum instruments as a whole should make it clear

that the detention for administrative purposes of a child and families with children falling under the Directive must be prohibited.

SC believes that detention of asylum seeking children outside their country of origin, as a general rule, should be prohibited given that: (a) Article 37 of the UN CRC allows this only as a measure of last resort and (b) Article 3 of the UN CRC requires that the best interests of the child to be taken into account in relation to all State actions in its regard, including any decision to detain.

SC believes that unauthorised entry and absence of residence permission should not in and of itself form a ground for detention of any asylum seeker. Moreover, in the case of unaccompanied or separated children, however, SC believes it to be worth expressly stating that Member States' obligation is to provide special protection and assistance, regardless of unauthorised entry or illegal residence, rather than detention.

Moreover, this prohibition on detention in the asylum directives could be distinguished from the position taken in the proposed EC Returns Directive, i.e. detention on the basis of a "risk of absconding" prior to a removal order, given that such a ground is in any event not directly relevant prior to any final asylum decision. (We note that SC believes in any event that as a general rule detention of children under the proposed Returns Directive should be avoided).

#### Background law and principles

Article 37 (b) of the UN CRC provides that "*no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*"

General Comment No. 6 of the Committee on the Rights of the Child addressing the treatment of unaccompanied and separated children outside their country of origin notes that "*applying Article 37 and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.*"

General Comment No. 6 notes that international obligations should also be taken into account and refers to Article 31 (1) of the Geneva Refugee Convention. It notes that "*States should further take into account that illegal entry or stay in a country by an unaccompanied or separated child might also be justified according to general principles of law, where such entry or stay is the only way of preventing a violation of the fundamental human rights of the child.*"

Detention has a well-documented detrimental impact on the emotional and physical well-being of children, who may suffer depression, changes in behaviour and confusion.<sup>4</sup> Save the Children's research showed that detained children suffered from weight loss, lack of sleep, skin complaints and persistent respiratory conditions. Children often suffer from depression and changes in behaviour:

*"After the detention Michael was in a bad way. The bed-wetting was a problem again and he had nightmares. He wouldn't go upstairs without me. At 9pm when I took him to bed, I had to go to bed as well because he wouldn't let me leave. Michael was afraid of the police coming again, He was always afraid".*

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<sup>4</sup> See for example, Crawley, H (2005) *No Place for a Child: Children in UK immigration detention: Impacts, alternatives and safeguards*, Save the Children, London; Fazel, M and Silove, D (2006) 'Detention of refugees', *British Medical Journal* 332, pp. 251-252, Amnesty International (2005) 'Seeking asylum is not a crime: detention of people who have sought asylum', 20 June; Cutler, S (2005) 'Fit to be detained? Challenging the detention of asylum seekers and migrants with health needs', Bail for Immigration Detainees, London.

SC refers to a wide range of campaigns against the detention of migrant and asylum seeking children, including recent ones in Belgium, the Netherlands and the UK.

**Insert provision in Article 7 indicating that “*Pending an examination of any relevant asylum application, or in the case of separated children, pending an examination of any other claim for humanitarian protection under national law or their return to their country of origin, the detention of separated children and families with children is as a general rule prohibited.*”**

#### *Exceptional Circumstances*

General Comment No. 6 notes that “*When detention is exceptionally justified for other reasons [reasons other than the child being unaccompanied or separated, or on their migratory or residence status] it shall be in accordance with Article 37 (b) of the Convention that requires ... In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation*”.

Accordingly, should the Directive include a possibility to detain separated children or families with children as a measure of last resort and for the shortest possible period of time, ***such possibility should be established only in clearly circumscribed terms***, potentially in the Procedures Directive.

#### *Obligation to consider alternatives to detention*

There should be *an explicit obligation on Member States to consider all possible alternatives to detention before imposing detention.*

Possible alternative restrictions might include certain forms of reporting obligations, electronic monitoring in the form of certain kinds of voice recognition-based reporting (but not electronic tagging and tracking), certain forms of supervised accommodation, certain forms of community supervision and certain forms of incentivised compliance. Clearly, the circumstances in which these can be applied and the manner in which they might be applied will need clear and careful definition. A guiding principle as to their use should be the need to inform and to provide contact, support and information to ensure compliance on the part of asylum seekers. Any such restrictions on liberty should be clearly justifiable and should comply with international standards. Formal decisions should be required before the adoption of any such restrictions in individual cases, with the possibility of both appeal and legal assistance.

In this case, SC suggests as follows:

A recital should note: *Applying Article 37 of the UN CRC and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained.*

The operative part of the Directive should note:

1. Families with children and unaccompanied or separated children, as a general rule, should not be detained. Unaccompanied or separated children, regardless of their status and of any unauthorised entry on their part, are entitled to protection and assistance by the State.
2. In the event of an exceptional justification for detention of families with children or unaccompanied or separated children, such detention must be as a measure of last resort and for

<sup>5</sup> Save the Children (2006) No Place for a Child: Children in UK immigration detention Impacts, alternatives and safeguards.

the shortest possible period.

3. When considering detention and all possible alternative measures for children and family with children, the best interests of the child shall be a primary consideration.

#### *Conditions of detention*

In the event of the possibility to detain separated children or families with children in exceptional cases, we would suggest that the Reception Directive draw inspiration from General Comment No. 6 which identifies the conditions of detention in exceptional cases. *“Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child’s best interests not to do so. Indeed, the underlying approach to such a program should be “care” and not “detention”. Facilities should not be located in isolated areas where culturally-appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to recreation and play as provided for in article 31 of the Convention. In order to effectively secure the rights provided by article 37(d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative.”*

We also cite to the UN Rules for the Protection of Juveniles Deprived of Their Liberty which addresses conditions in detention, including references to segregation of facilities, the possibility to contact and receive visits from friends, relatives and legal counsel, education, play and recreation, open air access and adequate community based medical care.

In summary, we would in particular recommend:

- An obligation to make special arrangements for living quarters (separate to adult quarters, with gender sensitive conditions and with suitable personnel and facilities) in the case of unaccompanied or separated children;
- An obligation to provide separate accommodation for detained families, ensuring both family unity and adequate privacy (accommodation should be in line with national standards for health and safety and avoid overcrowding);
- right to education outside the detention facility save in exceptional circumstances;
- right of access to community based and adequate/appropriate medical services;
- an obligation to provide recreational and play facilities for children, including daily access to the open air;
- rights to contact and visitation with legal representatives, guardian, family and relatives, friends.

#### *Procedural Safeguards*

In the event of a possibility for detention in exceptional cases, it is crucial that appropriate procedural safeguards are in place to ensure formal decisions are taken, with a possibility of both appeal and legal assistance. Ongoing and regular review of the detention order, with a view to speedily ending detention, should also be mandatory.

### **Article 8 Families**

Articles 8, 13, 14 and 18 should include further the recognition of the need to protect both family unity and family life more generally. They should allow for a clearer definition of reception condition standards in this regard based on the recognition that the family unit often provides the most protective environment for children and that Member States should seek to support the family unit in the same manner as it would in relation to citizen children and families.<sup>6</sup> It should ensure that family separation/division is avoided throughout the reception period.

### **Article 9 Medical Screening**

It is widely recognised that medical screening of children, without appropriate explanation, can cause trauma.

Insert *“All children should receive appropriate information on why and how medical examinations are carried out, having regard to their evolving capacities”*.

### **Article 10 schooling and education of minors**

#### *10.1 Access Issues*

SC strongly advocates a change from “*similar conditions*” to the “*same conditions*” on the basis that the former may lead to segregated schooling. Some Member States, for example, Spain and UK, already provide access to education on this basis. To the extent that it is not possible because of the circumstances of the children, Article 10(3) already provides the possibility for other arrangements to be made. The Commission’s recent Green Paper on “*Migration & mobility: challenges and opportunities for EU education systems*” identifies a range of problems arising from segregation in education.

SC also believe that access to education should not be used by Member States as leverage to ensure compliance with removal conditions and that therefore education should be available right up to the moment of any removal. The phrase “*for so long as an expulsion measure against them or their parents is not actually enforced*” should be deleted. There can be a long gap between removal directions and actual removal in which case this phrase might deprive children of education for a protracted period.

Education provision should include lessons in the language of the Member State and permit the continuation of study of the language of country of origin. The latter requirement is essential for a number of reasons, not least the fact that if an asylum application fails and an applicant or other family members must return to the country of origin, continued education in the language of the country of origin will facilitate the child’s reintegration.

SC recommends that the reference to the fact that minors shall be younger than the age of legal majority should be deleted (in particular post the introduction of a definition of a child).

#### 10.1 Proposed revision

*Member States shall grant to minor children of asylum seekers and to asylum seekers who are minors access to the education system under the same conditions as nationals of the host Member State for as long as they are in the Member State. [EITHER DELETE Such education may be provided in accommodation centres OR ADD only as a matter of last resort.]*

*The Member State concerned may stipulate that such access must be confined to the State education system. State*

<sup>6</sup> See also UNHCR Refugee Children: Guidelines on Protection and Care which notes that “*the single best way to promote the psychosocial well-being of children is to support their families.*”

*education should permit the continuation of study of the language of country of origin.*

*Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.*

#### 10.2 Postponement of access to the education system

We would recommend that “[Access] to the education system should not unduly be postponed and in any event for no longer than one month” instead of three months.

**10.2** We advocate deletion of the second sentence. *“this period [of postponement] may be extended to one year where specific education is provided in order to facilitate access to the education system”.*

#### 10.2 Proposed Revision

*“Access to the education system shall not be unduly postponed and in any event for no longer than one month from the date the application for asylum was lodged by the minor or the minor’s parents, or in the case of a separated child, from the date on which the child’s needs were screened.”*

**10.3** This provision should be made mandatory rather than discretionary.

#### 10.3 Proposed Revision

*“Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State shall offer other education arrangements”.*

**Insert new 10.4** Provision should be made for Member States to ensure that any reporting requirements imposed by Member States do not interfere with the right to education.

*CASE STUDY: Children in the UK may be asked to report from the age of 17 and often have to report regularly – sometimes having to travel up to 25 miles to report. The times of reporting do not take into account school and other educational activities.<sup>7</sup>*

Insert 10.4 or include in any extension of Article 7 (see discussion on detention above)

*“Any reporting requirements imposed by Member States should not interfere with the child’s ability to receive education”.*

### **Article 11 Employment**

The Directive should ensure children falling within the scope of the Directive with rights to access employment on the same basis and under the same conditions as national children. SC also calls for more rapid and generous access to the labour market for asylum seeking adults (as this will allow asylum seekers better to support their families).<sup>8</sup>

<sup>7</sup> The Children’s Society (2007) Going it Alone: Children in the Asylum Process

<sup>8</sup> Access to the Labour market for asylum seeking adults after 6 months (used to be the case in UK prior to July 2002) – In the UK Barnardo’s have called for this right to be restored as has a new campaign launched in April 2008 by Refugee Council and the Trade Union Congress.

**Article 13 General rules on material reception conditions and health care**

Amendment to point 5: SC recommends that material reception conditions should be provided at least to some degree in the form of financial allowances given that voucher systems can pose significant practical difficulties, requiring families to travel to particular outlets, having a limited choice of product and on occasion not receiving change.

Following from the discussion under Article 8 above, we would also recommend the inclusion of a specific provision relating to families, noting that children and asylum seeking families should be entitled to access the same family services and benefits as citizen children and families in terms, for example, of childcare, health visitors.

SC also recommends noting that the standard of living in relation to children and families with children should be adequate for the child's physical, mental, spiritual, moral and social development.

*CASE STUDY: In Scotland Glasgow City Council's (where most asylum seeking families are located in Scotland) policy stated that all families with children under the age of 5 were entitled to free childcare but in practice asylum seeking families were denied places as priority was always given to citizen families.<sup>9</sup> Following campaigning by Save the Children this discriminatory practice has ended.<sup>10</sup>*

Article 13.2 *“Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. For children and families with children, material reception conditions should also ensure a standard of living adequate for the child's physical, mental, spiritual, moral and social development. In line with the principle of non-discrimination, children and families with children falling within the scope of this Directive should be entitled to access the same [family] services as national children and national families with children.”*

Article 13. 5 *“Material reception conditions may be provided in kind and to at least some degree in the form of financial allowances.”*

**Article 14 Modalities for material reception conditions**

*Insert new provisions relating to the needs of families as regards housing*

See Article 8 and Article 13 above and Article 18 below. . Under Article 14.2 or 14.2a: we would once again recommend that there be a fuller recognition of the needs of the family, including a reiteration of the application of the principle of both family unity and protection of family life and allowing for a proper definition of reception condition standards in this regard. For example, the necessary obligation to provide accommodation which is suitable for families should note in particular that this means accommodation affording adequate space to ensure privacy and the development of children (including, for example, space for babies to crawl, space to play, ability to cook family meals). In accommodation centres, families should be afforded access to paediatricians and social workers. Families with children should be allowed to express reasonable preferences in relation to alternative accommodation options.

*... necessary obligation to provide accommodation which is suitable for families should note in particular that this means accommodation affording adequate space to ensure privacy and the development of children.*

Article 14.3 which addresses the lodging of children with their parents should be deleted, with family unity being promoted in Article 14.2 or 14.2 (a), save where it is not in the best interests of the child.

<sup>9</sup> Save the Children (2006) Future Scots: Pre-five services for asylum seekers in Scotland.

<sup>10</sup> Scottish Government Press Release (3 August 2007) Children of Asylum Seekers.

Article 14.4 should expressly state that accommodation transfers should not take place where this will adversely affect the education of children or the child's access to specialised health care including psychological counselling.

### **Article 15 Health care**

**15.1** Amend to indicate that "Member States shall ensure that minors within asylum seeking families and separated children receive the same level of health care as citizen children".

More generally, SC would like to see this level of health care being accessible to all asylum seekers. It is particularly critical for children in asylum seeking families that their parents are in an adequate state of health to take care of the family. At minimum, it should be clear that pregnant women should have access to full pre and post natal care.

*CASE STUDY: Regulations introduced in the UK in 2004<sup>11</sup> have resulted in pregnant failed asylum seeking women being denied access to pre-and postnatal services and maternity services. <sup>12</sup> A recent case in the High Court ruled this practice to be illegal.*

#### Article 15 Proposed Revision

Article 15.1 Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness. Member States shall ensure that minors within asylum seeking families and separated children receive the same level of health care as are national children.

Article 15.2 Member States shall provide necessary medical or other assistance to applicants who have special needs. Pregnant women should have access to full pre and post natal care.

### **Article 16 Reduction or withdrawal of reception conditions**

16.1 (a) and Article 16.2

We recommend that all children should be expressly excluded from this provision.

### **Chapter IV: Provisions for persons with special needs**

#### **Article 17 General Principles**

Member States should be obliged to put in place a specific screening mechanism to ensure the identification of special needs. This should be placed as early as possible in the process. In the case of an unaccompanied or separated child, it should take place post the appointment of a guardian, whether temporary or permanent. Member States should have an obligation to approach children within families as individuals and screen their needs. Provision should be made for an initial screening and then subsequent monitoring mechanisms pending final determination (and any appeals thereof) of the international protection claim.

#### **Article 18 Minors**

**18.1** Remove "involve minors" or replace with "may affect minors". We would recommend the introduction of a broader article reflecting the principles which should guide actions in relation to children (referenced above in relation to the recitals) and specifying factors which must be taken into account in any assessment of best interests.

<sup>11</sup> NHS (Charges to Overseas Visitors) (Amendment) Regulation 2004.

<sup>12</sup> Refugee Council (2006) First do no harm: Denying healthcare to people whose asylum claim have failed.

*In assessing the best interests of the child, Member States shall in particular take due account of the following factors:*

- (a) the preservation of family life, including family reunification possibilities in the case of separated children;*
- (b) the minor's well-being and social development, taking into particular consideration the minor's ethnic, religious, cultural and linguistic background and further having regard to the need for stability and continuity in care and custodial arrangements and access to health and education services;*
- (c) safety and security considerations, in particular, where there is a risk of the child being a victim of any form of violence and exploitation, including trafficking;*
- (d) the views of the child, with due weight being given to such views in accordance with the child's age and maturity.*

**18.1a** Add provision on timeliness as follows

Insert "*Decisions should be made in a timely manner as this is in line with the best interests of the child.*"

### **Article 19 Separated Children**

Article 19 should address a range of issues including:

- (a) overarching principles to be applied as regards separated children, including the obligation to provide special assistance and protection to separated children;
- (b) identification;
- (c) the appointment of a guardian for separated children, definition of the qualifications and role of the guardian;
- (d) the grant of legal assistance;
- (e) obligation to provide interpretation assistance;
- (f) initial screening and needs assessment taking into account both short and long term perspectives;
- (g) access to education and health;
- (h) proper accommodation;
- (i) prohibition on detention and principles underpinning alternatives to detention;
- (j) family tracing obligations;
- (k) leaving care and aftercare supports for aged-out minors;
- (l) ongoing monitoring of care arrangements;
- (m) child friendly complaint procedures in relation to the application of the Reception Directive's provisions; and
- (n) training of officials interacting with children.

These are discussed in more detail below.

*(a) Overarching Principles*

Expressly in addition to the principles expressed in Article 18, the following principles should be highlighted:

- Special Duty of Assistance and Protection

Member States are obliged to provide special protection and assistance for all separated children.

- Continuity of Care and Stability

Member States should be obliged to ensure for separated children continuity of care and stability of living environment to the greatest degree possible.

- Promoting Family Unity

There should be a general expression of respect for family unity specifically in the case of unaccompanied or separated children, including (i) respect for family ties (and keeping siblings together in the case of children separated from parents or a customary or primary legal caregiver) and (ii) obligations to engage in family tracing.

(b) *Identification*

As noted above, the Reception Directive should also include appropriate provisions for identifying separated children. Identification procedures must relate to both (i) age and (ii) whether the child is separated and there should be (iii) accountability provisions for those charged with notifying the presences of a separated child to the authorities in charge.

(i) Age Assessment

In relation to age assessment, the provision on age assessment in the Procedures Directive could be used as a basis for a clearer common procedure. It should include further references to:

- the presence of a guardian;
- training of officials;
- no indiscriminate age assessment;
- the consideration of all aspects (including physical, psychological and cultural elements);
- the use of a combination of different methods;
- limits on the collection and use of biometric data;
- limits or prohibitions on certain medical examinations;
- an appreciation of margin of error in certain methods of medical examination;
- the use of a panel of different independent experts to arrive at a decision;
- strengthening identification measures at the border, in particular, via inter-agency cooperation;
- application of the benefit of the doubt in favour of the child;
- special accommodation, but not detention, during the testing period and any subsequent appeal;
- the ability to appeal an age assessment decision and the conditions of appeal.

SC is happy to discuss this further with the Commission

(ii) Identification of separated status

We note that there are no procedures established in any of the current asylum instruments in order to ensure proper identification of a child as separated. Immigration officers should be required to verify that accompanying adults are authorized to take responsibility for the child concerned. Moreover, as a general principle, such procedures should include an obligation to approach children as individuals even within apparent family groups. Potentially it could anticipate the establishment of EU wide indicators. Proper identification should be founded on training of officials coming into contact with children (both at the border and in other contexts) and potentially the involvement of child social services in any determination (inter-agency cooperation).

(iii) Accountability

Provisions should be put in place to strengthen accountability for those charged with notifying the presence of a separated child to the authorities in charge.

(c) *Appointment of a Guardian*

SC believes that every separated child who arrives in the EU should be appointed an independent guardian who has powers to represent the child's best interests in order to ensure that their welfare and protection needs are properly safeguarded within the context of the asylum determination and immigration process and that their support and care needs are met by all responsible agencies.

We believe the Reception Directive should include a definition of qualifications and role of a guardian based on General Comment No. 6 and the SCEP Statement of Good Practice.

At minimum Article 19 (1) should provide that *“a guardian should be appointed to advise and protect the child and to ensure that all decisions are taken in the child's best interests. A guardian should have the necessary expertise in the field of childcare so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.”*

The SCEP Statement of Good Practice defines the role of guardian more fully as follows, to:

- (a) Ensure that all decisions taken are in the child's best interests;
- (b) Ensure that the child has suitable care, accommodation, education, language support and health care provision;
- (c) Ensure that the child has suitable legal representation to deal with his immigration status of asylum claim;
- (d) Consult with and advise the child;
- (e) Contribute to a durable solution in the child's best interests;
- (f) Provide a link between the child and various organisations who may provide services to the child;
- (g) Advocate on the child's behalf where necessary;
- (h) Explore the possibility of family tracing and reunification with the child.

With a definition of guardianship in place, we would propose the deletion of the phrase in **19.1** *“or where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.”*

We would recommend that the obligation to appoint a guardian should be as soon as possible and not later than identification of a child as possibly separated and prior to any age assessment procedures and special needs screening. (This may require provision for the appointment of an initial temporary guardian and subsequently a permanent guardian.) Monitoring systems should be set up on the appointment of guardians and on their work with the children.

In relation to guardians, we take note of the *“Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States”* which notes that *“the practical implementation of the legal provisions creates a problem in several Member States resulting either from the absence of a legal guardian or from the roles that is assigned to him.”* (e.g. reference to Hungary *“certain legal guardians limit their role to the asylum procedures, while other legal guardians represent the interests of the minor in other aspects of daily life”*; also see reference to Czech Republic *“This poses practical problems, for the ‘residential legal guardian’ [sometimes appointed in place of an ‘asylum legal guardian’] is often not familiar with the subject of asylum.”*) This report clearly highlights the need for a definition of the qualifications and role of a guardian.

(d) *Appointment of a legal representative*

As well as the appointment of a guardian, a legal representative should be appointed to advise the child on his or her rights and the procedures associated with those rights, including asylum procedures, any other protection procedures and return procedures under national law. Such representative should have the necessary knowledge of the special needs of minors. Such legal assistance should in general be provided free of charge.

(e) *Obligation to provide interpretation assistance*

To discuss, in light of any other anticipated provisions in relation to interpretation.

(f) *Initial screening and needs assessment taking into account both short and long term perspectives*

See also Article 17 above. More specifically, Member States should bear a specific obligation as to:

- timing - as rapidly as possible post identification of child as separated, although potentially in advance of any final determination on age assessment;
- involvement of guardian in screening process;
- participation of child;
- range of needs to be addressed – accommodation, access to education and health services, any additional specialised services, initializing family tracing processes.

(g) *Access to material assistance, education and health services*

Reference should be made to special features distinctive to separated children, i.e. access to pediatricians, therapists where necessary, proactive obligation to identify needs, measures in place to identify children affected by armed conflict and to refer them to appropriate support/services.

Provision should be made for some form of financial allowance.

(h) *Appropriate Accommodation*

**19.2** – amend to take into account broader application to all separated children.

**19.2 (a)** provision should be made for child protection assessment re placement with adult relative.

**19.2 (c)** this provision should be clarified to ensure that accommodation for unaccompanied or separated children shall be separate from adult accommodation and gender sensitive, and that it shall be equipped with specialised staff and facilities.

**19.2** SC recommends deletion of “Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers”.

Express provision should be made for the views of the child to be taken into account in relation to accommodation options in accordance with his or her age and degree of maturity.

(i) *Prohibition on detention and principles underpinning alternatives to detention*

See discussion under Article 7 above.

*(j) Family Tracing and Family Contact Obligations*

**19.3** Suggest addition “where appropriate, the child’s guardian should facilitate regular communication between the child and his/her family”.

*(k) Leaving care and aftercare supports for aged-out minor*

Separated children who then turn 18 should benefit from special procedures that acknowledge their potential vulnerability and possible classification as persons with special needs. This would allow for follow up and after-care services in particular for young persons leaving care centres.

*(l) Ongoing monitoring of care arrangements*

Provision should be made for an ongoing monitoring by Member States of the care arrangements in place for separated children. The possibility to sanction those who start up and manage shelters/reception centres for separated children on the basis of public funds, and who might subsequently neglect the children, should be considered.

*(m) Appeals & Complaints*

Provision should be made for a child friendly, complaints system through enhancement of the mechanisms in Article 21.

*(n) Training*

Reference in Article 18 or Article 24 to appropriate training for all those working with children (separated and accompanied) should include the need for awareness of the needs of trafficked children as well as the needs of children affected by armed conflict.

*(o) Collection of Data*

Member States should be obliged to compile uniform and anonymised data in relation to the identification and assistance afforded to separated children. Such data compilation would serve a series of purposes and in particular would allow for proper planning, funding and regional cooperation in relation to the reception of separated children. For example, it may be particularly relevant in the case of child trafficking where patterns of movement can change due to policies and practices at national level.

Data collected within such a system might include, basic biographical data on each child (including age, sex, country of origin and nationality, ethnic group); total number of separated children attempting to enter the country, number of those admitted, number of requests for asylum, assignment of a guardian, assignment of a legal representation, legal and immigration status, living arrangements, enrolment in school or vocational training, family reunifications, return to their country of origin, disappearance, suspected cases of trafficking, children affected by armed conflict, any transfer under Dublin II Regulation and if so, the country to which a child was transferred.

*(p) Funding*

In the context of the Reception Directive, SC would welcome a further discussion on the extent to which funding issues might be available to support Member States bearing a significant burden in relation to the reception of unaccompanied minors.

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