



ANNUAL REPORT 2009

Office of the Ombudsman

Malta



**PARLIAMENTARY COMMISSIONER
FOR ADMINISTRATIVE INVESTIGATIONS
MALTA**

ANNUAL REPORT

**for the period
January - December 2009**

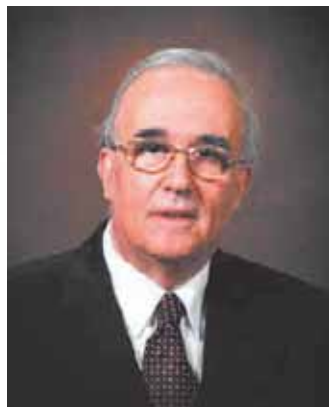
**Presented to the House of Representatives
pursuant to section 29 of the Ombudsman Act, 1995**



Ombudsman

August 2010

**The Hon Dr Michael Frendo
Speaker
House of Representatives
The Palace
Valletta**



Mr Speaker,

I am pleased to present my **Annual Report** covering the period January to December 2009 pursuant to section 29 of the Ombudsman Act, 1995.

This is the fourteenth annual report submitted on the work of the Office of the Ombudsman since it was established in 1995.

Yours sincerely

**Joseph Said Pullicino
Parliamentary Ombudsman**



President George Abela and Chief Justice Emeritus Dr Joseph Said Pullicino exchange views during a courtesy call which the Parliamentary Ombudsman paid on the President of the Republic at the Palace in Valletta on 13 April 2009.

CONTENTS

1. THE YEAR IN REVIEW

Introduction	7
The Ombudsman's sustained drive to improve administrative practice	10
The right to good administration	11
On sustained cases that remain unresolved: a further attempt	15
Systemic maladministration	17
On a hospital waiting list that is transparent and accountable	18
On criteria that are transparent, fair and consistent in the award of promotions in the Armed Forces of Malta	19
The presence of foreign nationals in Malta	22
<i>Failed enforcement action by a public authority that led to a state of illegality by a foreign community</i>	22
<i>A sustained breach by the Marriage Registry of the fundamental right of irregular immigrants to marry</i>	24
On good governance by public authorities in the context of their institutional autonomy	29
Developments during 2009 in the unification of the ombudsman service	35
Background information	35
Towards a closer functional relationship with Mepa's Audit Office during 2009	37
On Mepa's reform and a new accountability structure	38
The consolidation of the Office of the University Ombudsman	43
On the design principles to underpin the new ombudsman house	45
The Ombudsman as a protector of human rights	50
Concerns on the fundamental human rights situation of irregular immigrants in Malta	53
The European Pact on Immigration and Asylum and the situation in Malta	54
International relations	57
The Rabat Declaration	58
Third meeting of the <i>Association des Ombudsmans de la Méditerranée</i> in Athens on 14-15 December 2009	59
Inputs by the Office of the Ombudsman in the work of the <i>Association</i>	63

2. PERFORMANCE REVIEW

Overall performance	64
Incoming caseload	66
Complaint outcomes	78

3. CASE STUDIES

Office of the Parliamentary Ombudsman

The open secret of the airline employee	83
The Physics Teacher who had librarianship at heart	89
The Team Manager who would be Unit Manager	93
The making of a Qualified Expert in medical radiation physics	100
Contrasting assessments of the degree of disability of an injured employee	104
A particularly unjust situation that was allowed to persist for years on end	109
The tenant who was adamant on his right to the airspace overlying his property	115
An unfair exchange rate formula for foreign service pensions based on an unjust application of the law	117
The laptop from the US	124

Office of the University Ombudsman

The MCAST Lecturer who bit off more than he could chew	129
Seniority and experience are not always trump cards in a selection process	133
The shortcomings of a system that placed too much on the shoulders of MCAST Principal	136

APPENDICES

Appendix A

Guidelines for Good Governance	142
--------------------------------	-----

Appendix B

Office of the University Ombudsman - Annual Report 2009	154
---	-----

Appendix C

Presentation by Dr Joseph Said Pullicino, Parliamentary Ombudsman, at the Seventh Seminar of the National Ombudsmen of EU Member States and candidate countries at Paphos, Cyprus on 5-7 April 2009 on Migration and its impact on the work of Ombudsmen - <i>Admission, integration and regularisation of immigration</i>	168
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Appendix D

Staff organisation chart (on 31 December 2009)	176
--	-----

Appendix E

Report and financial statements for year ended 31 December 2009	177
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1. THE YEAR IN REVIEW

Introduction

In a year when the ombudsman institution celebrated its 200th anniversary, this Office devoted its energy throughout 2009 not only to its traditional task of complaint handling and resolution but also to its participation in the ongoing bricklaying process to put the new ombudsman house that is under construction in Malta on stronger foundations. The entrenchment of the office of Ombudsman in the Constitution of Malta in 2007 did not mean the end of the road for the task to update the Maltese ombudsman institution but signified the intention to extend the powers and functions of the Parliamentary Ombudsman and give even greater credibility to the Office.

As is widely known, the ombudsman institution owes its roots to Sweden. It was in 1809 that a new Swedish Constitution was adopted which made provision for the election of an Ombudsman who took office and was entrusted with responsibility to undertake supervision on behalf of Parliament of the observance of the laws by judges and officers of the State.

For more than one hundred years the Swedish Parliamentary Ombudsman was the only institution of its kind in the world although especially from the 1950s the concept of having a person to safeguard the rights of the common man against the might of officialdom spread rapidly. This led to the establishment of ombudsman institutions in several countries and to the appointment of Parliamentary Ombudsmen with the primary role to probe actions and decisions by governments and statutory public authorities in the exercise of their powers and the performance of their day-to-day functions and duties.

Whereas this second phase of ombudsman development that gained ground as from the middle of the 20th century is largely attributed to the expansion of public administration mostly after the end of the Second World War under the impact of expanding social welfare systems and new regulatory functions undertaken by governments, the third wave of ombudsman expansion occurred in vastly different circumstances.

The introduction of democratic forms of government in countries such as Greece, Portugal and Spain as well as the fall of Communism and authoritarian rule and the birth of new democratic structures in Central and Eastern Europe in more recent years gave an added dimension to the ombudsman institution and a broader thrust to its work as its mandate was widened to focus on citizen rights, particularly fundamental human rights and respect for the rule of law. This shift towards basic human rights is evident in the names that were given to officeholders

in countries such as Spain (*El Defensor del Pueblo*) and Portugal (*Provedor de Justiça*).

Backed by legislative power, and in most countries also by constitutional status, the ombudsman institution worldwide now serves, as a result of these developments, to uphold the right of citizens to be shielded from maladministration, inefficiency and bad governance that gnaw at their dignity, promotes wider trust at all level of public administration based on the principles of transparency, accountability and integrity and works in favour of human rights.

By contrast, in addition to aiming at the institution's traditional objectives, the establishment of the Office of the Ombudsman in Malta by virtue of the Ombudsman Act, 1995 can also be considered as a further sign of the country's commitment in its EU accession process to anchor itself even more closely to European concepts and principles of empowerment to citizens in their daily dealings with public administration.

Judicial review of administrative action in Malta was already in place even at the time of the launching of the Maltese ombudsman institution. However, although the relationship between public administration and Maltese citizens is governed by the principles and practice of British public law and in the field of liability government action falls under the jurisdiction of the ordinary Maltese civil courts and is subject to the ordinary laws of the land¹, it was still considered in the citizen's best interest to make better and more effective provision for remedy in challenges raised by an aggrieved person against administrative action by a public body.

This widening of the remedy network also took due account of the fact that procedures in courts of law are not generally known to be expeditious and are rather expensive while judicial proceedings are of their very nature bound by formal legal rules and procedures and laws while judgements are executive titles that are enforceable forthwith.

It was the recognition of benefits that may be derived by citizens from an alternative forum for the resolution of disputes with the public administration that led to the establishment of the Maltese ombudsman institution. As a result, the founding legislation rolls out a wide set of criteria on which the Parliamentary Ombudsman is to investigate complaints that are lodged with his Office.

¹ The civil courts in Malta cannot, however, assume the role of administrative courts in instances where *ad hoc* tribunals are set up under particular laws to deal with specific issues and situations.

For this reason his oversight is not limited to administrative acts and omissions that he considers “*contrary to law*” but extends to administration that in his opinion is “*unreasonable, unjust, oppressive, or improperly discriminatory, or in accordance with a law or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory.*” The Ombudsman is also empowered by his founding legislation to determine whether an act of maladministration that is alleged to have caused harm to citizens was based “*wholly or partly on a mistake of law or fact*” or was merely “*wrong.*”

Based largely on the New Zealand model of ombudsman legislation the Ombudsman Act, 1995 links the functions of the Maltese Ombudsman to maladministration in its various forms and includes within his jurisdiction administrative shortcomings that go beyond the legal definition of administrative misconduct and bad management that a court of law would be required to take into account.

In view of this, the Ombudsman’s interpretation of maladministration encompasses omissions, negligence, avoidable delay, unfairness, discrimination and abuse of power while the flexible nature of his operation and his broad evaluation of what constitutes maladministration² enable him to be more closely attuned to the right of citizens to good administration at a practical day-to-day level. It is this approach which enables the ombudsman institution worldwide to operate as “*a mechanism for ‘soft’ justice, which is both highly informal and accessible to all citizens*” and as “*an institution capable of flexibility and multidisciplinary, able to stay at the leading edge of progress.*”³

While the Swedish ombudsman institution commemorated its 200th anniversary, the Office of the Ombudsman in Malta although with a much shorter history, continued to uphold the rights of ordinary citizens and to serve as a guardian of both their human and constitutional rights. By promoting the rule of law and striving to ensure that public authorities, bodies and agencies serve citizens in a timely, efficient and accountable manner, the Office promoted a culture of good governance that is necessary if the country is to attain its medium term vision as a centre of excellence.

During the year under review the Office of the Ombudsman continued to serve the country well and worked forcefully on each of the three main planks that

2 In his 1997 *Annual Report* the European Ombudsman wrote that “*maladministration occurs when a public body fails to act in accordance with a rule or principle that is binding upon it*” – a definition that was also approved by the European Parliament.

3 Paper delivered by Daniel Jacoby, former *Protecteur du Citoyen* of Québec at the 7th Conference of African Ombudsmen and Mediators in the Seychelles.

currently sustain its vision to improve administrative practice in the public sector at large.

Its performance throughout 2009 was underpinned by its traditional role as an institution for the handling and resolution of complaints and allegations of government maladministration; the unearthing of systemic deficiencies in particular sectors of public administration as a springboard for the remedy of shortcomings that constitute hardship to a wide cross section of the population and also, possibly, impinge on the human rights of these citizens; and the ongoing initiative to bring together separate ombudsman jurisdictions into a unified public sector ombudsman service led by the Office under one overarching statutory cornerstone but that would at the same time allow jurisdictions brought under tow to maintain their independence and autonomy in complaint management and resolution.

On the international front the Office of the Ombudsman continued to maintain a close relationship with international ombudsman organizations to keep abreast of developments in contemporary ombudsmanship. Besides attendance at conferences and seminars overseas, the Office continued to attach importance in particular to the *Association des Ombudsmans de la Méditerranée* that aims to bring together ombudsman offices and mediation institutions in the Mediterranean region and to participate in a meaningful manner in its initiatives and programmes. The Office also maintained regular contact with the British and Irish Ombudsman Association (BIOA) as a means of sharing experience and learning about improvements and trends in ombudsman practice that are of relevance to the Maltese institution.

The Ombudsman's sustained drive to improve administrative practice

In recent years the country witnessed determined efforts to strengthen accountability and fair decision-making in various levels of national management. Several aspects of the government's annual budgetary outlays as well as overall performance and results are subjected to rigorous controls by parliamentary committees with the aim of ensuring better value for money, higher efficiency and better all-round utilization of public resources especially at a time of deep international financial and economic turbulence.

This was accompanied by programmes aimed at instilling in public officials deeper awareness of improved organizational techniques as a means of promoting integrity, transparency, due process and diligence in public administration not only for the benefit of citizens but also to enhance the island's competitiveness and ranking in international fora. A disciplined,

diligent and responsive workforce manning the country's public sector that is fully committed to the positive values of good administration and good governance is a valuable resource that can serve as one of the mainstays in support of the attainment of national objectives.

Since its establishment in the mid-90s the Office of the Ombudsman has positioned itself at the forefront of the country's integrity mechanism and has placed at the disposal of aggrieved individuals an investigative service that is nationally acknowledged to be fair, effective and impartial and that reassures citizens that their interests are safeguarded in their contacts with the various branches of the public administration. The key role of the Office of the Ombudsman is to investigate claims of maladministration in government departments and public authorities falling under its jurisdiction so as to put right instances of administrative wrongdoing and to rectify procedures, rules and regulations that are found by its investigative staff to have given rise to justified concerns and ultimately to provide an effective remedy in sustained cases.

In his review of these complaints the Ombudsman does not act as an advocate for either party but delves into the circumstances of these cases and gives a fair hearing to the views of all the parties concerned with a view to the issue of recommendations that in sustained cases seek to put the complainant back in the position in which he would have found himself if the wrongdoing had not occurred at all.

The right to good administration

Intervention by the Ombudsman when maladministration by the public sector is the cause of distress, anguish or injustice is the sum response of two basic rights – the right to complain and the right to good administration – which derive their inspiration from the Charter of Fundamental Rights of the European Union.

The ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed at Lisbon on 13 December 2007 was officially completed by all member states of the European Union on 13 November 2009 and the Treaty of Lisbon came into force on 1 December 2009. The Charter of Fundamental Rights of the European Union that is referred to in the Treaty of Lisbon also had full legal effect on the same date.

Article 41 and Article 43 in Chapter V *Citizens' Rights* of the Charter of Fundamental Rights of the European Union state as follows:

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
 - The right of every person to be heard, before any individual measure which could affect him or her adversely is taken;
 - The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - The obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 43

Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

When in 2007 the Maltese Parliament enshrined the Office of the Ombudsman in the Constitution of Malta, this Office had recommended to the House that in Chapter II *Declaration of Principles* the Constitution should acknowledge the right of Maltese citizens to good administration. However, although the House of Representatives did not accept this proposal, the Public Administration Act in substance recognizes the values of public administration as an instrument for the common good and the Office of the Ombudsman continues to uphold this right of every Maltese citizen – and indeed of every citizen of the Union – that is declared by the Treaty of Lisbon.

Whereas the open definition that maladministration occurs in instances where “a public body fails to act in accordance with a rule or principle that is binding upon it” allows ombudsman institutions – as opposed to courts of law – to adopt a flexible approach in the evaluation of complaint issues that are brought to their attention, the elements that underpin good administration are more readily identified. Given that public administration exists primarily to serve citizens

and since public service delivery should at all times be efficient, accountable and transparent, it is possible to associate good administration with service provision that places citizens first and that manifests itself by actions and decisions that are respectful and courteous; that are responsive and sensitive to the needs of citizens; that are timely, reasonable and equitable; and that acknowledge and make amends for any service deficiency.

In 2009 the Office of the Ombudsman sought to instil values that sustain the culture of service even deeper among leaders in the public sector who are responsible to roll these service delivery standards further down the line among their subordinates who in most cases are the ones in regular and direct touch with citizens. For this purpose a meeting with Permanent Secretaries and Directors General in government ministries and departments took place at St James Cavalier, Centre for Creativity on 1 April 2009 to discuss the work and initiatives by the Office of the Ombudsman to improve service delivery by public officers while participants were given the opportunity to air their views on how the public service can work more effectively with the Maltese ombudsman institution. The Office of the Ombudsman feels that these occasions are useful to engage the top rungs of the Maltese state bureaucracy in its efforts to pursue greater accountability, respect for citizen rights and good governance.



With the cooperation of Dr Godwin Grima, Principal Permanent Secretary at the Office of the Prime Minister, the Office of the Ombudsman held a meeting for Permanent Secretaries and Directors General on 1 April 2009 at St James Cavalier, Valletta. During the meeting participants discussed further improvements in standards of public service delivery and considered how the public service can work more effectively with the Maltese ombudsman institution

During 2009 the Office of the Ombudsman also felt the need to revamp the publication that serves as its main means of contact with citizens regarding its purpose, power and jurisdiction and its work to review the conduct of government authorities. With this aim in view the Office in March 2009 released a new leaflet captioned *Guidelines for good governance*. This publication translates the basic principles that sustain good governance and due process in the context of practical situations that public officers face on a daily basis and provides guidance on the way in which civil servants should weigh these circumstances and fashion their responses. With a more pleasant and attractive layout than its predecessor, this leaflet gives prominence to values that should guide the conduct of public officials in their relations with citizens.

The Office of the Ombudsman would even here like to acknowledge the good work that has been done in this field by Ms Ann Abraham, UK Parliamentary and Health Service Commissioner, and to extend its appreciation for permission to draw on this material in its leaflet that is reproduced in Appendix A in this annual report.

During 2009 the existing arrangements with Liaison Officers as the initial contact points for this Office in government departments and public bodies and authorities continued to serve the institution well and to facilitate its work. This relationship enabled incoming verbal inquiries and requests for guidance addressed to the Public Relations Officer as well as written grievances on relatively minor cases to be initially relayed to these Liaison Officers to handle and resolve them in an informal manner. It is felt that the internal resolution of citizens' concerns and anxieties and prompt corrective action on small issues following a nudge by this Office is in line with the view that points of service delivery should themselves be accessible, directly involved in complaint resolution and close to citizens' expectations. Enhancing the ability of a public authority to resolve its own complaints even before these escalate and migrate to the Ombudsman is another response to the existence of the ombudsman service and contributes towards better service delivery to citizens.

The fourteenth year of the Office of the Ombudsman coincided with a period of wide financial instability and deep international economic turbulence that inevitably took its toll on the country and made it more necessary for the Maltese public service to provide even better value for money as resource allocation for public service delivery became tighter. Against this background the Ombudsman's task gains added significance since an effective by-product of oversight by an independent external force such as his Office is that it can re-establish a sense of justice and fair play and put the public administration back on the right course by being prepared to learn directly from proven shortcomings and service weakness. This is in itself an inexpensive learning process that is of

benefit to the public body involved and that at the same time contributes towards fairer and more transparent decision-making and increase public trust. Service improvements that are a direct consequence of effective complaint handling and management and that are driven by the resolution of individual complaints can be considered as a relatively inexpensive way of stamping out pockets of inefficiency and maladministration in government service provision and easing aggravation among citizens.

Public service providers who are willing to learn from complaints and to improve internal governance arrangements are a reflection of an outlook that welcomes and appreciates the Ombudsman's intervention. It is an approach that gives due credit to the institution's conciliatory role and to its mission to safeguard the right of citizens to administrative justice in a non-confrontational environment.

On sustained cases that remain unresolved: a further attempt

The wide acceptance of the Ombudsman's work is, however, to some extent dampened by the refusal by some public authorities, admittedly on very few occasions, to accept the Ombudsman's conclusions and to implement his recommendations in sustained cases.

While this Office accepts that there may be instances where those in office may have their hands tied down and may even feel justified in failing to honour the Ombudsman's proposals, this Office remains of the view that as Mr Joseph Sammut, the first Maltese Ombudsman, wrote in his *Annual Report 2005* "... any rejection of the Ombudsman's findings based on providing a remedy for an injustice harms the institution since even one sustained grievance that remains unresolved is one grievance too much."⁴

On various occasions in the last few years this issue featured in the annual discussion by the House Business Committee of the House of Representatives on the *Ombudsplan* that is presented by the Ombudsman to the Speaker of the House in the first half of September with information on the institution's programmes and initiatives for the forthcoming year. This Office has regularly made its views known on the way forward.

This Office accepts that in cases of sustained maladministration its recommendations should have no executive force and should not be binding on the Government and that this should remain so. At the same time this Office appreciates that in some instances the Government may have its own rightful

4 *Annual Report 2005*, pps 27-28.

reasons that constrain it from implementing the Ombudsman's findings in his Final Opinion. It is nonetheless frustrating for the Ombudsman and his staff to find that in sustained cases that remain unresolved and where complainants fail to secure redress, there is so far no direct intervention by the House of Representatives that can at least serve to bring matters to a head.

This Office would again like to propose that these cases should be brought to the attention of the House and be given an airing in front of a parliamentary committee that could monitor the work of the Ombudsman and take a political decision in the same way as the Public Administration Select Committee of the House of Commons operates.

Appointed by the House of Commons under Standing Order No. 146 of the Standing Orders of the House of Commons Public Business 1997, the Select Committee on the Parliamentary Commissioner for Administration scrutinizes the reports of the Parliamentary and Health Service Ombudsman which are laid before the House and considers matters relating to the quality and standards of administration provided by civil service departments and other matters relating to the civil service. The Public Administration Select Committee consists of eleven Members of Parliament drawn from the three largest parties represented in the House of Commons and works mainly by conducting inquiries on issues of its own choice during public sessions and seeking evidence from groups and individuals with relevant interests and experience.

This Committee is empowered to send for persons, papers and records; to sit notwithstanding any adjournment of the House; to appoint specialised advisers to supply information which is not readily available and to elucidate matters of complexity within the Committee's order of reference; and to report from time to time, setting out findings and making recommendations to the Government and other bodies. The Government generally responds to reports within about two months.

In this connection it is interesting to refer to the Fourth Report of Session 2009-10 by the Public Administration Select Committee of the House of Commons entitled *Parliament and the Ombudsman* which was issued following an evidence session on 5 November 2009 by the Parliamentary and Health Service Ombudsman which was primarily concerned with the performance of the Ombudsman's office. In this document the Committee decided to report "*on two wider issues about her relationship with Parliament, which are of increasing concern to the Ombudsman and to us.*"

Whereas the first issue concerned the removal of the MP filter whereby the Ombudsman for England may only investigate a complaint that is referred by a

Member of the House of Commons which is of no direct interest to the Maltese situation, with regard to the second issue – the reaction by the Government and the House of Commons to an instance of unremedied injustice resulting from maladministration that was found by the Ombudsman – the Select Committee reported as follows:

“11. When Parliament’s Ombudsman takes the exceptional step of issuing a report indicating that the Government is failing to take steps to remedy injustice she has found it has caused, a mechanism is needed to ensure a debate and decision on how to respond, one on which Members can vote on party lines if they wish, but one which would not depend on either the Government or the Opposition to enable it to take place. Under the current system a debate can only take place either through the goodwill of the Government, which might well evaporate in the face of a potentially uncomfortable debate and a critical decision, or through that of an opposition party, which would be likely to frame the debate in a party political, rather than parliamentary, manner.

12. As an interim measure we recommend that the Government commits to providing a three-hour debate, in government time and on a substantive motion, on any future report by the Ombudsman concluding that injustice has gone unremedied and laid under section 10(3) of the Parliamentary Commissioner Act 1967. In the longer term, however, we do not think it is constitutionally appropriate for Parliament to have to rely on the Government’s willingness to provide debating time on an ad hoc basis. We therefore also invite the Procedure Committee, in this Parliament or the next, to examine ways in which such a debate could be triggered under Standing Orders.” (Report HC107 published on 9 December 2009 by authority of the House of Commons.)

The Office of the Ombudsman is of the opinion that in deserving cases where justified complaints remain unresolved, as an Officer of Parliament the Ombudsman should act as the sole interlocutor of these cases in front of a parliamentary committee entrusted with responsibility to make recommendations to the House for a final political decision. This action should finally set the seal on any such cases brought to the bar of public opinion. The Ombudsman will abide by any decision reached by this committee, and ultimately by the Government, comforted by the conviction that in this way his institution would have reached the end of the road and given its best to put right instances of proven maladministration that are not remedied.

Systemic maladministration

Although the main focus of ombudsman work remains geared on the investigation of individual complaints, occasions arise when concerns that emerge from a

citizen's relations with a public body or authority may give rise to an awareness that the roots of the problem are deeper and that the issue affects other individuals. In similar circumstances the insight gained by the Ombudsman's investigation and the situations uncovered by his scrutiny of individual grievances may reveal systemic maladministration that cannot be allowed to pass unnoticed.

In 2009 the Ombudsman responded in a positive manner to this aspect of his oversight function and issued several reports, some of which were based on own-motion investigations, which identified problem areas that were synonymous with an erosion of citizen rights or that adversely hit a wider swathe of the population. The investigations that were undertaken during 2009 covered diverse fields as can be seen from the list below:

- The Ombudsman on the urgent need of a fair and transparent system of waiting list management in state hospitals (January 2009);
- The abusive use of an apartment in a residential block as a place of worship or gathering (March 2009);
- Armed Forces of Malta (AFM) promotion exercise 2006 – Collective report by the Ombudsman in accordance with section 29(2) of Act XXI of 1995 (March 2009);
- The right of immigrants to marry (August 2009); and
- Principles that should govern relations between the national government and public authorities and entities – own-initiative report by the Parliamentary Ombudsman.⁵

Public reaction to these reports was by and large positive and served to enhance the level of public confidence and trust in the institution as being in the forefront of the defence of citizen aspirations.

On a hospital waiting list that is transparent and accountable

The inquiry by the Ombudsman into hospital waiting list management found that the authorities at Mater Dei Hospital have no control on the way that waiting lists for operations are established and on the management of patient admission on these lists; that waiting lists are kept on the appointments diary of individual consultants and that only in ophthalmic and cardiac cases are the lists of pending operations recorded in a centralized system; and that only consultants establish the urgency of any particular case and determine priorities for individual patients who need to undergo an operation.

5 Although the report is dated January 2010, this own-initiative investigation by the Ombudsman was conducted during 2009.

At the end of a detailed report which gave full coverage to the problems that beset waiting list management in the country's state healthcare system, the Ombudsman insisted that the interests of citizens and patients in state hospitals should be safeguarded and that Mater Dei Hospital should be promoted as a successful healthcare institution with best practice standards in terms of service that it provides to patients. The Ombudsman also insisted that operating theatres and beds in state hospitals are not and should not be considered as the exclusive domain of consultants and specialists but should fall under the responsibility and control of the hospital management and should be managed in the best interest of patients.

The Ombudsman recommended that the hospital authorities should set in place a new system for waiting list management with appropriate measures based on transparency, accountability and best practice and that the authorities should implement these measures with urgency in the national interest and reassure patients that they should have full confidence in new procedures for the management of waiting lists.

On criteria that are transparent, fair and consistent in the award of promotions in the Armed Forces of Malta

Another noteworthy intervention by the Office of the Ombudsman during 2009 consisted in the issue of a detailed report that reviewed the promotion exercise by the Armed Forces of Malta to men of the Force in 2006 which led to the submission of a raft of complaints – a total of 153 grievances out of which 124 were actually investigated. Although most of these complaints were received during 2007 and the Office of the Ombudsman brought its investigation of these cases to an end at the same time in 2008 in order to ensure a consistent approach and coherent outcomes in the determination of these issues, a Collective Report on these multiple complaints was issued in March 2009 following consultations with the Commander of the Armed Forces.

The Collective Report drew heavily on the Ombudsman's evaluation of each complaint that was investigated by his Office and identified the main issues that gave rise to misgivings among AFM members on the promotion exercise such as the relatively long time that elapsed since the previous promotion exercise in 2001; lack of information about Confidential Reports that were drawn up in respect of each Member of the Force; and the manner in which points were awarded in the subjective areas covered by the Promotion Assessment Report (PAR) of each AFM member such as efficiency and suitability to fill a vacancy.

Other concerns that were investigated by the Ombudsman were based on perceptions of preferential treatment to certain members who were transferred and

positioned in sections of the Force where promotion prospects were better or who were chosen to attend trade and military courses in order to gain an advantage in the award of points in their PARs; abuse in the award of points for Army Physical Fitness Tests; the reduction in weighting given to seniority and the shift in favour of members holding educational qualifications which led older members of the Force to feel aggrieved at being overtaken for promotion by younger and more academically qualified, but less experienced, colleagues; the system of medical exemptions; and the award of points for those taking part in ceremonial duties, parades and drills while others with a supporting role in these activities or who were not ordered on such duties were not awarded any points.

Faced with a situation of mass discontent with procedures used by the AFM management to regulate the award of promotions, the investigation by the Ombudsman revealed several systemic deficiencies in the system adopted by the AFM in the ranking and assessment of candidates by their superiors in their PARs. In particular it was found that this system lacked transparency and that Members of the Force were as a rule unaware of the appraisal of their respective merits or shortcomings that were entered in their Confidential Reports by their Officers Commanding. It was also found that Members of the Force were not given any information about the way in which the points system for performance, qualifications, etc. was applied and that the system was beset by poor recordkeeping as well as lack of proper scrutiny in the preparation of Confidential Reports and PARs by Reporting Officers.



Passing the baton - on 14 January 2010 Brigadier Carmel Vassallo, the outgoing Commander of the Armed Forces of Malta, paid a farewell call on the Parliamentary Ombudsman accompanied by his successor Colonel Martin Xuereb.

In order to ensure that future promotion exercises in the Armed Forces of Malta would be conducted by means of a just and fairer process and in accordance with procedures that would maximise transparency, equity and uniformity, the Office of the Ombudsman in its Collective Report listed a wide range of recommendations that were inspired by the need for AFM authorities to follow open, preset and published procedures. These proposals were meant to give due consideration to selection criteria that are for the most part objective in nature while allowing the AFM management enough room to use its own judgement to reward performance provided that this judgement appears reasonable and falls within the limits of the Army's discretion.

By this Collective Report the Office of the Ombudsman stressed upon the Armed Forces of Malta the need to adopt complete transparency in criteria used to assess candidates and to ensure that these criteria are not only determined and known before a promotion exercise gets under way but also, and more importantly, that they be applied in a uniform and consistent manner. The Collective Report also recommended that although the assessment of candidates in a promotion exercise in the AFM is invariably based on the personal judgement of the adjudicating board and is dependent on the board's discretion, this assessment should be verifiable to the extent that it can stand the test of inquiry that it was not improperly exercised as well as the test of fairness and reasonableness.

The Office of the Ombudsman is pleased to note that the AFM management was broadly in agreement with its stand in favour of a process for the assessment of Members of the Force that is consistent and transparent and that promotions in the Force should be based on the principle that at all levels the exercise of discretion has to reflect what an ordinary man would consider, on the strength of the evidence available, to be a reasonable judgement on the qualities and adaptability of candidates to fill the vacant posts.

After the AFM Commander confirmed in March 2009 that the Force was prepared to take on board any recommendations by the Ombudsman that would contribute towards an improvement in the system for staff promotions, in August 2009 the Administration Branch of the Force issued a document entitled *The Armed Forces of Malta – Soldiers' Career Handbook*. This booklet provides information to Members of the Force to become acquainted with the career development process within the AFM and outlines the designated qualifications, experience, knowledge and time in rank required to offer all Members of the Force the best possible career development prospects according to their abilities.

The Office of the Ombudsman welcomes this initiative in homage to transparency, fair and responsible governance and holds this commitment to the principles of good administration by the AFM leadership as an example of its ability to encourage public bodies to learn lessons from the Ombudsman's investigations as well as from their own experience; to recognize good practice; and to act in accordance with a code of conduct that is made known to all interested parties.

The presence of foreign nationals in Malta

As the attentive guardian of citizen rights the Ombudsman's vista in recent years has not remained insensitive to the repercussions on the country's social and cultural fabric by the large number of irregular immigrants who have found themselves in Malta and who now reside in the country under various different arrangements. These people fall within the Ombudsman's jurisdiction just as much as Maltese citizens and their right to a fair and proper treatment by the public bodies that are in regular contact with them in connection with their personal situation and circumstances needs to be strenuously safeguarded as well.

A corollary of this statement, however, is that these persons as well as other nationals who reside in the country for other reasons should respect, honour and abide by local laws, customs and regulations and not expect any favoured treatment or believe that they are free to disregard their obligations towards their country of residence and its citizens.

These considerations prompted the Ombudsman to issue two public reports during 2009 on issues that are connected to the presence in the country of foreign nationals and their approach towards aspects of public behaviour and attitude as well as personal relationships that are strongly linked to the observance of local legal requirements and regulations.

Failed enforcement action by a public authority that led to a state of illegality by a foreign community

In the first report the Ombudsman publicly took up the cudgels on behalf of residents in an apartment block who felt aggrieved at failure by the Malta Environment and Planning Authority (Mepa) to follow a Stop and Enforcement Notice that it issued two years earlier against the owner and tenant of a ground floor residence following an abusive change of use of this apartment. It was claimed that negligence by the Authority caused inconvenience to residents who were unable to live peacefully in their apartments since although the law requires that a permit is needed for any such change, the premises in question were no longer being used for residential purposes but had been converted into and were used solely as a place of public worship by the Muslim community.

Whereas the owner affirmed that the apartment was still being used as a residence by tenants who have every right to invite the Muslim community for prayers at their residence, Mepa pointed out that the premises were no longer being used as a residence in line with the original permit and were being used solely for public worship and this constituted a change of use. In February 2007 the Ombudsman had considered this complaint and recommended that Mepa should make further verification to determine whether the apartment was still used as a *bona fide* residence and to follow up activities taking place in this apartment. In subsequent months the Ombudsman and Mepa continued to follow up the case in view of insistence by residents on effective executive action by the Authority to remedy the inconvenience that they were suffering.

In November 2007 Mepa decreed that there was a breach of development control since a change of use from residential premises to a place of gathering had occurred without the necessary permit. This in turn led the Authority to issue another Stop Notice and the owner and tenant was enjoined with immediate effect to stop the change of use of the premises. Since this Stop Notice was not contested in court or according to procedures established under the Development Planning Act, the use of the premises in question as from that date as a place of gathering or worship was illegal and sanctionable at law.

Residents, however, were considerably distressed when after one year the situation remained the same and no effective action was taken in respect of the Stop Notice issued by the Authority. This led the Ombudsman to update his 2007 Final Opinion.

Recalling that the primary function of his Office is to strengthen and enforce the rule of law, he stated that it was also important to safeguard the exercise of fundamental rights, including those of freedom of conscience and of worship as well as freedom from discrimination, for all persons without distinction although the exercise of this right is not an unlimited one and should be kept within the parameters established by the Constitution of Malta and by the European Convention on Human Rights, specifically in order to protect the fundamental rights of others. The Ombudsman observed that for this reason he could not condone authorities that tolerate a state of illegality or accept that under the excuse of an alleged intolerance, the legitimate rights of others be downtrodden.

The Ombudsman insisted that since the Malta Environment and Planning Authority had effectively concluded that a state of illegality existed because of an unauthorised change in use and as consequence of which it had issued a Stop Notice, it should have proceeded forthwith to enforce this Notice. He was critical of the Authority's failure to provide a satisfactory reason why it took no steps to restore the rule of law and to enforce the two Stop Notices that it had issued.

At the same time the Ombudsman made it clear to the Islamic community making use of the premises that unless the community would provide evidence that the premises was rented to the persons residing in it as well as of the title that they held for such use, his Office could not tolerate the state of illegality and that its members had to abide by the laws of the state. On their part members of the community declared that they were considering legal action on the basis of a threat to their fundamental rights with special reference to their right of freedom of conscience and of worship as well as on the grounds of racial discrimination.

The Ombudsman insisted that the members of the community had ignored their obligation to observe the laws of the state and to respect the equally fundamental rights of others. The Stop Notices had not been related to the religious activity that was exercised abusively in the premises but concerned the change of use from a residential one to a place of gathering. According to the Ombudsman the crucial issue was that all should respect the laws of the state and that any contestation of a law or action under these laws should be made in the manner established by law. A state of illegality cannot be ignored; and any such action is inadmissible, especially when carried out by a public authority such as Mepa that is in duty bound to observe that development planning legislation is observed. He stated that any delay by the Authority to take steps against illegal action cannot but weaken its credibility in respect of enforcement.

The Ombudsman stated that in this instance Mepa was not preventing anybody from the exercise of the fundamental right to freedom of conscience or freedom to worship. The Authority was only insisting that all those who exercise such right, irrespective of their religious beliefs, observe the applicable laws.

The Ombudsman concluded that there should be no further delay to enforce the law as applicable in this case and that the Authority should enforce forthwith its own Stop Notices with all means available to it by law. He observed that the Islamic community, which had made abusive use of these premises and showed recalcitrance to respect the rule of law, should accept the laws and regulations of the country and find alternative premises where its members can practise their belief in full respect of the rights of others.

*A sustained breach by the Marriage Registry
of the fundamental right of irregular immigrants to marry*

The Ombudsman's work during 2009 to uphold the rights of immigrants who are resident in Malta was mostly typified by his landmark intervention against the rigid application of national laws by the Marriage Registry that was considered to restrict the fundamental human right of these persons to marry and found a family. This brought to the fore a response by the Marriage Registry to requests by

irregular immigrants resident in Malta for the publication of marriage banns that, though based strictly on legality, yet constitutes a barrier to the enjoyment of human rights.

The detailed investigation of systemic maladministration brought to the attention of the Ombudsman by the Emigrants' Commission revealed that government policy and legislation in this field was causing difficulties to irregular immigrants living in Malta and bringing on them unintended hardship. This situation led the Ombudsman to insist upon the Marriage Registry on the need to adapt and review its policies and procedures and to alert the Government to the need to reconcile its legislation in this area with the provisions of the Constitution of Malta and of the European Convention on Human Rights.

The Ombudsman's investigation on this issue got under way in response to alleged violations of the right to marry by persons whose applications for refugee status are rejected and whose applications to the Marriage Registry for the publication of marriage banns are subsequently also turned down because they are unable to produce identification papers required by the Marriage Act which lays down that marriage may only take place between identifiable persons. Following a review of the Procedural Standards in Examining Applications for Refugee Status Regulations and the relevant provisions of the Immigration Act, the Ombudsman referred to article 12 and article 14 of the European Convention for Human Rights⁶ and also set forth the norms of good governance applicable to this situation in the context of the primary duty of all public authorities to uphold the Constitution and to favour the protection of fundamental human rights and pre-empt their violation.

The Ombudsman insisted that in Malta's case fundamental human rights that are laid down by statute are primarily to be found in the Constitution of Malta and the European Convention on Human Rights and are only subject to limitations expressly laid down by law while the protection arising from legal provisions regarding human rights should be applicable to all persons within the national jurisdiction. As a result, since article 12 of the Convention expressly applies to all men and women of marriageable age that subscribe to it, all men and women of marriageable age in Malta, whatever their condition and whatever their reasons for being here, have the fundamental right to marry and found a family so long as they can do so *"according to the national laws governing the exercise of this right."*

6 *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."* (article 12).

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." (article 14).

National laws cannot discriminate when laying down rules regulating the exercise of this right and the state is not allowed to impose limitations which discriminate between one class of person and another. At the same time although the state has the right to legislate to establish rules governing the exercise of this right, any such legislation cannot allow for administrative discretion that lays down rules for the exercise of this right by a category of persons who would otherwise satisfy all the requirements at law that were more burdensome on them than on others.

The Ombudsman referred to the stand by the Marriage Registry that civil marriage in Malta could only be celebrated between persons who are in Malta or who entered the island legally and who are identified or identifiable in an absolute manner and considered this position unacceptable at law. Article 12 does not allow for such a distinction which runs counter to the very essence of the fundamental human right of every person to establish a formal legal relationship with a partner of this person's choice and also declares the right to marry and found a family to appertain to every man and woman of marriageable age, irrespective of how these persons find themselves within the national territory.

Article 7(5) of the Marriage Act imposes on the Marriage Registry the duty to ascertain the identity of the person requesting the publication of banns for marriage as well as this person's status and to ensure that there is no legal impediment to the marriage. The law also provides that the facts establishing that a person is free to marry could be proved by a sworn declaration made and signed by each of the persons to be married. Since the Marriage Registrar is neither required nor empowered to demand any proof beyond that expressly stated by law, rejected irregular immigrants could be required to make a sworn statement just like any other person in similar circumstances.

The Ombudsman stated that the real issue remained the identification of persons requesting the publication of marriage banns who are unable to produce their certificate of birth. It is only in this area that the Marriage Registrar is allowed a measure of discretion and that in cases where it is shown to his satisfaction that it is impracticable or downright impossible to obtain a certificate of birth, the Registrar is bound to accept *"such other document or evidence as he may deem adequate for the purpose of this article."*

According to the Ombudsman, however, even in the exercise of this limited discretion the Registrar is obliged to apply uniform criteria and cannot discriminate between one category of irregular immigrants and another. He referred to the Registrar's admission that he has no problem with irregular immigrants who are given refugee status or subsidiary humanitarian protection

status and who apply to get married because they are in Malta legally and have been identified by the Refugee Commissioner in the process of establishing their status. However, since the Ombudsman found that these irregular immigrants do not really have their identity established but are granted Maltese identification papers that more often than not reflect their own declarations and are not based on any other corroborative evidence available to the Refugee Commissioner, these refugees are not in fact as identifiable as was made out to his Office.

The Ombudsman stated that since in these cases the Marriage Registrar rightly exercises his discretion when he accepts the immigration certificate issued by the Maltese authorities as sufficient evidence of the holder's identity as established in Malta and resulting from the holder's own declaration, the Registrar's refusal to exercise his discretion in the case of rejected immigrants with similar identification documents and sworn declarations is unjustified.

Upon their release from detention centres rejected immigrants are given a temporary visa/residence permit that is renewable every six months and considered in possession of an official means of identity that allows them freedom of movement and the right to work regularly. However, since several rejected immigrants have been in Malta for various years and the Government has found it difficult to send them to their own country while international conventions preclude the Government from giving rejected immigrants a travelling visa that would allow them to move on to other countries, instances arise when rejected immigrants enter into relationships that in due time lead them to submit applications for permission to marry.

The Ombudsman was of the opinion that in these circumstances a rejected immigrant who is allowed to remain in Malta could not be denied the right to marry and found a family. He declared that he saw no reason why rejected immigrants who rightly enjoy fundamental rights such as freedom of movement and freedom to work on a temporary basis in the Maltese territory, are denied the fundamental right to marry and found a family.

According to the Ombudsman, by its distinction between irregular rejected immigrants and irregular immigrants who enjoy asylum status or subsidiary humanitarian protection status, the Government risks being accused of improper discrimination and of being in breach of the individual's fundamental right to marry and found a family. The policy of the Marriage Registry to refuse applications for the publication of banns by rejected immigrants on the grounds that they are not identified or identifiable persons could be considered as a breach or at least as a threat to the fundamental right to marry in violation of article 12 of the European Convention on Human Rights since it imposes a

restriction that is not in pursuit of a legitimate aim. It also reduces the right to marry to such an extent that the very essence of this right for this category of persons is impaired and substantially interferes with their exercise of this right.

The Ombudsman found that, furthermore, the Marriage Registrar is exercising administrative discretion that is not empowered by a national law that governs the exercise of the fundamental right to marry as laid down by article 12 of the Convention. It is improperly discriminatory and also in violation of article 14 of the Convention.

Despite the Ombudsman's recommendation in favour of conformity with the Constitution of Malta and the European Convention on Human Rights in the exercise of the fundamental right to marry and to found a family, the Marriage Registrar continued to plead that according to the Immigration Act, the presence in Malta of rejected asylum seekers who have no valid immigration document is illegal and only temporary. It was claimed that every person who intends to contract marriage in Malta is obliged to observe the provisions of the Marriage Act irrespective of nationality and that the argument that any person in Malta, whether legally or illegally, has a right to marry in Malta is unacceptable since this would circumvent the Marriage Act and effectively deny the right and duty of the State to regulate marriage.

The Marriage Registrar further held that a person whose application for asylum is rejected by the Refugee Commissioner does not lose the right to marry and is still free to marry in a country where this person may enjoy legal status. According to the Registrar, the right to marry, like the right to private and family life, can only be enjoyed by any person with a legal status and the rejection of a person's application for asylum renders this person's entry and presence in Malta illegal and does not allow this person to enjoy any rights under the Maltese legal system, such as the right to marry, until this person's legal status is regularized.

The Marriage Registrar was also of the view that even while his Office fully recognized a person's fundamental right to marry, it had a legal duty to safeguard its interests and the observance of Maltese law. The Registrar considered it as his duty to ensure that any person who intends to contract marriage in Maltese territory will adhere to the provisions of Maltese law, irrespective of whether the person concerned is Maltese or a foreign national.

The Ombudsman, however, continued to insist that the fundamental right to marry and to found a family by rejected immigrants is being violated by an administrative decision by the Marriage Registry and commented that the implication by the Registry that a person with no legal status in Malta does not

enjoy fundamental human rights is dangerous and unacceptable. The Ombudsman considered this declaration even more alarming when made by a government department that has the duty to ensure that fundamental human rights are fully respected.

The Ombudsman also insisted that the Registry was wrong to state that the right to marry, like the right to private and family life, is restricted to persons who enjoy legal status since the right to the protection of private and family life and the right to marry and found a family are enshrined respectively in article 8⁷ and article 12 of the European Convention on Human Rights. In this regard the Ombudsman pointed out that although article 8 sets out limitations that public authorities can take into account with regard to the exercise of this right, it does not allow the state to impose as a further limitation the added qualification of legality of presence in the national territory.

The Ombudsman concluded that the Public Registry is bound to assist persons to exercise their fundamental human right to marry and found a family and to favour the exercise of this right and not to hinder it.

*On good governance by public authorities
in the context of their institutional autonomy*

In an own-initiative report undertaken during 2009 but published early in 2010 and entitled *Principles that should govern relations between the national government and public authorities and entities*, the Ombudsman moved from the issues that emerged during his investigation of an individual complaint to focus on an attitude by the Central Bank of Malta towards employee relations and conditions that in his view undermined the uptake of family-friendly measures meant to promote national economic and social objectives.

This position raised concerns on the institutional relationship between the Central Bank of Malta and the Government and the extent of the independence and autonomy that the Bank enjoys in its staff policies such as the determination of the employment conditions of its workers. According to the Ombudsman, despite their administrative autonomy and their freedom as a rule not to be bound to follow directives and policy decisions that bind the public service

7 “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” (article 8).

unless laid down by law, public authorities should consider them as guidelines for good governance and adopt them as long as they do not erode their institutional autonomy.

In the Ombudsman's investigation of a complaint by an employee of the Central Bank of Malta who felt aggrieved that the Bank refused to approve an extension of reduced hours until the employee's son reached the age of four, the Bank management held that family-friendly measures introduced by the Government do not apply to the institution since it does not form part of the public service but is a public entity enjoying its own separate and distinct legal personality at law.

On his part the Ombudsman held that this issue had to be viewed in the light of the Bank's current status as a national and international institution. This meant that consideration had to be given to the Statute of the Central Bank of Malta and its relations with the Government and the public service as well as to its role as a National Central Bank forming part of the European System of Central Banks and the independence that it enjoys to fulfil its functions through the exercise of specific powers conferred on it for this purpose by the EC Treaty and also in the context of the European Central Bank Statute. Furthermore the Ombudsman felt that this issue could be applied to relations between the Government and other public authorities set up by the Constitution or through *ad hoc* legislation that, though not part of the public service, provide a public service and enjoy a measure of administrative autonomy.

In his investigation the Ombudsman found that the Central Bank of Malta interprets the autonomy and independence from the Government that the Bank enjoys by virtue of the Central Bank of Malta Act practically in absolute terms. This led the Bank to state that it regards itself as *"an entity fully autonomous and independent from Government"* that does not form part of the public service. The Bank also considers that it forms *"an integral part of the European System of Central Banks established under the Treaty and shall participate in carrying out the tasks and complying with the objectives conferred upon it by the Treaty and the Statute and shall assume all rights and obligations consequential to such a status."*

In the context of the Bank's international legal personality, the Ombudsman pointed out that Article 108 of the EC Treaty circumscribes the autonomy and independence of National Central Banks to the exercise of powers, tasks and functions that are conferred upon them by this Treaty and the Statute of the ECB and it is only when exercising such functions that a National Central Bank is required not to seek instructions from its government or any other body. Within these limits the independence of the Central Bank of Malta is guaranteed and the Government of Malta is bound to abide by it.

In view of the emphasis by the CBM management on its European dimension to back its claim to a high level of autonomy which raised issues regarding the jurisdiction of the Maltese Ombudsman as well as issues of interpretation of the EC Treaty and the Statute of the European System of Central Banks and of the European Central Bank (ESCB Statute), the Ombudsman sought the views of the European Ombudsman who in turn approached the European Central Bank.

The European Central Bank submitted that the concept of central bank independence covers functional, institutional and financial independence as well as autonomy in staff matters. Member states might not impair the ability of a National Central Bank to employ and retain staff to enable the Bank to perform independently the tasks conferred upon it by the Treaty and the Statute of the ESCB and a National Central Bank may not be put in a position where it has limited or no control over its staff or where the government is in a position to influence its policy on staff matters.

The European Central Bank also submitted that the Central Bank of Malta Act provides that the Bank's Board of Directors, when exercising any function, duty or power under the Act, shall not seek or take instructions from the Government of Malta or any other body and that the Board is solely responsible for the appointment of employees of the Central Bank of Malta on terms and conditions as may be established by the Board. On these grounds the Central Bank of Malta is an independent body with its own distinct legal personality, separate from the Maltese Government and with its own recruitment policies and conditions of employment and its employees are public officials although they are not civil servants.

In view of this, the European Central Bank held that once the family-friendly measures under scrutiny by the Ombudsman were not established by the Maltese Government by means of legislation applicable to all employees in Malta but through internal regulations applicable to all its public officials, the Central Bank of Malta was not obliged to adopt or to follow any such measure.

After an examination of the relevant provisions of Community law, on 30 March 2009 the European Ombudsman concluded that there was nothing in this law to prevent a national Ombudsman from the investigation of a National Central Bank as regards the social rights of its employees and that the respective competences of a national Ombudsman in such matters are a matter of national law.

The Ombudsman next examined the issue from the perspective of Act No XXI of 1995 that allows him jurisdiction over government departments or any

government authority or statutory body over which the Government has effective control. Since the Central Bank of Malta does not feature in the First Schedule of the Act that lists exemptions to this provision, the Ombudsman has jurisdiction to investigate complaints against the Central Bank of Malta and to review actions and decisions taken by the Bank in the exercise of its administrative functions without interfering in the exercise of functions that pertain to the Bank.

On these grounds the Ombudsman concluded that while the Central Bank of Malta enjoys the right to make staff regulations without government approval and to autonomously define the conditions of employment of its staff, such autonomy and independence do not exclude it from the jurisdiction of the Maltese Parliament. The Ombudsman established that although there is no law binding the Central Bank to implement policy decisions taken by the Government and intended to be applicable across the board to all areas of public administration such as family-friendly measures and policies in the field of staff recruitment and employment, it was proper at this stage to consider whether the Bank ought to respect decisions that favour the conditions of government employees which in no way impair the proper exercise of its functions.

Although by virtue of its full membership within the European System of Central Banks the Central Bank of Malta assumed an international legal personality of its own, the Ombudsman held that the Bank did not cease to form part of the Maltese public administration in a wide sense. He recalled that the Central Bank of Malta is not established as a EU agency but as a National Central Bank set up by Maltese and not EU law and has also a national dimension with functions that pertain to fiscal and monetary policy. Despite the fact that unless established by legislation applicable to all employees residing in Malta the Central Bank of Malta is not bound to grant its employees the family-friendly measures launched by the Government once they are not civil servants, the Ombudsman felt that this statement should not be viewed merely in a strict legal context. In his opinion it had to be seen whether such an approach would satisfy aspects of good administrative practice that go beyond the norms of strict legality.

Since good administration reflects the correct conduct of public affairs for the common good as well as the underlying tenets of fairness and justice that an organized society expects, the Ombudsman questioned whether the Central Bank, notwithstanding its international status, would act correctly if it decides not to implement measures introduced by the Government for the benefit of employees in the public service.

The Ombudsman felt that family-friendly measures introduced by the Government do not have a negative impact on the ability of Bank employees to perform in an independent manner the functions conferred upon the Central

Bank of Malta by the ESCB Statute and national legislation. Any such measures do not impinge on the independence and autonomy of the Central Bank or fall foul of the EC Treaty.

At the same time since employees of the Central Bank of Malta are public sector employees and form part of the public administration, there is no reason why they should not enjoy benefits granted by the Government to public officers. Improved work conditions that go beyond what is provided in the Collective Agreement and that do not interfere in the exercise of the functions of the Central Bank of Malta do not harm the performance of the administration. In addition whenever, as an ideal employer, the Government introduces benefits to public officers that go beyond those enjoyed by them as of right, the Government expects national authorities such as the Central Bank of Malta to follow its example since they also have the duty, as good employers, to follow this lead when it does not impinge on their autonomy in the exercise of their functions.

The Ombudsman observed that while preserving the right to recruit staff and negotiate their conditions of employment in the context of autonomy and independence to properly exercise its functions, the Central Bank is still bound by the rules of good governance. It would therefore be improperly discriminatory if public authorities, without good reason, deprive their employees of the benefit of family-friendly measures introduced by the Government in favour of public officers where these are not in conflict with any exclusive jurisdiction enjoyed by these bodies unless there are cogent reasons that militate against such a decision.

While not breaching any binding law if it failed to do so, the Central Bank of Malta would breach the rules of good governance if it failed to implement objectively salutary measures on the grounds that any such action would materially impinge on the exercise of its powers and functions. A public authority that by law enjoys a measure of autonomy is not cut off from the mainstream of the management of public affairs and should as far as is reasonable be guided by the rules of good governance by which the public service is regulated.

The Ombudsman commented that the international characteristics and affiliations of the Central Bank of Malta do not place it outside the jurisdiction of the country's judicial, legislative and administrative organs since the Bank was established by Maltese law and is not a EU agency.

The Ombudsman also referred to the independence enjoyed by the Central Bank of Malta as a national bank within the European System of Central Banks and to the international legal personality of its own that was recently bestowed upon it to enable it to perform its international functions and

obligations. At the same time in the light of the autonomy that the institution enjoys under the Central Bank of Malta Act and its national status, it continues to provide an essential service to the public administration that is bound to act in these areas within the parameters of the EC Treaty applying guidelines and directives of the ESCB of which the Central Bank of Malta forms part.

The Ombudsman noted that the Governing Council of the European Central Bank recognizes that the independence of National Central Banks from interference from third parties is circumscribed to decisions that “*are incompatible with the Treaty and the Statute as far as ESCB related tasks are concerned.*” This makes it clear that the ECB does not expect a National Central Bank to be absolutely autonomous, independent and immune from decisions of governing bodies who would otherwise have the right at law to give it instructions on matters beyond the stated limits.

The Ombudsman was also of the view that although public authorities rightly maintain that they are not subject to employment regulations applicable to the civil service, these institutions should nonetheless have in place fair practices in the management of staff that are analogous to those in the public service according to the norms of good governance. They should ensure that freedom in the administration of their affairs is proportionate to the requirements of their functions while their procedures should conform to standards of transparency and good governance that the public service is bound to observe.

The Ombudsman concluded that:

- public authorities have a duty to respect government decisions on matters regarding the public administration and to apply the rules of good governance in the management of their affairs unless cogent reasons prevent them from doing so;
- since these authorities form part of the public administration in a wide sense and their duty extends beyond the sphere of strict legality, it is not fair that in matters which do not impinge on the exercise of their proper functions, they do not observe government policies unless bound to do so by *ad hoc* legislation;
- independent public authorities should accept that within their respective spheres of competence they remain an integral part of the public administration responsible to the people at large according to procedures laid down in their founding statutes; and
- the independence and autonomy of these authorities are not absolute and do not allow them to ignore government policies which do not impinge on the exercise of their functions.

The Ombudsman concluded that these authorities should be conscious of their institutional relationship with the administration and consider themselves as an extension of the government in the wide sense, entrusted with specific areas of national administration in the context of the government's policies and within the parameters of their proper functions. The application of rules that govern all areas of public governance is necessary to achieve a measure of cohesion in administrative issues between the public administration and autonomous and independent authorities and to promote fair, consistent public administration all round.

Finally the Ombudsman recommended the setting up of a consultative mechanism between the Government and public authorities to promote good practice, due process and high standards of transparency and accountability while respecting the autonomy and independence that these institutions enjoy. This mechanism would enable the Government to consult these authorities prior to the introduction of measures that would also be directed at them in order to allow them to submit their views even before the measures are approved by the Government and in this way ensure that these authorities would be able to envisage any adverse effects that such measures might have on their own operations.

Developments during 2009 in the unification of the ombudsman service

Background information

In recent years this Office embarked on a sustained drive to promote the advantage of a single ombudsman organization with overall responsibility for complaint handling and management in a number of ombudsman jurisdictions in the public sector.

Although to a large extent institutions assigned an oversight role of administrative action and decision-taking in specific fields of public administration have served citizens well, some more than others, the fact that these offices operate under different legislation and with different remits contributes towards a somewhat unsatisfactory appreciation of their potential to foster good administration and responsible management. Moreover, the fact that resource allocation to these institutions more often than not depends on the authorities that provide the public service which they are in duty bound to scrutinize, gives rise to the perception that these institutions are not their own masters and operate under the wing of the public bodies from whom they are required to be completely distant, autonomous and independent.

The last two annual reports for 2007 and 2008 by this Office gave comprehensive coverage to the way in which this situation came to the fore in 2007. It was at this

time that the Commissioner for Children and the Audit Officer of the Malta Environment and Planning Authority (Mepa) both publicly expressed concern at what they regarded as an erosion of the autonomy of their institutions and the public perception that also as a result of their location – and in the case of Mepa’s Audit Office, even its staff selection and recruitment process – they might give ground in their review of maladministration in deference to the public bodies under their jurisdiction.

This outburst led this Office in July 2007 to declare openly that what led to this situation was the way in which these mechanisms for administrative review operated and which failed to safeguard their autonomy on the lines laid down in Resolution 48/134 of 20 December 1993 *National institutions for the promotion and protection of human rights* that was adopted by the General Assembly of the United Nations at its 85th plenary meeting – the so-called Paris Principles.

The response to this call by the Ombudsman was generally positive and the process of convergence of national administrative review mechanisms was launched in the second half of 2007 following the Government’s agreement in principle that there should be collaboration between the Office of the Ombudsman and other mechanisms set up by law to investigate specific sectors of public administration. This exercise, while ensuring that designated existing complaint-handling services will be brought closer to the Office of the Parliamentary Ombudsman by means of direct access to its administrative and investigative services, was also meant to promote a streamlined and coherent process in terms of investigative techniques, the application of complaint evaluation methodologies and provision of remedy in sustained cases. In July 2007 the Prime Minister affirmed that as a first step Mepa’s Audit Office and the Office of the University Ombudsman should be the first institutions to form part of the new Maltese ombudsman service and that other review mechanisms could form part of this project as well at a later stage.

Although subsequent to the directive to launch a new and integrated ombudsman service this Office took in hand the necessary preparatory work and submitted proposals on how this new system could operate, initial progress on efforts to converge the Office of the Ombudsman and Mepa’s Audit Office was admittedly rather slow. In its *Annual Report 2007* this Office expressed its disappointment at the somewhat slow uptake of this proposal although it must be admitted that, as normally happens in the country, the prospect of a general election which eventually took place in March 2008 and the time taken by an incoming administration to settle down must have contributed towards a relative slowdown in the implementation of this programme.

A new impetus was, however, given to this project in the address by the President of the Republic on the opening of the eleventh Parliament on 10 May 2008

which referred to the Government's objectives in the field of good governance including proposals to introduce legislation for the empowerment of the Office of the Ombudsman with this institution taking a lead role in initiatives for the strengthening of the country's infrastructure for administrative review mechanisms.

Notwithstanding this development this Office acknowledged in its *Annual Report 2008* that despite its agreement with Mepa on 27 December 2007 that was meant to engage this Office more closely in the work of the Authority's Audit Office, these arrangements failed to gather the necessary momentum during 2008. This was attributed to an initial hesitation to accept the new system whereby the Office of the Ombudsman would support the Audit Office by means of inputs by one of its investigative staff members to review cases lodged with the Audit Officer. There were also fears that there was not enough technical expertise at the Office of the Ombudsman in the investigation on issues related to physical planning and building development while the Audit Officer also indicated that he was in favour of selecting his own staff rather than rely on inputs by the Parliamentary Ombudsman.

Towards a closer functional relationship with Mepa's Audit Office during 2009

This Office is pleased to report that matters improved during the year under review when one of its Senior Investigating Officers attended at the Audit Office on a regular basis and contributed towards a closer working relationship between the two Offices. These inputs were limited to casework handling on the basis of the investigative practice developed by this Office and to the preparation of draft remedial measures and recommendations, whenever deemed appropriate, for consideration and ultimate determination by the Audit Officer who would at any rate be required to assume full responsibility for the final decision. In this way it was ascertained that in complaints that passed through the sift that was provided by this Office's Senior Investigating Officer there was an approach that was consistent with the methodology that is generally adopted by the Office of the Parliamentary Ombudsman while the Audit Officer enjoyed full freedom of action regarding the resolution of complaints concerning Mepa that continued to fall uniquely under his jurisdiction.

In this connection this Office shares the concern expressed by the Audit Officer in the *Annual Report 2009* of the Malta Environment and Planning Authority where the Authority is statutorily bound to include the annual report prepared by its Audit Officer in its entirety. In this Report the Audit Officer states that cooperation between the two Offices increased throughout 2009 but admits that "... although this assistance is more than welcome, and has resulted in

*considerable improvement in the situation, it is far from the ideal situation. There is still a considerable backlog of pending cases to be investigated ”*⁸

The Audit Officer goes on to state, however, that “... .. despite the assistance provided by the Ombudsman, the backlog of cases requiring an investigation is still excessive. Most complainants have to wait an unacceptable long time to have feedback on their complaint. Moreover, it is impossible to initiate any investigation on some aspects of the working of Mepa unless a specific complaint from a member of the public has been received.”⁹

In its role as the main watchdog for the safeguarding of citizen rights vis à vis the public administration, this Office expresses concern at this situation. While pledging that it will do its best to improve this state of affairs as a matter of urgency as soon as the unified ombudsman system will be up and running, this Office believes that the overall picture should be viewed in its proper perspective.

On Mepa’s reform and a new accountability structure

As is well known, efforts to establish closer linkages between Mepa’s Audit Office and the Office of the Parliamentary Ombudsman coincided with a period that may be considered as a watershed in the Authority’s history. For reasons that are widely documented, the Malta Environment and Planning Authority, rightly or wrongly, in recent years turned into one of the country’s most controversial institutions and given its crucial role in physical development and planning and in the process of national economic growth, the reform of this institution has featured prominently on the national change agenda. This was one of the main planks of the incoming administration that was voted into office in March 2008.

Based on the four pillars of consistency, efficiency, accountability and enforcement, the reform document issued on 9 July 2009 and entitled *A blueprint for Mepa’s reform* reflected the Government’s proposals as well as suggestions from civil society in the wake of an extensive public consultation process aimed at the overhaul and consolidation of the Authority in order to encourage sustainable growth and safeguard the environment for future Maltese generations. This objective had already been captured earlier in the address by the President at the state opening of the eleventh Parliament as follows: “*The Malta Environment and Planning Authority will be reformed with an eye to greater efficiency and transparency in its operations, and with commitment to ensuring that there is consistency in its decisions and enforcement.*”

8 Cfr. page 105.

9 Cfr. page 110.

This heightened commitment to accountability in the Authority's reform programme featured in the address by the Prime Minister during the launch of the document *A blueprint for Mepa's reform* at the Auberge de Castille when he declared that in his view the most important reform in the accountability pillar concerned the proposal whereby *"... instead of the Mepa Audit Officer a Planning Ombudsman will be set up within the Office of the Ombudsman itself so as to bestow upon this institution the highest level of independence and scrutiny."*

The President's words, coupled with the government's vision, neatly encapsulated the Ombudsman's sense of purpose as the Mepa reform document, together with a review of policy direction, improved internal procedures, more efficient organizational structures, a healthier customer-oriented approach and better communications, also envisaged the setting up of a stronger and more focused structure to carry out an internal audit function as well as the attachment of the Audit Office to the Office of the Ombudsman. With regard to this latter proposal lead caption C1.1 in the reform document states as follows:

"The functions of the Audit Office within Mepa should be migrated to the Ombudsman's Office and established as a Planning Ombudsman. The mandate of the Planning Ombudsman would originate from the Ombudsman Act and no longer emanate from the new legislative instrument governing Mepa."

The document further states:

"In view of the current situation in the Audit Office, discussions are under way for this Office to be absorbed within the Office of the Ombudsman. The recommendations of a study carried out by the Management Efficiency Unit in June 2008 also confirm that the Audit Officer's role is more adequately suited in the Office of the Ombudsman."

... ..

Government still believes in the need for a dedicated right to recourse in the planning and environmental fields and is therefore proposing to migrate and upgrade the Audit Office to the Office of the Ombudsman thereby giving the latter independent powers over Mepa and which are ultimately accountable to the scrutiny of Parliament. This is but one of those statements and intents that shows the intent and commitment that Government has towards the reform of Mepa and the achievement of a fair process for all stakeholders."

The reaction by the Office of the Ombudsman was given on 21 July 2009 when the Parliamentary Ombudsman again openly expressed support to this initiative for greater convergence between his Office and a review mechanism in the field of physical planning and development and related issues. Drawing heavily from

his own previous work on this issue the Ombudsman commented as follows on several aspects of proposals that featured under the Mepa reform programme:

- with the suppression of the position of Audit Officer in the Malta Environment and Planning Authority and the establishment of “*a Planning Ombudsman*” as proposed in *A blueprint for Mepa’s reform*, the nomination of the officeholder should no longer be made by the Authority itself with the concurrence of the Minister responsible for development planning as has been done to date under the Development Planning Act but by Parliament itself or by the Parliamentary Ombudsman after due consultation in the same way as the appointment of the University Ombudsman is made;
- the proposal to set up the Authority’s internal audit office with a wide review function of Mepa’s internal processes in the fields of finance, operations and human resources is a step in the right direction that should contribute towards greater administrative accountability while undertaking functions that are separate and distinct from those undertaken by the “*Planning Ombudsman*”;
- the honorarium of the “*Planning Ombudsman*” should be a direct charge on the Consolidated Fund or, possibly, on the annual budgetary allocation of the Office of the Ombudsman;
- while making use of the investigative and administrative services of the Office of the Ombudsman, the “*Planning Ombudsman*” will operate on the same lines and under the same principles as the Parliamentary Ombudsman and will likewise only be answerable to the House of Representatives; and
- the “*Planning Ombudsman*” will submit reports, together with any recommendations that he may deem necessary, not only to the Board of the Authority but also to persons who lodge complaints to his Office as well as to any other person or institution that he may deem appropriate.

The Ombudsman observed that with his Office serving as a single channel to provide overall guidance and advice to autonomous institutions for the audit of administrative action, it would be appropriate to bestow upon the official heading each review institution the designation of Commissioner so as to establish a clear distinction between the respective roles and functions of the Parliamentary Ombudsman and of the Commissioners who collaborate with him on specialised sectors of public administration.

In this context and also in view of the indication given in the Mepa reform document that the Government was in favour of confirming the Authority’s joint portfolio for planning and the environment, it was suggested that the functions of the “*Planning Ombudsman*” should explicitly extend also to the environment and the designation of this Officer should be changed to Commissioner for Planning and the Environment. The Commissioner will operate in an autonomous and independent manner and will be authorised to

investigate and to reach a decision on all technical aspects of matters that fall under his scrutiny while the Parliamentary Ombudsman will retain his current function to verify whether an investigation by the Commissioner was done in a just manner and was procedurally correct.

The Ombudsman also made the following observations:

- in line with the Government's proposal that the mandate of the Commissioner for Planning and the Environment should originate from an amended Ombudsman Act and that the officeholder should be backed by a strong legislative framework, it was recommended that the provisions of the Ombudsman Act which bind the Ombudsman with regard to the method of his investigation and to procedural rules should also bind the Commissioner who would enjoy the same powers as the Ombudsman under the Ombudsman Act insofar as access to information and the collection of evidence are concerned¹⁰ – and this would not only strengthen the autonomy and independence of the Commissioner and give greater value and a more authoritative backing to his judgement and recommendations but would also ensure uniformity in the method of his investigation and in his interpretation of regulations that are applicable to the evaluation of evidence and to a fair hearing;
- while the Commissioner for Planning and the Environment should be allowed every opportunity to consult the Parliamentary Ombudsman throughout his investigation of issues lodged with his Office, the modalities behind this consultation should be defined in a detailed manner and in a way that would guarantee the independence and the autonomy of the Commissioner and at the same time establish his functional relationship with the Parliamentary Ombudsman;
- since the Mepa reform document envisaged that certain functions under the direct responsibility of the Authority will be assigned to government departments and other authorities including the Office of the Prime Minister and the Malta Resources Authority, the jurisdiction of the Commissioner should extend over administrative aspects associated with planning and the environment regardless of the public body responsible for this action;
- as in the case of the Parliamentary Ombudsman, a Commissioner will have no binding executive force although his Final Opinion and his recommendations should be recognised and accepted by the administration as providing judgment on the propriety of the action under scrutiny in the same way that a declaration by the Commissioner that maladministration has occurred or that a citizen has suffered injustice or improper discrimination should, as a rule, be accepted and can only be rejected for reasons that are also made public.

10 The Audit Officer of the Malta Environment and Planning Authority does not possess these powers under the Development Planning Act.

In the concluding part of his response to the Mepa reform document the Ombudsman recommended that just as he has the right, whenever he deems it appropriate to do so, to report to the House of Representatives on instances when the administration turns down the recommendations in his Final Opinion, the Commissioner for Planning and the Environment – through the Parliamentary Ombudsman – should also have the right, whenever circumstances so warrant, to refer cases regarding planning and the environment to the Standing Committee on Development Planning of the House of Representatives. On these occasions the report by the Commissioner would be presented by the Parliamentary Ombudsman and discussed by members of this Standing Committee who, if considered necessary, would also hear the views of the parties involved and reach a final decision.¹¹

The Parliamentary Ombudsman made it clear that this uptake of additional functions and duties by his Office would need to be accompanied by appropriate additional resource allocation to his Office. While the proposed convergence of administrative and investigative services would lead to a better utilization of these resources, there were indications even at this stage that additional specialized and qualified support staff would be required to deal with the technical issues of complaints brought to the attention of the Commissioner for Planning and the Environment, and of other Commissioners, to ensure that this new structure for administrative scrutiny will operate efficiently. At the same time this Office would like to express concern at the fact that inadequate attention has been given so far to the issue as to whether the office suites of Commissioners are to be co-located with the Office of the Ombudsman.

The reaction by Mepa's Audit Officer to the proposal that his Office should come together with the Office of the Ombudsman was also generally favourable. In the *Annual Report 2009* by the Malta Environment and Planning Authority, the Audit Officer referred to the “*considerable backlog of pending cases*” to be investigated by his Office and stated that “... *the proposed reform of... Mepa when the Audit Office would operate within the structure of the Office of the Ombudsman may be the long-term solution to the problem. As it is, the Audit Officer cannot investigate cases on his own initiative although there is an obvious need for such action.*”

At the end of an extensive consultation process on the Mepa reform proposals, the Government in early 2010 published a Bill for an Act entitled the *Environment and Development Planning Act, 2009* to provide for protection to the environment

11 As indicated earlier, it might be useful in similar hearings to refer to procedures that are followed by the Public Administration Select Committee (PASC) of the House of Commons in the UK.

and make provision for the planning and management of development and for the establishment of an authority that shall perform and succeed in the functions of the authority under the Development Planning Act and the Environment Protection Act and formulate and implement policies relating to the promotion of sustainable development, the protection and management of the environment and the sustainable management of natural resources in the Maltese Islands.

Among other things the Bill makes provision for the appointment within the authority of an internal auditor to provide oversight of the systems of internal control and risk management of the Authority; evaluate and coordinate the audit and financial reporting process of the Authority; and review and assess the effectiveness of the management of the Authority in its compliance with policies and in the discharge of its regulatory and compliance functions. At the same time the Bill makes no reference to the Authority's Audit Office since as the reform document had indicated, it was planned to move the function to investigate allegations of administrative malpractice in the Authority to the Office of the Ombudsman and the mandate to undertake this responsibility would emerge from amended ombudsman legislation.¹²

The consolidation of the Office of the University Ombudsman

Efforts during the year under review to develop the Office of the University Ombudsman into a strong institution by means of direct linkage with this Office were on the whole successful and quick to yield positive results and served as a precursor to other possible similar moves.

Following the appointment of Professor Charles Farrugia on 1 November 2008 as University Ombudsman and the widening of his remit to include the Malta College of Arts, Science and Technology (MCAST) and the Institute of Tourism Studies (ITS), the year under review was to a large extent one of sustained consolidation for the Office of the University Ombudsman. This enabled the University Ombudsman during 2009 to take further steps to put in place the elements for a more comprehensive service to both students and staff in the institutions falling under his jurisdiction.

While responding to the rising number of complaints that reached his Office and delivering his findings and decisions in a fair, reasonable and consistent manner, the University Ombudsman undertook various other initiatives to ensure that his

¹² This took place with the publication of Bill No. 48 in March 2010 entitled the *Ombudsman (Amendment) Act, 2010* that made provision for the appointment of specialised Commissioners for Administrative Investigations and for their designation as Officers of Parliament.

service would be more effective and gain the trust of all stakeholders including the leaders and management of the institutions under his mandate as well as students and employees. In parallel with complaint handling work which covered a total of 93 cases between November 2008 and December 2009 compared to an average annual intake of 26 grievances in recent years, other work carried out during 2009 included the preparation, distribution and dissemination of publicity outreach material designed especially for the target audience of the Office.

The promotional reach by the Office of the University Ombudsman was extended by means of contact with media outlets including newspapers, radio and television while a new website that was launched as a separate section in the website of the Office of the Parliamentary Ombudsman in March 2009 provides general interest content as well as advice and details about the functions and duties of the University Ombudsman including facilities for online complaint submission. The online presence of the University Ombudsman lifted the profile of his Office and served to further enhance its visibility and accessibility among potential customers while also serving as an effective marketing and communication tool. The inclusion of two complaint cases that were handled by the University Ombudsman in the October 2009 edition of the publication *Case Notes* that is issued biannually by the Office of the Ombudsman also contributed towards wider coverage of the work that is done by the University Ombudsman.

At this stage it is important to sound a note of warning. There are indications that the increased workload during 2009 will rise even further in the years ahead as the student population in institutions of higher and further education continues to grow and as the Office succeeds in getting its name out among its target audience. However, although resources at the Office of the Parliamentary Ombudsman were widely used to service the university ombudsman institution during 2009 in line with the ongoing project for the sharing of resources in the field of administrative audit and the scrutiny of the public administration, the anticipated rising demand for the university ombudsman service will in the short term need to be accompanied even here by the allocation of additional central support resources to the mother institution since if funding continues to be maintained at the level of recent years this is tantamount to a lowering of the institution's ability to function in real terms.

The good work by the Office of the University Ombudsman in recent months is given due recognition in the proposed legislative amendments that are meant to secure the Maltese ombudsman service under one single unified structure and with a coherent jurisdiction. As suggested by this Office, the Bill for an Act entitled the *Ombudsman (Amendment) Act, 2010* (Bill No. 48) published in the *Malta Government Gazette* on 12 March 2010 makes provision for the powers and jurisdiction of the new ombudsman set up in Malta. As laid before the

House, the Bill provides for the deletion of subarticles (15) and (16) of article 74 of the Education Act that refer to the appointment of the University Ombudsman and for the appointment and the tenure of Commissioners for Administrative Investigations for specialized areas as may be determined by the Ombudsman with the concurrence of the Prime Minister. Here too this Office has already on various occasions indicated that the post of Commissioner for Higher and Further Education should replace the post of University Ombudsman.

Given that the year under review represented the first full year that the University Ombudsman operated under one roof with the Parliamentary Ombudsman, it is considered fitting that this *Annual Report* should give due coverage to the work done by this Office during 2009. This *Annual Report* includes the report prepared and submitted by Professor Charles Farrugia in respect of his work for 2009 (Appendix B) together with a review of workload data in respect of complaints handled by the University Ombudsman during the reporting period. Furthermore, in the section that provides summaries of significant cases as samples of the Ombudsman's caseload this *Annual Report* includes summaries on three grievances that were dealt by the University Ombudsman during the year under review.

On the design principles to underpin the new ombudsman house

During 2009 this Office continued its preparatory work on the institutional and operational framework to underpin the proposed new unified ombudsman structure. Whereas in previous years this Office concentrated largely on the preparation of a draft legislative framework to encompass the various aspects of change that were implied by a new ombudsman formation, during the year under review the Office focused particularly on practical rules of engagement that the new set up would be required to observe. The main concern in this regard was to promote the setting up of an appropriate ombudsman structure and a workable model of good governance that would rationalize the Maltese ombudsman service and enable office holders to embrace a consistent model for their complaint handling and investigative work. These design principles duly featured in the Office's submissions to the authorities entrusted with the task, among others, of invigorating the Maltese ombudsman service.

On 16 July 2008 the House of Representatives unanimously approved a resolution by the Prime Minister to set up a Select Committee to examine and submit recommendations to the House on the strengthening of democracy and on greater transparency in the handling of national issues and public matters including, among other areas, a more vigorous parliamentary institution; stronger powers to the Permanent Commission against Corruption; improvements to the

electoral system in the context of a process of constitutional reform; the financing of political parties; and the strengthening of the country's ombudsman institution.

In its second interim report dated 14 December 2009 the Speaker, as chairman of the Select Committee, brought to the attention to the House developments that occurred since the submission of the Committee's first interim report on 31 October 2008. To a large extent this second report was dominated by the Select Committee's recommendations on the strengthening of the Office of the Ombudsman and drew heavily on the proposals that were submitted earlier by this institution. In view of the significance of this interim report on the future direction of this Office, a free translation of the relevant parts of this document appears in the box in the next few pages.

In this connection it is felt that it may still be opportune to raise an issue that was already raised at the time when the proposal to give constitutional status to this Office was under consideration in 2007.

In recent years wide swathes of economic activity such as telecommunications, the postal service, port and airport management and banking as well as relatively new areas such as the distribution of medicines to eligible persons on behalf of the Government under the Pharmacy of Your Choice scheme and institutional care for the elderly were withdrawn from public management and control and transferred to the private sector or placed under public private partnership arrangements under the government's privatization programme. The loss of controlling interest or effective control by the Government in these areas meant the introduction of restrictions on the Ombudsman's jurisdiction and that the protection against maladministration previously given to citizens in these areas by the Ombudsman no longer exists.

This Office remains of the view that consideration should be given at this stage to the proposal that the service provided to citizens by the Maltese ombudsman system should be extended to include decisions and actions in areas that provide an essential service to the community and that were previously provided directly by the Government or by an entity in which the Government's share was in the majority. It is felt that the interests of citizens should still be safeguarded regardless of the operational arrangements under which business in these areas is now conducted.

This is not to say that there should be a plethora of ombudsman jurisdictions with the type of institutions found in the UK such as, for instance, the Energy Ombudsman, the Legal Services Ombudsman, the Office for Legal Complaints, the Pensions Ombudsman, the Property Ombudsman, the Removals Industry

Select Committee of the House of Representatives

Interim Report No 2

(free translation)

According to the Resolution that was adopted by the House of Representatives on 16 July 2008¹ when this Select Committee was set up, the Speaker is due to report progress to the House. This is the second interim report as laid down in the Resolution.

Since the submission of the first interim report² on 31 October 2008, the Select Committee met on the following dates:

Sitting number 7	Friday, 30 January 2009
Sitting number 8	Tuesday, 11 August 2009
Sitting number 9	Monday, 31 August 2009
Sitting number 10	Wednesday, 30 September 2009
Sitting number 11	Tuesday, 3 November 2009
Sitting number 12	Wednesday, 18 November 2009
Sitting number 13	Thursday, 10 December 2009

Besides these sittings, different groups of Members of the Committee held several meetings to discuss subjects having a specific interest

THE STRENGTHENING OF THE OMBUDSMAN INSTITUTION

During these meetings the Select Committee finalized its discussions and its recommendations on its terms of reference item (iii) of the first paragraph of the Resolution, namely, *“the strengthening of the ombudsman institution whereby this institution will be entrusted with the responsibility to coordinate the processes related to administrative complaints in the public sector as a whole.”* It is worth recalling that the Office of the Ombudsman, besides the legal framework provided by the Ombudsman Act, has since 2007 also been enshrined in the Constitution of Malta.

The Committee first considered several aspects of the Ombudsman Act (chapter 385) as well as the positive experience and the reports on the work of the Ombudsman since the Office of the Ombudsman was set up in 1995 to date. The Committee also considered other legislative provisions regarding the scrutiny and the audit of administrative action in the public service and in the public sector. So far these legislative provisions cover the fields of physical planning and development and the higher education sector.

With a view to the strengthening of transparency, accountability, efficiency and administrative justice, the Select Committee reached unanimous agreement regarding the strengthening of the ombudsman institution by its recommendation that the House should consider the following proposals:

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1. Motion number 34 proposed by the Prime Minister, the Hon. Lawrence Gonzi, seconded by the Deputy Leader of the Opposition in Parliament, the Hon. Angelo Farrugia, and adopted by a unanimous vote by Members of the House of Representatives.
 2. Placed on the Table of the House in Sitting number 34 of 3 November 2008 (Paper Laid No. 777/08).

- In addition to what is already provided under the Ombudsman Act, the Ombudsman should also be given a clear mandate with a jurisdiction to investigate:
 1. every agency set up under the Public Administration Act (chapter 497);
 2. every foundation set up by the Government, by a statutory body, or by an organization or other body in which any one of the said bodies or any combination thereof has a controlling interest or over which it has effective control; and
 3. every chairperson and member of a board, committee, commission or some other decision-making body, whether set up by law or by means of administrative action, which can take decisions that effect any member of the public.
- There should be one structure to investigate allegations of maladministration in specific sectors of public administration that will be regulated by means of a legislative framework under the Ombudsman Act.
- For this purpose there should be *ad hoc* Ombudsmen, to be designated Commissioners for Administrative Investigations, in specialised sectors as may be established by the Prime Minister in consultation with the Parliamentary Ombudsman. Similar to the Ombudsman, these Commissioners would also be Officers of Parliament and would fall under the ultimate control of the House of Representatives and would report to the House through the Parliamentary Ombudsman.

Up to now the Education Act (chapter 437) makes provision for an Ombudsman in the field of tertiary and further education³ while the Development Planning Act (chapter 356) make provision for an Audit Officer⁴ to review all the functions and workings of the Malta Environment and Planning Authority (Mepa). A single unified structure would provide one central place for citizens who would like to submit their complaints and would allow them direct access to officials whose duty it is to assist them in safeguarding their right to good public administration. This should result in greater consistency, procedural uniformity and effectiveness. A single unified structure would bring about coordination and a more efficient use of investigative resources in the field of administrative scrutiny.

Commissioners in specialised sectors would:

- all be appointed in a transparent manner by the Ombudsman on the strength of a joint recommendation by the Prime Minister and the Leader of the Opposition. In the event that within a period defined by law no agreement would be reached between the Prime Minister and the Leader of the Opposition on a suitable person for a particular sector, the nomination will be made directly by the Ombudsman himself. In the appointment of Commissioners it should be ensured that the term of office of each Commissioner would expire on the same date.
- in the exercise of their powers and functions and in the implementation of their investigative and audit activity, Commissioners shall by law be guaranteed independence and autonomy in the sectors that fall under their respective jurisdiction.

3. Education Act (chapter 327), Article 74 (15) and (16).

4. Development Planning Act (chapter 356), Articles 2 and 17C.

The setup of Commissioners within the ombudsman institution will ensure that these mechanisms of administrative audit will be sufficiently strong to sustain their autonomy and independence from those institutions that they are in duty bound to scrutinize.

- Commissioners will be granted full immunity from any disciplinary or administrative action and from any civil or criminal proceedings in the course of their official functions.
- Throughout their investigations in connection with grievances that are lodged with them, Commissioners will apply the same legal provisions that are applied by the Office of the Ombudsman so as to ensure a more homogenous and uniform administrative process that will give more consistent results as required by law.
- Commissioners will be guaranteed full access without any restriction whatsoever to all the information that is considered necessary throughout each investigation on allegations of maladministration.
- Each Commissioner will provide an annual report on the performance of his functions that will be incorporated in the annual report of the Parliamentary Ombudsman.

The Ombudsman shall not contest the technical evaluation or the expertise of a Commissioner on a complaint in a sector falling under the special jurisdiction that is entrusted to him and to this effect the report submitted by a Commissioner on the merits of any such case is final and the Ombudsman shall not open any such case or review any aspect of this case. Notwithstanding this, the Ombudsman should ensure that the investigation is conducted in accordance with legislation governing ombudsman operations and according to the principles of equity and natural justice. It is the duty of the Ombudsman to ensure that internal procedures guarantee that investigative and audit work is done in a manner that is just, impartial, efficient and transparent.

The Committee confirmed the principle that the ombudsman institution, and eventually the new structure for Commissioners, should have no executive power to ensure that their recommendations would be observed. The administration should remain committed so that in an appropriate time it would provide full information regarding the implementation of recommendations issued by the Office of the Parliamentary Ombudsman and provide an explanation and clear reasons when these recommendations cannot be implemented.

In its deliberation and in its recommendations on this issue, the Committee gave full consideration to the consultations that the Speaker made with the Parliamentary Ombudsman and with the current Audit Officer of the Malta Environment and Planning Authority. Both officials expressed their agreement with the direction that emerged from the recommendations of the Select Committee as explained above. The Select Committee expressed its appreciation at the contribution by the Parliamentary Ombudsman and by Mepa's Audit Officer in the formulation of the proposals as explained above.

On this particular aspect of its terms of reference the Select Committee has completed its submission to the House which should now in turn in the shortest possible time consider these recommendations and decide on the next step. The Select Committee understands that various technical details that are connected to this issue will be considered as soon as the relative bill is brought for consideration by the House.

.....

Ombudsman Scheme, the Surveyors Ombudsman Service, the Waterways Ombudsman or the Furniture Ombudsman. While holding the view that citizen rights in various fields would be better served by existing structures in favour of consumer protection or by internal standards bodies, this Office would again like to advocate an awareness of the need to ensure that with regard to undertakings entrusted with the operation of a service of an essential public nature or interest or having the character of a revenue producing monopoly, the Parliamentary Ombudsman should be allowed adequate flexibility of operation so as to involve himself with due discretion and within the limits of well-defined powers, functions and responsibilities to ascertain that the best interests of citizens are at all times respected.

As a further means of serving citizens to uphold their right to good public administration the Office of the Ombudsman is additionally of the opinion that besides being empowered to appoint Commissioners for Administrative Investigations in areas of the public administration as may be determined by the Ombudsman with the concurrence of the Prime Minister and to provide administrative and investigative services to these Commissioners, the Office should be entrusted to carry out investigations on behalf of any corporate body established by law whose specific functions include investigative powers on issues that are directly related to its jurisdiction. Although the proposed cooperation between the Office of the Ombudsman and these institutions need not be established on a formal basis as with Commissioners, this process should contribute towards a homogenous investigative process on the strength of procedures used by this Office that have withstood the test of time.

Furthermore, in similar cases the Ombudsman shall, upon the conclusion of any investigation carried out on behalf of a corporate body, forward his report with his own recommendations to this body which will then be free to determine the issue along the lines that it would consider most appropriate. Clearly similar arrangements would be most applicable in instances where the body involved, in addition to a statutory investigative role aimed at an evaluation of discrimination and maladministration, is also assigned by law other additional functions that are beyond the Ombudsman's mandate. Such a measure of limited convergence with the Office of the Ombudsman could be explained, for example, with regard to the National Commission Persons with Disability or even the Commissioner for Children.

The Ombudsman as a protector of human rights

Reference has been made in earlier sections in this *Annual Report* to the fact that the role of the Maltese Ombudsman in recent years may be said to have followed in the path of Ombudsmen in other countries in the sense that the institution

complements its traditional role as an oversight mechanism for public sector operations by the application of a human rights dimension to its work.

This focus enables the Ombudsman to acquire an added role since championing a citizen's right to good administration would lose most of its significance unless events that give rise to individual complaints are also viewed in the context of a person's entitlement to respect for individual human rights which all governments are bound to safeguard. As a result the Ombudsman's scrutiny of individual grievances includes in its point of departure not only the extent to which a person's right to be treated with dignity and in a lawful manner has been respected but also the degree to which the person's administrative law rights such as the right to natural justice, fairness, due process, non-discrimination, legitimacy and proportionality have been preserved by the public authorities.

On several occasions this Office expressed the view that the constitutional and political rights of Maltese citizens as well as their social and economic rights are adequately safeguarded by the Constitution of Malta in its various manifestations and by international conventions including the European Convention on Human Rights and Fundamental Freedoms. In the light of this obligation by public authorities to respect and uphold citizens' rights and given the wide range of governance responsibilities that fall under these authorities which require them to legislate and to take actions and decisions that could possibly encroach upon these rights, it is not surprising that the Maltese ombudsman institution, particularly in recent years, has taken it upon itself to carve a niche for its work that fits within the wider framework for human rights protection.

There exists in Malta no national *ad hoc* institution to safeguard human rights despite the proposal that was put forward by this Office to include this function among its responsibilities when the discussion took place in the House of Representatives in 2007 to give constitutional status to the Office of the Ombudsman. However, despite the absence of a formal institutional setup, the fact that the Office of the Ombudsman is embedded in the Constitution of Malta means that the right to complain and to demand an informal – as opposed to judicial – review of government action is guaranteed under the Constitution.

Even though with privatization the long arm of government now has an admittedly lesser reach, action by public bodies and authorities continues to exert a significant impact on the daily lives of individuals. People are still required to be in regular touch with government-run institutions on issues related to tax, social security, education, civil status, health, building development, licensing, etc. Although complaints on these issues do not always carry an overtly human rights tag, nonetheless this perspective can be directly or indirectly evoked since ensuring that citizens are at all times treated fairly and

proportionately in their ongoing relationships with government-led bodies and agencies is a basic concern of human rights.

This commitment by national Ombudsmen to human rights is backed by the Council of Europe Commissioner for Human Rights who has promoted the development of national human rights structures by close cooperation with national Ombudsmen and national human rights institutions in the context of his Office's mandate to foster the effective observance of human rights and to assist Council of Europe member states to implement the Council's human rights standards.

During the year under review the Office of the Ombudsman continued to scrutinize individual complaints about alleged administrative malpractice from a human rights prospective whenever it was felt this approach was warranted under the terms of its functions in the Ombudsman Act, 1995. In this regard it can be stated that this aspect of the Ombudsman's activity was enhanced even further in 2009 by own-initiative investigations which picked on systemic issues and problems that were found to have caused adverse repercussions on various citizen groups and to have contributed towards service delivery that was arbitrary and unacceptable and placed them at a disadvantage in relation to other citizens and deprived them of some aspect or other of their human rights.

In this branch of his 2009 work the Ombudsman defended the right of patients on the waiting lists of state hospitals to a more transparent management of these lists; the right of residents in an apartment block to the peaceful enjoyment of their property when no change of use of one of these apartments into a place of worship or gathering had been sanctioned by the Malta Environment and Planning Authority; and the right of employees in public authorities and entities to benefit from family-friendly measures introduced by the Government for its public officers that do not impinge on the autonomy of these institutions.

In this context the Ombudsman's investigation in 2009 on the right of irregular immigrants to marry while in Malta is of particular significance and represents a landmark in the defence of the human rights of these persons. Although this Office can state with confidence that its work consistently reveals that the level of human rights observance at a national level in Malta is high and that investigations find no evidence of any deep-rooted violation of fundamental human rights among the country at large or any systemic disregard for them, it is advisable at this stage to sound a note of caution.

While there is a growing awareness that human rights have to be protected and there is also an increased sensitivity on the need for the public administration to respect provisions arising from the Constitution of Malta and from international

conventions to protect human rights and to reflect these provisions in the day to day regulation and management of public business and administrative affairs, it is relevant to point out that alleged maladministration based on violations of fundamental human rights in the country generally arises from complaints by individuals who attempt to seek redress against single acts of maladministration that adversely affect their interests. It is positive to note that very rarely do these complaints refer to the more basic fundamental rights such as the right to life, freedom from degrading and inhuman treatment and the right to freedom of expression and association.

Concerns on the fundamental human rights situation of irregular immigrants in Malta

In this regard this Office feels that there is one area of public administration that is a cause of serious concern. This involves the handling of irregular immigrants in Malta that is considered to have reached a situation that favours the violation of fundamental human rights, or at best, puts them at risk. Aware that this problem has reached massive proportions and that the number of irregular immigrants in Malta is very high in comparison to the Maltese population and to the number of registered persons in search of employment, this Office underlines the fact that proper integration is difficult and inevitably a slow process.

The detention of irregular immigrants beyond a reasonable time can qualify as a breach of a fundamental right especially if this is done under conditions that do not adequately respect the minimum material and psychological conditions to which a human being is entitled. At the same time it is recognized that the sheer number of irregular immigrants seeking work is now creating a new reality of labour exploitation in defiance of existing employment legislation.

These concerns led the Ombudsman in August 2009 to issue a report on the right of irregular immigrants to marry while they are domiciled in Malta. Towards the end of the year under review the Ombudsman also laid the groundwork for another own-motion investigation on the regulation of employment opportunities, engagement procedures and conditions of employment of irregular immigrants in Malta to determine the awareness by public authorities of these issues and whether existing laws and regulations in this area are being enforced.¹³

While the investigation on the right of irregular immigrants in Malta to marry is critical of policies adopted by the Public Registry with regard to these immigrants

¹³ The Office of the Ombudsman announced this investigation in a media release on 20 January 2010 and invited interested parties to submit their views on this issue by 26 February 2010.

and openly criticizes the failure to respect the right of these individuals to marry, the Ombudsman is concerned to note that irregular immigrants in Malta are likely to fall victim to other violations of their fundamental rights in an increasingly hostile environment. Notwithstanding Malta's traditional hospitality and the fact that its population is historically multi-national and, to some extent, multi-ethnic, there are indications that Maltese society increasingly views the rather heavy influx of immigrants as a serious threat to its way of life, its social customs, religious beliefs and secular traditions.

The Ombudsman is aware that during 2009 the Government took in hand several initiatives to cushion the impact of illegal immigration on the human rights situation of these individuals. These included the construction and opening of new detention centres and a programme for the regular maintenance and upkeep of these premises; the provision of free meals; the payment of a subsistence allowance to unemployed immigrants; administrative improvements for the operation of detention centres; and the integration and welfare of asylum seekers by way of medical and psychological care. Other policies in favour of vulnerable persons included the setting up of a Board of Visitors to monitor detention centres and consider complaints by detainees and the decision by the government authorities responsible for the control of illegal immigration in Malta to grant access to the media to detention centres.

Despite all these positive steps, however, it is the view of the Ombudsman that the situation is still far from optimal. Long term plans need to be drawn up for the resettlement of the considerable number of immigrants reaching Maltese shores.

While continuing to hold his conviction that the policy of manning detention centres for immigrants with ex-military personnel is not the right solution, the Ombudsman understands, however, that the main problem in this situation derives from lack of financial resources. Despite appreciating increased funding allocations to tackle the immigration problem, the Ombudsman at the same time acknowledges that housing human beings for a long time in tents is unacceptable and a blot on any administration. In the view of the Ombudsman this is not only a violation of immigrants' fundamental right to privacy but can also be qualified as amounting to inhuman and degrading treatment.

The European Pact on Immigration and Asylum and the situation in Malta

The European Pact on Immigration and Asylum that was endorsed by EU heads of state and government at the European Council on 15-16 October 2008 seeks to balance calls for stricter control of migratory flows in delivering countries and the human rights of asylum seekers and to integrate efforts by EU institutions to shape a common EU approach to both legal and illegal migration.

Admitting that the European Union does not possess the resources to decently receive all the migrants who hope to find a better life in Europe and that poorly managed migration may disrupt the social cohesion of host countries, the Pact states that the organization of immigration must consequently take account of Europe's reception capacity in terms of its labour market, housing and health, education and social services while protecting migrants against possible exploitation by criminal networks. In line with values that have consistently inspired the European project, the European Council solemnly reaffirms in the Pact that migration and asylum policies must comply with the norms of international law particularly those that concern human rights, human dignity and refugees.

Following the creation of a common area of free movement among EU Member States, the Pact recognizes that it is imperative that each Member State takes account of its partners' interests in the design and implementation of its immigration, integration and asylum policies. The European Council considers that the time has come to provide a new impetus, in a spirit of mutual responsibility and solidarity between member states and also of partnership with third countries, to the definition of a common immigration and asylum policy that will take account of both the collective interest of the European Union and the specific needs of each Member State.

Given that the European Pact on Immigration and Asylum would require changes to the legal framework of the Union and its treaty bases, the European Council made five basic commitments:

- to organize legal immigration to take account of the priorities, needs and reception capacities determined by each Member State and to encourage integration;
- to control irregular immigration by ensuring the return of irregular aliens to their country of origin or a country of transit;
- to make border controls more effective;
- to construct a Europe of asylum; and
- to create a comprehensive partnership with the countries of origin and transit to encourage the synergy between migration and development.

Under the Pact the European Council considers that legal immigration should be the result of a desire on the part of both the migrant and the host country to their mutual benefit. The Pact recalls that it is for each Member State to decide on the conditions of admission of legal migrants to its territory and, where necessary, to set the number of migrants and that the implementation of the quotas that may be involved might be achieved in partnership with the countries of origin.

In the Pact the European Council calls on Member States to implement an immigration policy that is both selective, particularly with regard to all the needs of the labour market, and concerted, given the impact it may have on other Member States. The European Council also stresses the importance of adopting a policy that enables the harmonious integration of migrants into the societies of their host countries.

The Ombudsman, however, is of the view that these arrangements are not particularly conducive towards a solution of the situation in which Malta has found itself as a result of the escalation of the problem. Recognizing that the response by EU Member States to Malta's pleas for burden sharing has not been as good as the situation warrants, the Ombudsman openly shares and supports Malta's insistence for several years with her European partners that they should put the principles of solidarity and subsidiarity in practice by agreeing to positive measures that can alleviate a burden that it continues to shoulder and that is obviously disproportionate to the island's size and physical as well as material resources. It is clear that financial aid by the European Union to improve the material conditions of irregular migrants in detention or open centres remains inadequate and does not really solve the humanitarian problem.

The Ombudsman holds that the core of the problem from the point of view of fundamental human rights is not limited to inhumane and degrading conditions in which irregular immigrants might be detained especially since these conditions are in the process of being improved. The main issue is whether detention in itself can be qualified as a violation of an immigrant's fundamental right to freedom from unlawful arrest and to freedom of movement.

It is known that almost all irregular immigrants in Malta would immediately leave for the European mainland if given a chance to do so. As a result it can safely be held that their release from detention camps but accompanied at the same time by a denial to allow them the opportunity to leave Malta to resettle in the EU because they cannot be given open travel documents according to EU rules and, even worse, because other EU Member States refuse to accept them, means that they are essentially being forcefully detained within the Maltese territory.

In the Ombudsman's view the question arises whether such a restriction could qualify as a violation to their right to free movement once there does not appear to be a justification for such a limitation. While these persons are being kept in Malta against their will, at the same time other EU Member States expect Malta, notwithstanding the fact that it is a frontier state of the Schengen area, to allow them to move freely within its territory but not beyond to other countries within the Schengen area. The end result is that irregular immigrants on release from

detention centres are being forced to exchange one detention for another, albeit within larger boundaries.

The Ombudsman believes that this major humanitarian problem can only be solved through effective international cooperation. The international community has to shoulder its responsibilities as well to ensure respect and observance of fundamental human rights for all, irrespective of race, colour or creed. At the same time irregular immigrants who have a right to expect hospitality should also be made aware of their duties to respect and comply with the laws, regulations and customs of their host country.

While the country is in duty bound to contribute towards the solution of this precarious situation, the Office of the Ombudsman will in turn continue in its endeavours to highlight issues falling within its remit that require attention. At the same time it remains committed to exercise its investigative functions to ensure the observance of fundamental human rights by the Government and by entities that fall within its jurisdiction throughout the entire spectrum of the Maltese public administration and to recommend appropriate remedial action to redress violations or pre-empt perceived threats.

International relations

During 2009 the Office of the Ombudsman continued to attach importance to linkages with counterpart ombudsman institutions. Participation at international conferences and meetings by the Ombudsman and by members of staff of the Office served as occasions to keep in touch with the latest concepts and thinking in ombudsmanship on complaint handling and resolution. Attendance at these conferences serves to promote an exchange of views and ideas from which both the Office and its representatives can benefit and enables a sharing of experiences and discussion on issues meant to improve the quality of governance that lies at the core of every ombudsman institution.

In recent years the main thrust of the international programme of cooperation in which this Office has participated with vigour was geared particularly towards involvement in activities organized by the *Association des Ombudsmans de la Méditerranée* (the Association of Mediterranean Ombudsmen). The Association aims at the strengthening of cooperation among Ombudsmen and Mediators in the Mediterranean region and the exchange of skills and knowledge in complaint management as well as the promotion of basic human rights among populations bordering the Mediterranean region.

The Association of Mediterranean Ombudsmen was set up on 19 December 2008 in Marseille during the second meeting of the network of Mediterranean

Ombudsmen. The *Wali al Madhalim* (the Ombudsman of Morocco), the *Defensor del Pueblo* (the Spanish Defender of the People) and the *Médiateur de la République française* (the French Mediator) were at the forefront of this initiative which is committed to promote the defence of common values such as democracy, the rule of law and the principles of justice and equity in the Mediterranean.

Another aim of the Association is to foster respect for national and international texts that are related to human rights such as the Universal Declaration of Human Rights and the Rabat Declaration that was adopted by participants in Rabat, Morocco on 8-10 November 2007 on the occasion of the first meeting of mediator and ombudsman institutions of Mediterranean countries.

The Rabat Declaration

The Rabat Declaration serves as the bedrock of the *Association des Ombudsmans de la Méditerranée*. It recognizes that the ongoing process of democratic transition in some Mediterranean countries deserves consolidation and that progress has been registered in the Mediterranean area in the practice of democratic principles, rights and freedoms including the constitutional reference to human rights, the setting up of democratic institutions, respect for the rule of law, the existence of mediation systems in relations between the public and the administration, multiple party systems, the encouragement to local democracy through decentralization and the introduction of rules of good governance in the management of public affairs.

The Rabat Declaration also acknowledges that despite this progress the situation is characterized by conflict leading to the interruption of the democratic process in some countries, political violence, infringements to human rights, the lack of independence of certain institutions and economic, financial and social constraints that give rise to reservations on the part of citizens regarding democracy.

The Rabat Declaration establishes democracy, the rule of law, political freedom and the right to freedom of opinion, expression, assembly, demonstration and association as guidelines for the recognition of the inalienable nature of dignity and equal rights of all human beings and refers to the functioning of national institutions for the protection and promotion of human rights in accordance with principles approved at the General Assembly of the United Nations in Resolution A/RES/48/134 dated 20 December 1993 and known as the Paris Principles.

In the context of dialogue at all levels between citizens, political parties, the state and civil society, the Rabat Declaration refers to good governance, accountability, administrative transparency and the improvement of relations between public administration and citizens as necessary requisites for the

effective management of public matters. The Declaration refers to the common values of mediation and to the fostering of initiatives calling upon public administration to respect the principles of justice, equality and the rule of law.

Deeming the development and consolidation of mediation and ombudsman institutions as a contribution towards the attainment of these objectives and the spreading of these values, the Rabat Declaration holds that it is necessary to define a strategy at the Mediterranean level regarding the role of these institutions in the development of good governance in public administration based on improved relations with citizens, the reinforcement of ethics in the public service and the protection of the rights of citizens. The Declaration envisages the need to establish an institutional mechanism to enable mediation institutions in Mediterranean countries to coordinate their action and consolidate their achievements. It was this aim that led to the establishment of the *Association des Ombudsmans de la Méditerranée*.

Third meeting of the *Association des Ombudsmans de la Méditerranée* in Athens on 14-15 December 2009

Following the first meeting in Rabat on 8-9 November 2007 and the second meeting in Marseilles on 18-19 December 2008, the third meeting of the *Association des Ombudsmans de la Méditerranée* took place in Athens on 14-15 December 2009. In this meeting, where the Parliamentary Ombudsman represented the Maltese ombudsman institution, the main topic was the role of the Ombudsman in the promotion of transparency in the public service. Other issues included access to administrative documents; access to detention and pre-trial detention centres; and transparency and the fight against corruption.

At the end of the conference which was attended by delegates from twenty four ombudsman and mediation institutions from the Mediterranean basin and representatives of the Office of the United Nations High Commissioner for Human Rights, the League of Arab States and the European Union, participants approved a Resolution which made reference to the declaration by the representative from the Office of the UN High Commissioner for Human Rights and agreed that the *Association des Ombudsmans de la Méditerranée* should develop its cooperation with the United Nations by:

- inviting institutions in the field of the defence of human rights and in the field of mediation to participate in the network of institutions for the promotion and protection of human rights;
- encouraging their respective states to sign and ratify international instruments concerning the deprivation of liberty including those that concern mechanisms for the protection against torture; and



Chief Justice Emeritus Dr Joseph Said Pullicino, Parliamentary Ombudsman represented the Office of the Ombudsman at the inauguration of the headquarters of the Association of Mediterranean Ombudsmen in Tangier, Morocco on 4 November 2009



- undertaking to take into account, in the work of mediation institutions, these international benchmarks in this same way as those that are relative to human rights.

In this regard this Office refers to Resolution A/RES/63/169 *The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights* that was adopted by the General Assembly of the United Nations on the report of the Third Committee (A/63/430/Add.2) at the 70th plenary meeting of its sixty-third session under agenda item 64(b) on 18 December 2008 (vide text in box below). The Office understands that the *Association des Ombudsmans de la Méditerranée* intends to express its full support in favour of the Resolution when the General Assembly of the United Nations will consider this issue at its sixty-fifth session and undertakes to go along with any initiative which the *Association des Ombudsmans de la Méditerranée* will carry out to push this proposal forward.

The Office of the Ombudsman was also represented by the Parliamentary Ombudsman at the inauguration of the new headquarters of the Association in Tangier in Morocco that took place on 4 November 2009.

**Resolution adopted by the General Assembly of the United Nations
in its sixty-third session, agenda item 64(b)
on the report of the Third Committee (A/63/430/Add.2)**

63/169. The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights

The General Assembly,

Reaffirming its commitment to the principles and purposes of the Charter of the United Nations and the Universal Declaration of Human Rights,¹

Reaffirming the commitment of Member States, in accordance with the Charter, to promote and ensure the respect of human rights and fundamental freedoms, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling the principles relating to the status of national institutions for the promotion and protection of human rights, welcomed by the General Assembly in its resolution 48/134 of 20 December 1993 and annexed thereto,

¹ Resolution 217 A (III).

Recognizing the role of the existing Ombudsman, whether a male or female, mediator and other national human rights institutions in the promotion and protection of human rights and fundamental freedoms,

Underlining the importance of the autonomy and independence of the Ombudsman, mediator and other national human rights institutions, where they exist, in order to enable them to consider all issues related to the field of their competences,

Considering the role of the Ombudsman, mediator and other national human rights institutions in promoting good governance in public administrations, as well as improving their relations with citizens, and in strengthening the delivery of public services,

Considering also the important role of the existing Ombudsman, mediator and other national human rights institutions in contributing to the effective realization of the rule of law and respect for the principles of justice and equality,

Stressing that these institutions, where they exist, can have an important role in advising the Government with respect to bringing national legislation and national practices in line with their international human rights obligations,

Stressing also the importance of international cooperation in the field of human rights, and recalling the role played by regional and international associations of the Ombudsman, mediator and other national human rights institutions in promoting cooperation and sharing best practices,

1. *Encourages* Member States:
 - a To consider the creation or the strengthening of independent and autonomous Ombudsman, mediator and other national human rights institutions;
 - b To develop, where appropriate, mechanisms of cooperation between these institutions, where they exist, in order to coordinate their action, strengthen their achievements and enable the exchange of lessons learned;
2. *Also encourages* Member States:
 - a To consider conducting communications campaigns, with other relevant actors, in order to enhance public awareness on the importance of the role of the Ombudsman, mediator and other national human rights institutions;
 - b To give serious consideration to implementing the recommendations and proposals of their Ombudsman, mediator and other national human rights institutions, with the aim of addressing claims of the complainants, consistent with the principles of justice, equality and rule of law;
3. *Requests* the Secretary-General to report to the General Assembly at its sixty-fifth session on the implementation of the present resolution;
4. *Decides* to consider these issues at its sixty-fifth session.

*70th plenary session
18 December 2008*

Inputs by the Office of the Ombudsman in the work of the *Association*

During 2009 the Maltese ombudsman institution contributed in a practical manner towards the further expansion and consolidation of this cooperative Mediterranean project by providing translation services into English of documents that were sent to the Office by the secretariat of the Association while following the transfer of the bank account of the *Association des Ombudsmans de la Méditerranée* to Malta subsequent to the appointment of the Parliamentary Ombudsman as the Treasurer of the Association, the necessary work was also taken in hand to carry out the financial transactions and the work that the presence of this account in Malta entailed.

The necessary preparatory work was also taken in hand towards the end of the year in the light of the interest shown by this Office to support the first training session in complaint handling and resolution techniques in March 2010 in Rabat, Morocco for staff in ombudsman institutions that are members of the Association by the nomination of one of its senior investigative officers to lecture to participants on the processing of complaints, the defence of human rights, principles of good governance and the ombudsman institution as an alternative means of redress.