Office of the Ombudsman, Malta

ANNUAL REPORT

2011

The artwork on the cover is *Fortezza*, a *bas relief* in mixed media by the artist Anthony Patrick Vella.

The composition represents experiences from the artist's youth, surrounded by the complex geometrically designed fortifications of Valletta. The *Gardjola* (a watch tower), is the extreme destination from which the sheltered city dweller Ulysses overlooks through the small window, longing for redemption beyond the horizon, "*my beloved Thrinakie*".

This forms part of a private collection.

Parliamentary Commissioner for Administrative Investigations

Malta

Annual Report

for the period
January - December 2011

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

MALTA

Ombudsman

August 2012

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

Mr Speaker,

I hereby submit my **Annual Report** covering the period January to December 2011 pursuant to the provisions of section 29 of the Ombudsman Act, 1995.

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

Yours sincerely

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Parliamentary Ombudsman

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Introduction

In its sitting on 16 February 2011 the House of Representatives approved Motion 203 that was presented by the Prime Minister and seconded by the Leader of the Opposition for the appointment of Chief Justice Emeritus Joseph Said Pullicino for a second term of five years. On 11 March 2011 the Ombudsman was sworn in by the President of the Republic for his second mandate during a ceremony at the Palace in Valletta.

This reappointment signified recognition of the contribution by this Office under the leadership of Chief Justice Emeritus Joseph Said Pullicino to improved standards of public administration and was a sign of trust in the institution's programme for its continued development in the years ahead.

When viewed against this background, however, it is not without a sense of concern that even at the very outset of this review on developments that took place in the Maltese ombudsman institution during 2011, this Office would like to put on record that although it was eager to roll out and assume its added responsibilities following the enactment by the House of Representatives of Act No. XVII of 2010 in November 2010 and the assent by the President of the Republic, this momentum was somewhat halted as the provisions of this Act had not yet taken effect by the end of the year.

The institution's programme of activities for 2011 was geared mainly on three planks:

- firstly, the continuing commitment to the Ombudsman's core function to promote transparency, fairness, equity and administrative justice in the operations of the Maltese public authorities that fall under its jurisdiction and to restore dignity and justice to citizens with a sustained grievance against a public institution;

- secondly, the implementation of a plan of action for the expansion of the Maltese ombudsman service based on the convergence of specialised sectoral scrutiny mechanisms operating autonomously but under the baton of and guided by the Parliamentary Ombudsman as one unified service to allow for a more effective surveillance of administrative action in the three areas that have been designated priority status in the country's ongoing development programme namely education, health and the environment; and

- thirdly, the organization and hosting of the Fifth Conference of the Association of Mediterranean Ombudsmen in Malta on 30-31 May 2011 and of the meeting of the Public Sector Ombudsmen (PSO) Group of the British and Irish Ombudsman Association (BIOA) on 2-3 June 2011.

This Office is justifiably satisfied that in its core mission it continued to perform creditably well. The right by Maltese citizens to good public administration gained further inroad in the national mindset also due to the contribution by this institution although without doubt a lot still remains to be done to embed and to sustain this national commitment to good governance among all sections of Maltese society.

This pursuit of fairness at all levels in the decision making process and in administrative action by public bodies needs to reach especially those who live in the margins of society. It needs to be brought within the grasp of the under privileged and of those who are generally inarticulate in the face of the power and dominance of public institutions and their involvement in day-to-day issues and decisions that more often than not impact strongly on the life of citizens.

This performance was to some extent stunted by failure under the second plank of the programme of action for 2011 to effectively launch the long drawn-out project aimed at convergence between sectoral scrutiny mechanisms and at forging a unified ombudsman structure where this Office unfortunately met heavy weather. Admittedly this was rather surprising.

Following a comprehensive debate in Parliament, on 15 November 2010 Bill No. 48 of 2010 entitled the *Ombudsman (Amendment) Act, 2010* to empower the Ombudsman to provide administrative and investigative services to specialised Commissioners for Administrative Investigations gained the unanimous approval of both sides of the House. The President of the Republic

signed his assent to Act No. XVII of 2010 on 19 November 2010. However, since sub-article (2) of article 1 states that this Act "... ... *shall come into force on such date as the Prime Minister may by notice in the Gazette establish, and different dates may be so established for different provisions or different purposes of this Act*" and no such date was established by the Prime Minister during 2011, the proposal to set up sectoral scrutiny offices that would function in a collaborative relationship under the overall guidance of the Ombudsman failed to get off the drawing board during the year under review.

This delay to activate mechanisms meant to give greater empowerment to citizens cannot but give rise to concern to this institution.[1] In truth, however, it has to be acknowledged that both the Audit Officer of the Malta Environment and Planning Authority as well as the University Ombudsman, in close collaboration with the Parliamentary Ombudsman, continued to fulfil their functions under the respective legislation that establishes their offices and provided adequate forms of protection to citizens who raised allegations of injustice and of maladministration in their particular areas of competence.

Also during the survey period the Office played its part to promote the concepts of good and accountable governance in the context of a democratic environment in the Mediterranean region when the Fifth Conference of the Association of Mediterranean Ombudsmen (*Association des Ombudsmans de la Méditerranée*, AOM) was held in Malta. The main theme of the meeting was the role of the Ombudsman in reinforcing good governance and democracy.

This event happened to take place at a crucial period in the contemporary history of several Arab countries in the southern Mediterranean region as waves of demonstrations and protests and various other forms of civil dissidence served to promote democracy and political freedom, institutional reform and respect for human rights. There is no doubt, however, that the conference helped to instil among participants a greater awareness of the role of Ombudsmen and of *Médiateurs* as prime movers of a democratic environment that is buttressed by respect for the rights of the individual including the right to proper, fair and dignified treatment at the hands of public administrative authorities.

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1 In this regard the Office of the Ombudsman is also concerned to note that by the end of December 2011 several articles of the Freedom of Information Act (Act No. XVI of 2008) had not yet come into force while Bill No. 58 of 2010 entitled the *Protection of the Whistleblower Act, 2010* still awaited discussion by Parliament and featured on the agenda of the House.

Overview of the Ombudsman's complaint handling functions in 2011

The thousands of citizens who approached the Office of the Ombudsman since the institution was set up in 1995 to lodge complaints concerning administrative shortcomings, unfairness, deficiency or unlawfulness allegedly committed against them that were perceived to constitute discrimination are living testament to the institution's commitment in favour of the interests and rights of citizens in their routine everyday contacts with the wide gamut of the country's public authorities.

As is widely known, the powers and investigative functions of the Ombudsman as well as the procedures that he adopts prior, during and subsequent to his investigation of an admissible complaint are spelt out in the Ombudsman Act, 1995. The Act also contains provisions regarding the government departments, ministries and other public authorities and statutory bodies and partnerships in which the Government has a controlling interest or over which it has effective control that are covered by the Ombudsman's jurisdiction as well as persons, bodies and authorities to whom the Ombudsman Act does not apply and matters that are not subject to investigation and are thus excluded from the Ombudsman's purview.

By and large this legislative framework modelled on the New Zealand model served the institution well during the years that the Office has been in operation. Its complaint management techniques and investigation procedures are known to have been generally successful and to have contributed towards bringing to light evidence and information that are considered relevant to the Ombudsman's scrutiny of cases that are brought to his cognizance.

Especially in recent years citizen empowerment in the Maltese Islands has come increasingly to the fore. This can be attributed to various factors including the country's membership of the European Union and direct access to EU institutions by Maltese citizens; improved educational opportunities; and a surging wave of liberalism especially among the younger sections of the population.

This Office, however, believes that it has contributed and has given its share in the process towards greater empowerment and strength among individuals when engaging with society and institutions such as government-backed

bodies and authorities or when enhancing their capacity to access information and increase their involvement in decision making processes to ensure that they are based on fairness, transparency and equity.

Serving as a force for good, throughout the years that it has been in existence the Maltese ombudsman institution has assisted, encouraged and motivated the people and Maltese society as a whole to be more assertive in favour of their right to good public administration. It has helped to mobilize resources and skills so as to enable their voices to be heard more forcefully in the day-to-day administrative decisions that affect their lives and, more often than not, even their livelihoods and the quality of their daily life.

Assisting citizens with justified grievances and concerns to stand up to public authorities that are much stronger and possess greater resources and facilities while backing them, within the framework of redress mechanisms defined in the Ombudsman Act, to reclaim any lost rights, the Maltese ombudsman institution has been instrumental in instilling a new sense of self-reliance among citizens. This process will continue unabated in the years ahead, possibly with even greater vigour and a stronger sense of purpose.

This important aspect of ombudsman operations is in turn closely allied to an equally crucial feature that underscores the work done by this institution. This concerns the Ombudsman's role in exerting a gentle form of pressure by relying exclusively on his moral authority on public authorities that have acted unlawfully or have violated a citizen's right so as to make amends and, wherever possible, provide compensation for any harm that they might have caused.

Redress for any such violation has to be based on the principle that a complainant who has been wronged is to be placed as much as possible in the same position in which he would have found himself if this wrongdoing had not taken place at all. The right to an effective remedy in sustained grievances by complainants who are found to have been on the receiving end of an act of maladministration continues to underpin to a large extent the work and functions of ombudsman institutions worldwide.

Recommendations to award redress in justified complaints are never reached lightly and are guided by the Ombudsman's objective evaluation of the facts and circumstances of the case that result from an investigation by his Office.

These proposals to rectify and correct any such violation of a citizen's right to good administration need of course to be appropriate and proportionate so as to repair any damage that might have been caused by any unlawful action to citizens by the public authorities that fall under the Ombudsman's scrutiny.

On justified complaints that remain unresolved: yet another attempt by the Ombudsman

In recent years this Office has on various occasions expressed its concern that although by far most of its recommendations to authorities who have caused an injustice through maladministration so as to provide a remedy for justified complaints are accepted and duly acted upon, at the same time there still remain a few cases where complainants, although comforted by the Ombudsman's findings in their favour in his Final Opinion, still remain deprived of his proposals for remedy. In similar instances the public authority that is implicated would normally resort to legal, procedural, administrative or other reasons in order to justify its stand in refusing to accept and implement the Ombudsman's proposals for redress. Since it is common knowledge that this Office has no binding executive power to enforce its recommendations, the few complainants who find themselves in this position are left high and dry.

The Ombudsman had suggested that an equitable solution to this impasse would be that his Final Opinion on grievances which he deems as deserving cases would be submitted to the Speaker of the House of Representatives with a request that the contents of his report would be discussed during a plenary session of the House or by a parliamentary committee such as the House Business Committee. During this discussion Members would be able to consider the merits of the case and reach a political decision on the act of maladministration as well as the redress, if any, for the administrative shortcoming identified by the Ombudsman.

Although this proposal featured repeatedly during the discussion in 2007 by the House of Representatives to confer constitutional status on the office of Ombudsman and also regularly crops up in the meetings of the House Business Committee on the institution's annual *Ombudsplan*, nonetheless this suggestion failed to materialise.

The year under review witnessed yet another attempt by this Office to revive this issue. These efforts were to a large extent inspired by the intervention by the Hon Tonio Borg MP who, as Leader of the House, on 20 October 2010 made the winding-up speech in the debate on the second reading of the Bill entitled the *Ombudsman (Amendment) Act, 2010* to amend the Ombudsman Act. The Leader of the House, while insisting on the Government's right not to implement any recommendation by the Ombudsman on grievances where the administration would, as a matter of principle, harbour serious reservations and assume full political responsibility for this position, went on to refer to another method to which the Ombudsman could resort in order to put pressure to bear on the administration with regard to sustained cases that remain unresolved.

Dr Borg suggested that the Ombudsman could give coverage to similar complaints and provide details to the general public about their background together with his findings and recommendations as well as an overview of the Government's reactions to his Final Opinion. This approach would help to mould public opinion on these cases and also allow the people's representatives to decide whether Parliament should pass on to examine these cases.

The Leader of the House was of the view that in this manner it would be possible to exert pressure on the administration so that the number of sustained complaints that remain unresolved would be kept to a minimum. Furthermore, in cases where the administration does not share the Ombudsman's final position, a clear distinction would be made between complaints where despite its misgivings the Government would still implement the Ombudsman's recommendations and other grievances where the issue at stake could be expected to bring about considerable repercussions or to give rise to serious financial implications that the administration would be prepared to shoulder full political responsibility for not accepting to meet the Ombudsman's proposals for remedy to the aggrieved party.

Ever ready to consider suggestions that could possibly serve to thaw this deadlock, this Office expressed its acceptance in general of these considerations by the Leader of the House which also seemed to have been subscribed to by the Opposition. This led the Office of the Ombudsman in November 2011 to adopt the proposal that was advocated by the Leader of the House and to submit to the House of Representatives as a first test case a publication that gave comprehensive information on a complaint that was regarded to constitute a

case of special public interest. The case concerned an application that had been turned down by the Licensing Authority for the opening of a new pharmacy in Burmarrad, a small locality that is administered by an Administrative Committee that had been elected under the Local Councils Act.

Although upon the conclusion of his investigation on this complaint the Ombudsman judged that existing legislation allows full scope for such a development and found in favour of complainant, this person's grievance nonetheless remained unaddressed. No regard was given by the authorities to the recommendations by the Ombudsman in his Final Opinion that complainant's application to open a pharmacy in Burmarrad should be processed with urgency since he was of the view that in this hamlet there was no limitation to the opening of a pharmacy regardless of the larger locality of St Paul's Bay of which the hamlet forms part. According to the Ombudsman, the Licensing Authority that was responsible for this instance of maladministration held that while it fully respected the Ombudsman's opinion, it was not in a position to take the necessary steps to implement his proposals for remedy.

In the introductory section of this publication the Ombudsman explained that in his view the repercussions of this complaint went beyond the merits of a mere complaint by an individual citizen. He expressed his belief that this grievance was in fact symptomatic of the plight of possibly thousands of citizens who live in communities that, according to law, are administered by an elected Administrative Committee but are denied direct and easy access to pharmacies that could be established in their own localities as a result of the policies followed by the Licensing Authority.

Since these circumstances led the Ombudsman to consider that the complaint had a wider national dimension and was deserving of being brought to the attention of Parliament, he requested the Speaker to put his Final Opinion on the Table of the House. The Ombudsman also considered this complaint to be deserving of a discussion by Members of the House in the forum that they would consider most appropriate with a view to a deliberation on various aspects of the report and issues raised by the situation. This would represent their contribution towards the formulation of a political judgement on his recommendations and could in turn, if so required, lead to the necessary administrative and/or legal action in order to redress the unjust situation that had been identified by his work.

Mindful of the observation made by the then Ombudsman Mr Joseph Sammut in his *Annual Report 2005* – a reflection that remains equally relevant even at this time – that "… *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*"[2] and in a further attempt to widen the people's involvement in a situation that could be of direct interest to them, the report was also made available to the media and to representatives of civil society.

It was the wish of this Office that this initiative would open a new window on the local administrative scrutiny system with regard to sustained complaints that remain unaddressed by public authorities and would turn out to be a successful innovation while serving as a useful means for the solution of similar cases. Despite this goal this Office would have no hesitation to admit, however, that it is somewhat disheartened that this attempt did not achieve, at least so far, the desired results.

After an initial flurry of interest by the media in the contents of this publication that included reactions by interested lobby groups to the Ombudsman's findings and recommendations, the matter soon fell by the wayside. Possibly even more frustrating was the fact that there was no reaction either way by the House of Representatives to the contents of this document and to the purpose behind its publication and all in all even this initiative in this field by the Ombudsman can be considered to have drawn yet another blank.

This experience may be taken to confirm that this Office has not as yet succeeded in establishing a meaningful ongoing dialogue with the Maltese parliamentary institution where obviously one of the main reasons for this situation is the heavily congested agenda of the House and the paucity of its resources. Even so, this lack of progress has not weakened the resolve and the morale of this Office.

The Ombudsman pledges to continue to work with unflagging determination towards the ends that have underpinned this initiative while at the same time giving due recognition to the fact that it is ultimately the Government that has the authority, the responsibility, the discretion as well as the right to make a final determination in similar cases.

2 Vide pages 27-28.

At the same time the Ombudsman will not lose sight of the fact that these decisions need to be grounded in a sense of justice and to be backed by other considerations that keep the overall national interest in mind as well as the particular circumstances of these complaints. Ultimately they will be judged in the forum of public opinion to which the country's elected representatives are finally accountable.

Proposal for the convergence of sectoral scrutiny mechanisms

The grounds for this proposal

In recent years the proposal to establish autonomous and independent sectoral scrutiny mechanisms under the wing of the Maltese ombudsman institution may be considered to have represented the second milestone in the institution's development since it was established by means of the Ombudsman Act, 1995.

The first marker was represented by the elevation of the office of Ombudsman to constitutional status in 2007. This called for the addition of article 64A to the Constitution of Malta to make provision for the appointment, the term of office and the manner of removal or suspension from office of the Ombudsman by means of an Act of Parliament. At the same time this article was included in sub-article 2 of article 66 of the Constitution of Malta among a list of several other articles and sub-articles that could not altered by a bill for an Act of Parliament unless at the final voting thereon in the House it is supported by the votes of not less than two-thirds of all the Members of the House of Representatives.

A second significant event in the lifetime of the Maltese ombudsman institution occurred on 15 November 2010 with the passage by consensus in the House of Representatives of the Bill entitled the *Ombudsman (Amendment) Act, 2010* and the assent of the President of the Republic on 19 November 2010 to Act No. XVII of 2010. This development empowers the Ombudsman to provide administrative and investigative resources available at his Office to specialized Commissioners for Administrative Investigations and designates these Commissioners as Officers of Parliament.

In the annual reports of this Office that were issued in the last few years, adequate coverage was regularly given to the way in which this proposal

originated in homage to the Paris Principles. Under these guidelines on the structure and functioning of national institutions vested with competence to promote and protect human rights (including the right to good administration by the public sector), an organization that operates in this field should have "*an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding*" aimed at enabling this institution "*to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.*"[3]

Spurred strenuously by a firm commitment to these principles this Office was instrumental in pushing forward its view that it was at the very least incongruous that sectoral scrutiny mechanisms such as those embodied by the Audit Officer of the Malta Environment and Planning Authority (Mepa) and by the University Ombudsman owed their existence to, and were established under, the same legislation that affirms policies and rules that regulate the conduct and organization of these sectors. This Office also served to raise national awareness of the fact that when even under this legislation oversight bodies are dependent on the authorities that they are bound to investigate for the allocation of financial and other resources that are necessary for them to carry out their duties, this structure is inconsistent with contemporary international sentiment that these mechanisms should have – and be seen to have – all the guarantees that are necessary to safeguard their real independence of the government that itself appoints and establishes these institutions for the stewardship of good public administration.

These considerations led the Office of the Ombudsman to propose that, also in line with developments in international thinking on the ombudsman institution, there should be a consolidation of the Maltese ombudsman service. This process would not only place these scrutiny mechanisms within the scope and orbit of the Maltese Parliamentary Ombudsman but would also enable them to benefit from a unified ombudsman structure including common investigative and administrative services, harmonized investigation techniques and a common approach towards remedial and redress measures.

While further enhancing their total independence from the wide public

3 Vide paragraph 2 of section entitled *Composition and guarantees of independence and pluralism* in the Annex captioned *Principles relating to the status of national institutions* in Resolution 48/134 *National institutions for the promotion and protection of human rights* that was approved by the General Assembly of the United Nations on 20 December 1993.

administration whose actions and decisions fall under their oversight, this new configuration of ombudsman operations would at the same time guarantee their complete functional autonomy insofar as their evaluation of good or bad administration and their promotion of good administrative practice are concerned in jurisdictional issues that fall within their specific mandate.

Convergence in other foreign ombudsman jurisdictions

The proposal to develop a single port of call for ombudsman activity is not unique to Malta. In England the Parliamentary and Health Service Ombudsman combines the two statutory roles of Parliamentary Commissioner for Administration whose powers were set out by the Parliamentary Commissioner Act 1967 and of Health Service Commissioner for England which was established under the Health Service Commissioners Act 1993 and subsequently modified by the Health Service Commissioners (Amendment) Act 1996.

The Scottish Public Services Ombudsman was established by the Scottish Parliament by the Scottish Public Services Ombudsman Act 2002 and replaced the offices of the Scottish Parliamentary and Health Service Ombudsman, the Local Government Ombudsman for Scotland and the Housing Association Ombudsman for Scotland.

On the other hand the Public Services Ombudsman (Wales) Act 2005 which mainly came into force with effect from 1 April 2006 established the Public Services Ombudsman for Wales as a unified public sector ombudsman service and brought together the functions and powers and combined into one office the services that were formerly provided by the Commission for Local Administration in Wales, the Health Service Commissioner for Wales, the Welsh Administration Ombudsman and the Social Housing Ombudsman for Wales.

Other notable processes for the unification of separate ombudsman jurisdictions that are of more recent origin took place in Hungary, Croatia and France.

The Fundamental Law of Hungary that was adopted on 18 April 2011 and entered into force on 1 January 2012 not only changed the designation of the Parliamentary Commissioner for Civil Rights to Commissioner for Fundamental Rights to guarantee the protection of fundamental rights in

the country but also changed the organizational structure of the ombudsman system. This entailed the establishment of a unified ombudsman system with a broadening of the mandate of the General Ombudsman and the integration in this office of the posts that were previously referred to as Parliamentary Commissioner for Minority Rights and the Ombudsman for Future Generations (the so-called Green Ombudsman).

In October 2011 a new Ombudsman Act, to enter into force on 1 July 2012, was enacted by the Croatian Parliament. The Act provides for the merger of the Office of the Ombudsman with the Centre for Human Rights and with three specialised ombudsman offices, namely the Office of the Ombudsman for Gender Equality, the Office of the Ombudsman for Persons with Disabilities and the Office of the Ombudsman for Children. This merger should ensure the emergence of a stronger system for the protection of human rights and equality and to combat discrimination and makes provision for a body that will have adequate office premises, joint database and appropriate levels of financing.

Another significant development in this direction occurred in France when after approval of the nomination by the National Assembly and by Senate, on 22 June 2011 the President of the French Republic appointed M. Dominique Baudis for the new post of *Défenseur des droits* (Defender of Rights) of France. This new institution not only replaced the office of the *Médiateur de la République* but also merged three other institutions, namely, the *Défenseur des enfants* (the Defender of Children), the *Haute autorité de lutte contre les discriminations et pour l'égalité* (the High Authority against Discrimination and for Equality) and the *Commission nationale de déontologie de la sécurité* (National Commission on Ethics in the Security Services).

Delay in the launching of the new unified ombudsman service

On other occasions this Office already put on record that it was rather understandably somewhat disappointed that its proposal for a comprehensive unified and coherent national ombudsman service that would provide a single channel for the various existing scrutiny mechanisms of administrative conduct failed to achieve the necessary support. Instead it was considered advisable that as a first step the proposed framework for the new ombudsman system in the country should only bring together and be restricted to a limited number of sectoral oversight offices rather than having a wider initial uptake that could possible render the whole process unwieldy.

Acting to a large extent on the work done by the Select Committee of the House of Representatives that was set up on 16 July 2008 and guided by its Interim Report No. 2 dated 14 December 2009 that contained recommendations on the strengthening of the ombudsman institution, there was consensus in the House during its sittings in October 2010 on the Bill on the Act for the appointment of specialized Commissioners for Administrative Investigations that the widened remit of the Office of the Parliamentary Ombudsman should cover, initially at least, education, health and environment and physical planning. These chosen fields reflect national developmental priorities as laid down by the Government in its plans for national growth. At the same time it was made clear that the window is still open for the possible inclusion at a subsequent stage of other scrutiny mechanisms including new areas that might be deemed to warrant administrative audit as well as of institutions that are already entrusted by law with a wider range of responsibilities and whose oversight function represents only one of their activities.

Even while welcoming the enactment of Act No. XVII of 2010 as a positive step in the drive towards increased levels of transparency in the diverse areas of public administration and pledging its full commitment towards a widening of its mandate, this Office had immediately considered it necessary to sound a note of warning to the Government.

Although fully recognized, the limitations of existing office space in the Office of the Ombudsman in 11 St Paul Street, Valletta were further brought to the fore in November 2008 when the University Ombudsman started to make use of facilities and resources available in these premises. This led the Ombudsman to advise the Government that it would be unwise to appoint Commissioners for Administrative Investigations under Act No. XVII of 2010 and expect these nominees to commence their assignment and perform their work effectively at a time when his Office was unable to provide, as required by law, adequate physical and other backup resources to house the new sections within his institution largely due to space restrictions.

The Ombudsman also expressed his view that putting together the systems of the new components of his Office and ensuring the maintenance of standards of administrative inquiry that have at all times characterized the work of this institution while directing this activity from premises that are inadequate to serve for this purpose could possibly establish the whole project on a wrong footing. This led him to plead that the authorities needed to make urgent

arrangements either to relocate his Office in larger premises, preferably in Valletta, that would be able to accommodate the new institutional set up assigned to his charge or else to vacate adjoining premises in 12 St Paul Street and allocate these buildings to his Office.

It was therefore a matter of concern to this Office that although at one stage during the year it was decided to earmark the adjoining building to cater for the expansion of this institution, by the end of 2011 the Planning and Priorities Coordination Division of the Office of the Prime Minister had not yet vacated these offices. As a result the project for the unification of the Maltese ombudsman service stopped in its tracks and the stakeholder map of a unified ombudsman service, though boldly sketched out, remained on hold.

This slowdown during the period under review in the process to give a new dimension to the scrutiny of administrative action by public authorities was to say the least disconcerting. In the view of this Office the delay to bring the Act into force and to put the new ombudsman structure into place on the grounds of lack of proper accommodation might have conveyed an impression of indecisiveness and an element of ambiguity in the national commitment in favour of the notion of good governance. This Office is afraid that delay on the part of the authorities to give effect to such important legislation on citizen rights due to a minor issue such as the identification of adequate premises to house the extended ombudsman institution could possibly have served to instil among citizens a wrong perception about the priority that ought to feature in the national mindset to the right of good administration and to stronger forms of transparency in the handling and management of citizen affairs.

Convergence of institutions with a shared vision for the defence of citizen rights albeit in different spheres of public activity can be expected to contribute to various advantages such as the sharing of experiences and standard operating procedures in an environment that at the same time allows them to operate separately to fulfil their respective sectoral functions. In addition, especially at a time of several competing demands and priorities for resource provision, the co-location of sectoral scrutiny bodies under one roof with the Parliamentary Ombudsman will allow common management and support services including shared offices and facilities as well as financial savings.

When viewed from this perspective, this initiative in favour of a single door approach will not serve to weaken the profile of these offices or to marginalize the work and the concerns that constitute their specific functions. On the

contrary it is expected to give them a sharper focus, a stronger influence and a deeper recognition of their work in the context of a streamlined legislative framework for overall ombudsman operations.

Proposed functions for Commissioners for Administrative Investigations

Although as a consequence of this delay by the end of 2011 the tentative timeframe for the launching of the final leg of the ombudsman unification programme was pushed beyond anybody's reckoning, this Office remained firmly determined to make a success of this project; and even while this situation prevailed, it undertook the necessary preparatory work assigned to it by the relevant provisions of Act No. XVII of 2010. In particular this Office, as laid down by sub-article (5) of article 17A of the Ombudsman Act, prepared draft rules with regard to the functions of the Commissioners for Administrative Investigations and took the necessary steps to consult with the Prime Minister on these rules.

Entitled *Commissioners for Administrative Investigations (Functions) Rules*, these Rules establish a set of procedures and guidelines that are to be followed by Commissioners in the exercise of their functions. An overview of these Rules is given below.

Part I – Preliminary Provisions

This section defines an "*educational entity*" that falls under the jurisdiction of the Commissioner for Tertiary Education as "*a public entity which provides tertiary education*" and covers further and higher educational entities established under the Education Act such as the University of Malta and any company, institute, centre and other body established by the University; the Junior College; the Malta College of Arts, Science and Technology; and the Institute of Tourism Studies. The mandate of the Commissioner for Tertiary Education also includes any other tertiary educational entity established under the Education Act or any other law as well as "*a public/private entity or a private entity providing tertiary education or participating in a tertiary education scheme for or on behalf of a public educational entity … … … in the exercise of a function pertaining to such educational entity.*"

This section also refers to "*a health service*" within the mandate of the Commissioner for Health as a health service provided by the Government,

other authority, body or person to whom the Act applies, whether such service is preventive or curative, and includes a hospital, an establishment and service mentioned in articles 6 and 16(2) of the Department of Health (Constitution) Ordinance or any law substituting it which sets out or defines such health service. The remit of the Commissioner for Health also covers "*a pharmacy, laboratory service, community health care service, clinic and any other service that forms part of a public health service; and … … a health service … … which is provided for or on behalf of Government through the private sector.*" At the same time "*a health care professional*" is defined as a person who is authorised to practise a health care profession that is regulated in accordance with the Health Care Professions Act.

These provisions and definitions give due recognition to ongoing developments in the country's landscape for the provision of selected aspects of state care and obligations towards citizens. With increased resort to public private partnerships, various activities that traditionally fell under exclusive state responsibility are now funded and operated on the strength of contractual arrangements between a public sector authority and private parties whereby an agreed range of technical services and operational inputs are provided by the private sector.

The proposed unified ombudsman service accepts this reality and adjusts its scrutiny and oversight functions in a way that includes services having a public interest but which are provided by the private sector on behalf of a public authority since it is felt that these initiatives should fall under the purview of the respective Commissioner once service provision is being undertaken and delivered to consumers in the name of a public authority.

Part II – Functions applicable to all Commissioners

Complaints to be investigated by Commissioners to be addressed first to the Parliamentary Ombudsman

Under these Rules all complaints in respect of sectors that fall under the jurisdiction of a Commissioner for Administrative Investigations appointed under Act No. XVII of 2001 are to be submitted in the first instance directly to the Ombudsman. On occasions when a grievance is addressed to or received by a Commissioner without having first been submitted to the Parliamentary Ombudsman, the Commissioner involved will be required to forward this complaint to the Ombudsman who will in turn proceed to distribute or allocate any such complaint in accordance with the relevant provisions.

Assignment of complaints to be investigated by a Commissioner

In assigning complaints reaching his Office, the Ombudsman shall consider the nature of the complaint and the functions assigned to the respective Commissioners who are in office from time to time. The Ombudsman shall also determine any question that might arise as to whether a complaint is duly assigned to a Commissioner. In instances where the Ombudsman is of the view that a complaint does not fall within the functions of a Commissioner, the Ombudsman shall in his discretion either investigate that complaint himself or else delegate any such investigation to another Commissioner.

In the case of complaints which fall within the functions of two or more Commissioners, the Ombudsman shall decide to which Commissioner the complaints shall be assigned and, for all intents and purposes of law, this Commissioner shall have jurisdiction to investigate any complaint assigned to him in this way.

In complaints which fall within the functions of one Commissioner but contain elements which go beyond these functions, the Ombudsman may decide to delegate those parts of these complaints which go beyond the Commissioner's functions as set out in these Rules to that same Commissioner, or to another Commissioner, or the Ombudsman may decide to investigate the complaint himself.

Duty of Commissioners in the exercise of their functions

In the exercise of their functions under Act No. XVII of 2010 or any other law and under these Rules, it shall be the duty of Commissioners to comply with any Code of Practice and Procedure which the Ombudsman may from time to time set out for this purpose. On their part Commissioners shall act autonomously and in accordance with procedures and processes laid down by the Act and by these Rules in determining whether to initiate, continue or discontinue any investigation under the Act.

Regulation of own-initiative investigations

Following consultation with the Ombudsman, own-initiative investigations that fall within the functions of a Commissioner shall be carried out by the Commissioner in question.

In an own-initiative investigation that is due to be carried out by two or more Commissioners which in substance concerns the same merits, the Ombudsman shall entrust such investigation to the Commissioner most suited for the purpose of carrying out such investigation.

Consultation among Commissioners

A Commissioner to whom a complaint has been assigned or an investigation has been entrusted may consult another Commissioner in respect of the particular merits of the matters being investigated.

Delegation of functions by the Ombudsman

The Ombudsman is not precluded from delegating to a Commissioner the investigation of any complaint or element in a complaint that goes beyond the functions of a Commissioner as set out in the Rules.

Conflict of interest

If a situation arises where it appears that a Commissioner may have a conflict of interest in the exercise of the functions of his office, the Commissioner shall consult with the Ombudsman who shall provide guidance in accordance with the Code of Practice and Procedure followed in his Office. Where the Ombudsman concludes that a conflict of interest exists, he shall invite the Commissioner involved in this situation to remedy the conflict of interest and the Commissioner shall comply with the Ombudsman's decision.

Term of office of Commissioners

Commissioners shall hold office for a term of five years.

Functions of Commissioners

Commissioners shall have the functions that are set out in these Rules in addition to those that are set out in article 13 of the Ombudsman Act insofar as these provisions are applicable *mutatis mutandis* to Commissioners.

Powers of Commissioners

For the purposes of an investigation pursuant to a complaint, Commissioners shall have the same powers that are assigned to the Parliamentary Ombudsman under article 19 of the Ombudsman Act.

Time limit for complaints

Commissioners shall not replace internal complaint mechanisms and shall not entertain a complaint unless it is made not later than six months from the day in which complainant first had knowledge of the matter/s complained about. Commissioners may, however, at their discretion conduct an investigation on any such complaint if they consider that there are special circumstances that make it proper for them to do so.

Ombudsman's decisions under these Rules

Wherever the Parliamentary Ombudsman is assigned any decision making powers under these Rules, his decisions shall be considered as final.

Part III – Rules concerning the operation of the Commissioner for Tertiary Education

The Commissioner for Administrative Investigations appointed under article 17A(2) of Act No. XVII of 2010 to investigate matters related to the specialized area of tertiary education shall be called Commissioner for Tertiary Education.

The functions of this Commissioner include the investigation of complaints related to a service provided by an educational entity although he shall have no functions relating to the exercise of academic jurisdiction unless there is evidence of maladministration.

The Commissioner for Tertiary Education may not investigate any policy or decision taken by academic bodies unless there is evidence of maladministration on matters concerning academic provision, course management issues,[4] academic misconduct, academic integrity, academic

4 Such as examination results, degree classification, grades and grade review, academic supervision of students, quality and organization of academic teaching, academic teaching load, decisions by academic panels of appeal bodies, the nature or content of courses, academic awards, etc.

study or research programmes, academic policies and practices, academic regulations and course requirements.

Part IV – Rules concerning the operation of the Commissioner for Environment and Planning

The Commissioner for Administrative Investigations appointed in terms of article 17A(2) of Act No. XVII of 2010 to investigate matters related to the specialised areas of environment and planning shall be called the Commissioner for Environment and Planning.

This Commissioner shall be entrusted with the investigation of complaints related to the workings of the Malta Environment and Planning Authority (Mepa) in the exercise of its functions under the relevant legislation. This function extends also to those services which the Malta Environment and Planning Authority may outsource and which are provided on its behalf.

Part V – Rules concerning the operation of the Commissioner for Health

The Commissioner for Administrative Investigations appointed in terms of article 17A (2) of Act No. XVII of 2010 to investigate matters related to the specialized area of health shall be called the Commissioner for Health.

This Commissioner shall investigate complaints related to a health service but shall not investigate any action taken by health care professionals in the exercise of their medical and clinical judgement for the diagnosis of illness or for the treatment of patients. Nor shall the Commissioner for Health investigate any technical merits of decisions taken by health care professionals unless there is in either case evidence of maladministration by a health service provider in the exercise of his professional competence or of a discriminatory professional action.

Other observations

This Office is confident that these Rules will enable the institution to provide a uniform and integrated platform for investigative and administrative service while ensuring that Commissioners will operate in full autonomy as required by law. The Office is also confident that these Rules to underpin the process

for convergence between sectoral scrutiny bodies and the ombudsman institution will serve to build and enhance the capacity of its new member institutions to adopt a proactive attitude towards redress of administrative grievances experienced by citizens in the spheres falling under their respective jurisdictions within a newly redesigned ombudsman office.

Act No. XVII of 2010 also assigns the Ombudsman by means of sub-article (4) of article 17A the responsibility to determine, with the concurrence of the Prime Minister, the salary and allowances that are to be paid to Commissioners for Administrative Investigations. During 2011 the Ombudsman gave serious thought to this issue and his proposals for the remuneration to Commissioners were guided by several considerations such as the fact that, not unlike his own office, the office of Commissioner is " … *incompatible with the exercise of any professional, banking, commercial or trade union activity, or other activity for profit or reward*" – and this clause precludes appointees from engaging in any remunerative occupation and renders them to all intents and purposes full-time officers.

Another consideration in this regard was that sub-article (3) of article 17A of the Ombudsman Act provides that "… *Commissioners shall be so appointed from amongst persons knowledgeable and well versed in those specialized areas for which they shall be appointed to investigate*" – and this requirement in turn led to the need to ensure that the level of remuneration offered to persons nominated for the post of Commissioner would be commensurate with their experience and expertise if persons with the right credentials were to be attracted to serve in these positions.

At the same time another important aspect in this issue was related to the fact that the workload of Commissioners in terms of complaint numbers is even at this point in time an unknown factor – and indeed, the post of Commissioner for Health is a completely new office. In this connection it is useful to recall that one of the objectives of this project to bring together sectoral oversight institutions under the arching span of the Office of the Ombudsman is for Commissioners to launch effective outreach programmes among the community to enable citizens to become familiar with their roles, functions and objectives and to contribute towards an understanding among citizens of their rights in the areas that fall under their respective jurisdiction. This is undoubtedly expected to be one of the main duties of Commissioners and the success of this initiative stands to be judged by the outcome of these efforts to encourage citizens to stand up for their rights in these specific fields.

This Office is satisfied that the overall compensation package that it proposed to the Government for the remuneration of persons appointed to fill the post of Commissioner is fair and rewards these appointees in an adequate manner for their responsibilities.

By the end of 2011 consultations with the Government on these proposals were still under way.

The organization of the Fifth Conference of the Association of Mediterranean Ombudsmen in Malta

On its fifteenth anniversary the Office of the Ombudsman hosted the Fifth Conference of the Association of Mediterranean Ombudsmen in Malta as a sign of its appreciation of the invaluable contribution that this Association could make towards a wider diffusion and acceptance in the Mediterranean region of the values and objectives that sustain the ombudsman institution such as good governance, accountability, transparency, fairness, the rule of law and human rights.

Backed by respect for liberty and human dignity by governments within the framework of the law and guided by the appropriate institutional mechanisms in the legislative, judicial and executive fields, a system of governance that reinforces and guarantees respect for democratic values and promotes social peace can find a reliable ally in Ombudsmen, Mediators and People's Defenders and their institutions. The Association's mandate to promote the establishment of these institutions where they do not yet exist and the consolidation of existing ones while defending their independence and autonomy in a region such as the Mediterranean with its diverse political, economic and social systems is seen as a guiding light in favour of regional stability, cooperation and democracy.

When in June 2010 the General Assembly of the Association at the Fourth Conference of the AOM in Madrid accepted the invitation by this Office to host the Fifth Conference in Malta and when in November 2010 members of the organizing committee met in Malta to discuss issues related to the organization of this event, there was no forewarning at all at that stage of the violent political storm and of the social upheaval that were about to unleash themselves on the North African region only a few weeks later.

Although the waves of civil resistance and demonstrations in countries such as Tunisia, Egypt, Algeria and Morocco which are all members of the Association at times threatened to overshadow the organization of the Conference, mainly as a result of the insistence of this Office that the Conference should still go ahead, there was consensus among members that it was in the Association's best interest not to disrupt the event. In this regard due consideration was given to the relevance of the topics that were selected for the meeting to the political and social environment that was gradually evolving at that time in the southern region of the Mediterranean basin and to the role of Ombudsmen, *Médiateurs* and People's Defenders to safeguard democracy and human rights.

Auspiciously the main topic chosen for the Conference was ***The Role of the Ombudsman in Reinforcing Good Governance and Democracy*** while the main themes of the conference sessions were:

- *how to promote good governance in different Mediterranean cultures and systems of government: challenges for the Ombudsman*;
- *the impact of political changes on the functions and actions of the Ombudsman*;
- *the Ombudsman in the context of a changing economic and social environment*;
- *the relevance of Quality Service Charters and Codes of Conduct for the public administration in the context of good governance*; and
- *an evaluation of the work done so far by the AOM and a look at the future.*

The Conference was held at the Radisson Blu Resort, St Julian's on 30-31 May 2011.

There was wide agreement among participants that the Conference was on the whole a huge success. Not only was the event well organized and participants appreciated the hospitality that was shown by the Office but presentations by the main speakers demonstrated their in-depth knowledge of their subjects and their personal views and experience on how to enhance further the degree of commitment by Mediterranean ombudsman institutions towards citizens at large and towards good governance, democracy and human rights as the leading benchmarks for ombudsman action.

It was stressed that especially at a time of deep political, economic and social turbulence ombudsman institutions need to keep a constant watch on the actions of public authorities in the context of sustained vigilance and respect for the fundamental rights of citizens including the right to development,

economic growth, progress and justice. It was agreed that if ombudsman institutions in the Mediterranean are to honour their role and ensure the effective application of human rights by public authorities, they should at the same time ascertain that the human dimension would constitute an essential feature of progress across the whole region.

There was agreement that democracy and national development go hand in hand and that the ombudsman institution should stand out as a beacon in the defence of human rights that is fully autonomous of the powers of the state. Ombudsmen should therefore have no fear to challenge state institutions when they are found to overstep their boundaries and should be considered as a most important figure that can play their part to seal the quality of democratic development in the Mediterranean region as a whole.

Participants at the meeting appreciated that ombudsman institutions in the Mediterranean have a crucial role to promote good governance, accountability, due process and democracy. In countries where the rule of law prevails and governments and public bodies as well as citizens operate in deference to a legal system and to well established legal principles that serve as a check against the abuse or the discretionary exercise of power, the courts of law have the authority to determine whether these legal principles are being respected and whether the rights of citizens in societies that live under these laws are being observed.

At the same time democracy is a political system that allows citizens to participate directly in the various stages of their country's political process and to select their representatives in order to safeguard their legitimate rights, interest and freedoms. To a large extent democracy is associated with the traditional concepts of political liberties including pluralism, freedom of political expression, majority rule, freedom of speech and freedom of the press as well as a range of civil liberties and human rights.

Whereas the rule of law and democracy mutually reinforce and strengthen each other, both systems find support in an informal non-judicial setting that is the hallmark of the ombudsman institution. Acting at all times independently and autonomously of any other authority, the ombudsman institution subjects the executive to its scrutiny and investigates mainly individual cases of alleged unlawful administrative action by the public administration.

As users of public services, citizens have their own rights and it is the task of the ombudsman institution to ascertain that justice and equality are consistently applied in the actions and decisions of state authorities and that the rights of citizens are duly respected in their day-to-day interface with the public administration.

This is indeed the most significant feature of the Ombudsman's work – the need to ensure that democratic values that underpin the rule of law are respected and promoted; that accountability and legitimate state action are strengthened; and that when there is evidence of maladministration or of lack of observance of the principles of good administration, the ombudsman institution will do its utmost to remedy any such shortcoming and to empower the citizen in relation to the administration. It is the Ombudsman's faculty to intervene in this manner and in these issues that gives added strength to the democratic process.

Appendix A of this ***Annual Report*** provides the text of the speeches by the Ombudsman Chief Justice Emeritus Joseph Said Pullicino, the Speaker of the House of Representatives Dr Michael Frendo and the Prime Minister Dr Lawrence Gonzi during the opening ceremony on 30 May 2011. The summing up by Dr Edward Warrington, Rapporteur on the main ideas that featured during the Conference appears in Appendix B.

The meeting of the Public Sector Ombudsmen (PSO) Group of the British and Irish Ombudsman Association (BIOA)

For several years this Office has been a member of the Public Sector Ombudsmen (PSO) Group of the British and Irish Ombudsman Association (BIOA) which includes public services Ombudsmen from the United Kingdom and the Republic of Ireland as well as the Gibraltar Public Services Ombudsman, the Bermuda Ombudsman and the Cayman Islands Complaints Commissioner together with the Local Government Ombudsmen and the Housing Ombudsman for England.

Meetings of the PSO Group provide a valuable and interesting insight into the work and experiences of Ombudsmen in other overseas jurisdictions. For more than a century and a half the country was under British colonial rule while, also as a direct consequence of its membership of the Commonwealth,

the Maltese public administration was deeply anchored to the British administrative system. Although the ongoing reform programme in the public service is inspired to a large extent by the country's modernization programme including commitments and obligations arising from membership of the European Union, there still exists, however, a strong affinity with the British administrative model including its own particular culture, standards and practice.

The Office of the Ombudsman was pleased to host a meeting of the PSO Group on 2-3 June 2011. Whereas the first day was allocated to a round-table debate at the Palace, Valletta on the relationship between the Ombudsman and Parliament that was chaired by Dr Michael Frendo, Speaker of the House of Representatives, the second day of the meeting was allocated to normal PSO business.

The round-table that was attended by the Hon David Agius MP, Government Whip and the Hon Dr José Herrera MP, the main Labour Party spokesman for justice, provided an opportunity for a fruitful exchange of views and information among participants on matters of common interest. In particular this working session served to point the way in which the issues that have been raised in Malta in recent years regarding the emergence of a stronger working relationship between the Ombudsman and Parliament have been dealt with in other ombudsman jurisdictions in Great Britain.

Appendix C of this ***Annual Report*** provides an interesting run-through of the main points that were raised during the round-table by the various participants and that served to define the way forward if this issue is to be solved in the best interest of the country's public administration and of citizens.

Proposal for the setting up of a national human rights institution

In recent years this Office has pushed forward a proposal for the setting up of a national human rights institution (NHRI) as a tangible confirmation of the national commitment in favour of respect for and observance of human rights and fundamental freedoms. Under this proposal the Maltese human rights institution would be entrusted with responsibility to ensure the effective implementation of international human rights standards in the country and also to develop and promote public awareness of these rights and freedoms.

In its ***Annual Report 2010*** this Office gave ample coverage to this proposal[5] also with a view to testing initial public opinion on the feasibility of this suggestion. This Office is admittedly somewhat disappointed by the fact that this proposal seems to have fallen by the wayside and is unaware of any reaction during 2011 by the Government, the Opposition and members of civil society who are known to have a direct interest in the promotion of human rights in Malta and in aligning the country's outlook on the observance of human rights and concerns on this issue with contemporary international norms and standards.

This Office was not, however, discouraged by this apparent lack of initial interest and during the year under review continued to sound in an informal manner quarters that would be expected to play a primary role in the setting up, organization and running of any such institution.

While admittedly this Office has taken the lead in promoting this suggestion, it should even at this stage be made clear that this institution has no intention to exert any undue influence on the configuration and the operation of the proposed new organization. This Office has taken upon itself the onus to raise this issue since it is fully aware of the role that it can play in an advisory capacity to the competent authorities in the initial stages of the establishment of a Maltese institution for the promotion and protection of human rights.

Whereas in its initial thinking on this proposal this Office gave consideration to issues related mainly to the mandate, the statute and the activities of the proposed national human rights institution in Malta, during the period under review further thought was given to issues related to the composition and organization of the proposed institution.

In its groundwork on the Maltese human rights institution that is being proposed, this Office was guided by three basic principles that should govern the work of any such organization, namely:

- **independence** – although set up by the Government, the institution would fulfil its role while enjoying full independence and operating autonomously of government authorities;
- **adequacy of resource provision** – this is regarded as a necessary condition to enable the institution to be both credible and effective; and in this regard

5 Cfr. pages 33-38.

in order to avoid duplication of human, material and financial resources it is considered advisable that the proposed human rights mechanism will administratively form part of the Office of the Ombudsman that will provide the required administrative and technical inputs including the necessary office space in its enlarged premises in St Paul Street, Valletta;

- **a composition and an overall structure based on pluralism** – this entails cooperation with a wide representation of the country's social forces and civil society including NGOs involved in the promotion of human and civil rights and in efforts to combat all forms of discrimination; trade unions; social and professional organizations; experts on human rights; and representatives of Parliament and of the Office of the Ombudsman. Officials from government ministries and department whose work touches upon issues that are related to human rights could also be included in the membership of the proposed national human rights institution although these public officials will be expected to take part in the work of the institution only in an advisory capacity and to explain the government's position and without any right to vote.

With regard to the organization of the institution's work it is envisaged that members will meet in plenary session on a regular basis and that every effort will be made to seek consensus on issues that are brought to their attention and on recommendations and opinions in the field of human rights that are submitted to the Government including an evaluation of legislative and administrative provisions and the extent of their compliance with international and national human rights standards.

This Office is confident that on the strength of its preparatory work that was done in recent years, it should soon be possible for the Government, acting closely with human rights NGOs and representatives of civil society, to launch the Maltese Commission for Human Rights as an added safeguard for the civil, political, economic, social and cultural rights of citizens in the country.

Proposal for the establishment of a postgraduate course in ombudsman studies and principles of good governance

During the year under review this Office undertook preliminary work on its proposal to set up the Institute for the Development of Ombudsman Studies

and Principles of Good Governance as a means of fostering wider academic knowledge and research on these areas.

With administrative transparency, accountability and respect for human rights featuring high on the national agendas of several countries as a pre-requisite for economic development and growth and with the role of the ombudsman institution in the promotion of good administrative practice gaining a deeper focus, this Office during 2011 undertook some initial thinking on its proposal to set up the Institute for the Development of Ombudsman Studies and Principles of Good Governance. It is envisaged that this Institute will be established in cooperation with the Faculty of Laws and the Department of Public Policy at the Faculty of Economics, Management and Accountancy at the University of Malta.

The main purpose of this Institute will be to serve as a regional centre of excellence to organize postgraduate courses and accredited training programmes to suitably qualified candidates from ombudsman offices and complaint handling organizations on such topics as conflict management and resolution, investigation, mediation, legal systems, human rights, etc. and also to carry out research on ombudsman practice and principles of good governance.

Possibly acting also in partnership with a foreign academic institution that would be prepared to participate in this project, the Institute will aim at providing a Masters course to participants from ombudsman and mediator institutions in the Mediterranean region, and also possibly beyond, as a positive contribution by this Office to the strengthening of concepts and principles of good administration and good governance. In this regard the proposed Institute could be structured and organized on the same lines as the IMO International Maritime Law Institute (IMLI) at the University of Malta which is known to give sterling service in the field of training of specialists in international maritime law.

Another aim of this Office is to launch this project possibly in association with an international organization and/or a regional body grouping ombudsman offices and/or a Mediterranean institution covering joint technical and economic initiatives on a regional basis.

2 PERFORMANCE REVIEW

A broad snapshot

The number of incoming complaints during 2011 declined to 426, a drop of 56 grievances (11.6%) from 482 during 2010, which had itself registered a fall of 84 complaints (14.8%) when compared with an intake of 566 new complaints in 2009.

The new complaint workload in 2011 was the lowest annual total ever recorded since the Office of the Ombudsman was set up in 1995. This overall performance can, however, be attributed partly to the contraction in recent years in the range of public authorities that fall in the jurisdiction of the Ombudsman under the impact of privatisation and policies such as outsourcing and public private partnerships. These initiatives were aimed at the withdrawal of direct government intervention in various economic sectors traditionally occupied by state authorities and in several services having a distinct public interest and are believed to have continued to influence the volume of complaints received by this Office.

At the same time the independent regulatory and supervisory agencies that were established in the last few years to exercise authority over specific areas of activity asserted their roles and performed their oversight functions on behalf of citizens with increased vigour. It is also likely that internal complaint handling mechanisms now show a more responsive attitude towards customers who may feel aggrieved by some aspect of the conduct of a public body. This permits government departments and other public bodies to resolve potential concerns and disagreement with their actions and decisions at an early stage and in this way reduce or even eliminate the need to resort to the Ombudsman.

All these developments have served to narrow the breadth and depth of the Ombudsman's jurisdiction over sectors that are affected by these changes in this shifting landscape for the operation and management of the country's resources.

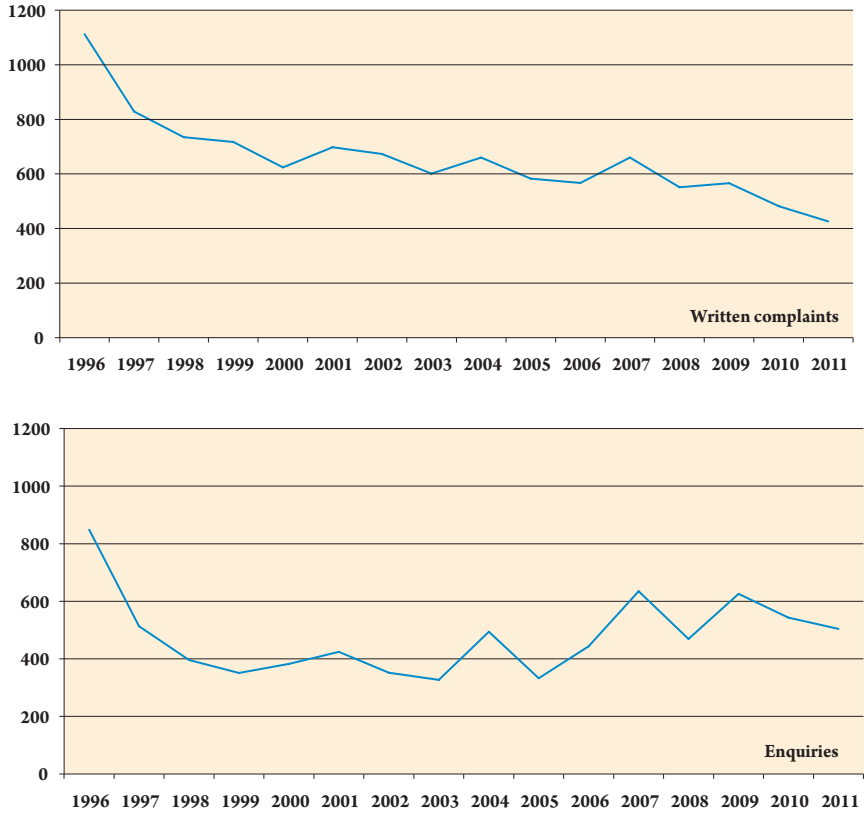
Although these explanations can to some extent serve to mitigate a possibly negative reading of the recent performance of this Office, the situation nonetheless calls for sustained efforts to raise anew the profile of the Maltese ombudsman institution in the country. These initiatives will need to be aimed primarily at promoting a wider, all-round awareness of its function and duties towards citizens; and indeed, the proposal to assemble sectoral scrutiny mechanisms under the aegis of the Office of the Ombudsman should also be viewed in this perspective.

In this regard, however, it should also be noted that for a more accurate picture of the overall complaint handling work done by this Office, due recognition should also be given to the number of incoming complaints that are addressed to the University Ombudsman. Since the University Ombudsman to all intents and purposes now functions under the wing of the Office of the Ombudsman, the 64 complaints that reached his office in 2011, when added to the 426

Table 2.1 Complaints and enquiries received 1996-2011

Year	Written complaints	Enquiries
1996	1112	849
1997	829	513
1998	735	396
1999	717	351
2000	624	383
2001	698	424
2002	673	352
2003	601	327
2004	660	494
2005	583	333
2006	567	443
2007	660	635
2008	551	469
2009	566	626
2010	482	543
2011	**426**	**504**

Diagram A: Office of the Ombudsman - workload 1996-2011



written complaints that were received by this Office during this period, would in effect bring the total complaint workload in 2011 to 490.[1]

During the period under review a similar performance was in evidence in the number of enquiries that were handled by the front-line staff of the Office. Here the drop of 83 approaches (13.3%) that took place in 2010 to 543 was followed by another decrease, albeit smaller, of 39 (7.2%) to 504 in 2011.

Table 2.1 mirrors the overall workload of the Office during its sixteen years of operation both in terms of the annual intake of written complaints as well as in

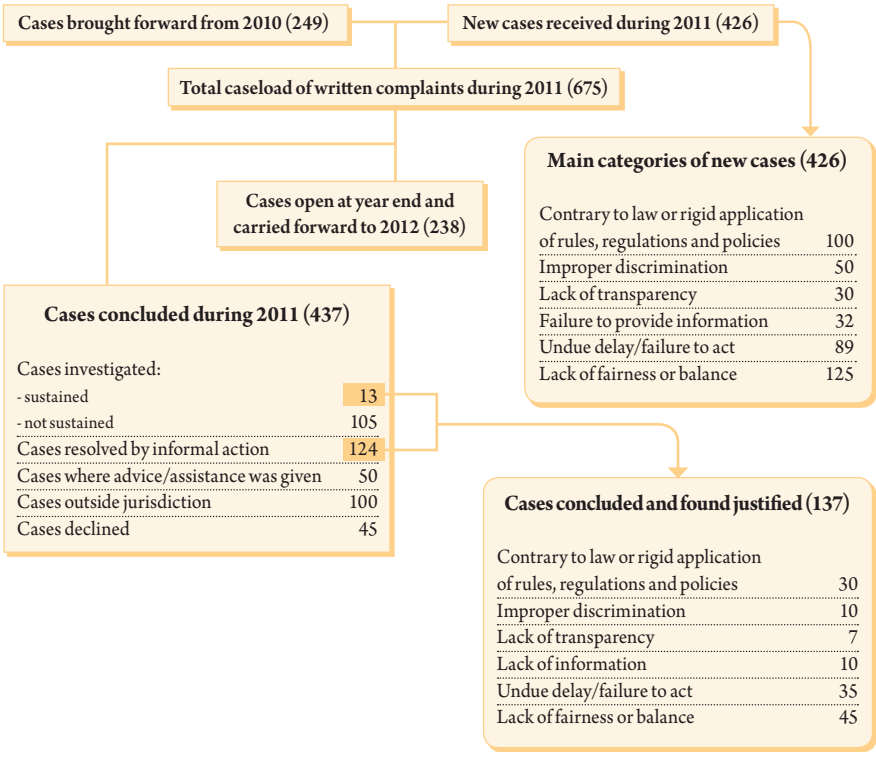
1 Statistical details on the complaints examined by the University Ombudsman between 2009 and 2011 are given in section four of this ***Annual Report***.

terms of enquiries that reached the institution mainly through informal face-to-face contacts in a dedicated interview facility with people who just called at the Office or via telephone contact or by electronic means.

Diagram A provides a visual representation of this information where the sustained drop in evidence in demand for the ombudsman service in the last few years may be considered as representing the greatest challenge that the Office of the Ombudsman will need to face in the future so as to reclaim its position as a leading outpost in the defence of citizens' right to good administration and good governance.

Chart A illustrates that when the caseload of 249 written complaints pending on 31 December 2010 is added to the number of new cases that were registered

Chart A
Overview of written complaints during 2011



during 2011 (426), the total caseload of formal written complaints during the year under review stood at 675. With 437 cases having been closed during 2011, open individual case files that were carried forward to 2012 stood at 238.

Incoming complaints

General comments

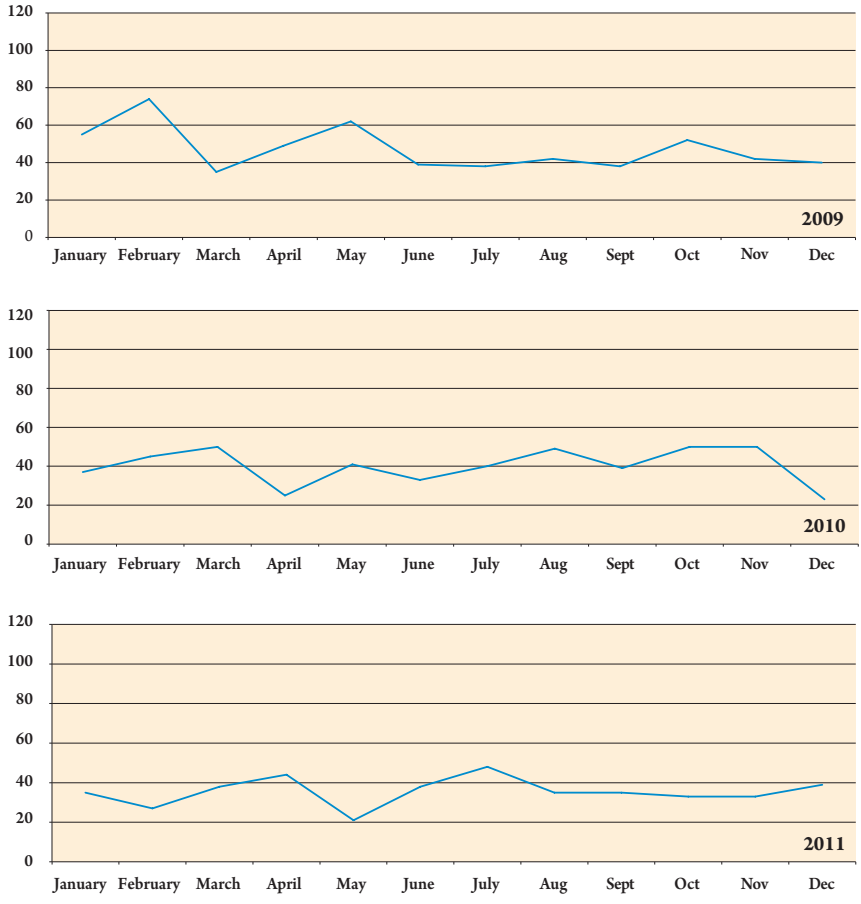
As in previous years grievances that made their way to the Office of the Ombudsman during the period under review were a mixed bag – and it is this variety that make the investigative work of this institution interesting and rewarding. It enables the Ombudsman to touch upon various sectors, aspects and issues of citizens' lives and their almost constant interaction with government bodies and authorities in the unfolding of their day-to-day concerns.

Table 2.2 Complaint statistics by month 2009-2011

Brought forward from previous year	2009			2010			2011		
	Incoming	Closures	In hand	Incoming	Closures	In hand	Incoming	Closures	In hand
			246			259			249
January	55	49	252	37	26	270	35	30	254
February	74	106	220	45	32	283	27	37	244
March	35	32	223	50	85	248	38	29	253
April	49	37	235	25	29	244	44	33	264
May	62	39	258	41	51	234	21	29	256
June	39	42	255	33	26	241	38	23	271
July	38	57	236	40	37	244	48	30	289
August	42	38	240	49	46	247	35	24	300
September	38	33	245	39	43	243	35	33	302
October	52	40	257	50	35	258	33	83	252
November	42	39	260	50	47	261	33	57	228
December	40	41	259	23	35	249	39	29	238
Total	**566**	**553**		**482**	**492**		**426**	**437**	
Enquiries	**626**			**543**			**504**		

Given that employment is acknowledged to provide the greatest spur to national economic activity and growth, it is not at all surprising that complaints related to employment issues constituted the leading group of alleged shortcomings in public service provision. Failings that were identified in this area as well as others that were, however, not sustained, ranged from procedures for the recruitment, deployment, transfer and promotion of employees in various positions in the public service, the payment of arrears, disciplinary action, working conditions and downgrading to age discrimination, suspension from work, requests to work in Gozo, removal from the register of unemployed workers, salary deductions and redundancies.

Diagram B: Monthly complaints received 2009-2011



In another area that is regularly visited by the Ombudsman and by his investigative staff, namely the field of housing accommodation and public property, some of the issues that arose in 2011 included repairs to damaged structures, the provision of alternative accommodation, inconvenience to tenants by neighbours and by illegal buildings, redemption of ground rent, alterations to requisitioned property, compensation for land expropriation and responsibilities of tenants following new rent laws.

Numerous other incoming complaints during the review period involved cases about pension payments, social security benefits, tax computations, settlement of utility bills and health and social care.

Also in evidence during the year there were a few notable cases such as the grievance lodged by an Australian citizen of Maltese origin who raised doubts about failure by the Government to explain local legislation to visitors with regard to topless bathing and naturism; the complaint by a resident in an area with thirty inhabitants who is regarded by law to live in an area that is not a residential zone and who claimed that this allowed hunters to shoot indiscriminately without the need to observe a distance of 200 metres; and the complaint by a resident in a built-up area underlying the route taken by the Malta/Gozo seaplane service who expressed his concerns with regard to safety considerations and noise.

Two other noteworthy complaints concerned the alleged violation of the human rights of a prison inmate who was taken by the Special Response Team from the Corradino Correctional Facility to Mater Dei Hospital and back in handcuffs; and the grievance sent by an employee of the Ministry of Foreign Affairs who claimed that his application to fill a vacancy for seconded personnel at the secretariat of the Union for the Mediterranean did not receive the necessary clearance from the government authorities with the result that he lost the opportunity to work with the Union in its offices in Barcelona.

Incoming caseload: an overview

Table 2.3 provides a breakdown of incoming complaints by areas of government policy and initiative. This classification of grievances by body shows that after claiming second position in 2009 in the list of top five public authorities by number of complaints received, for the second year running in 2011 Transport Malta topped this list as the single body that generated the

Table 2.3 Complaint numbers by type of public service sector 2009-2011

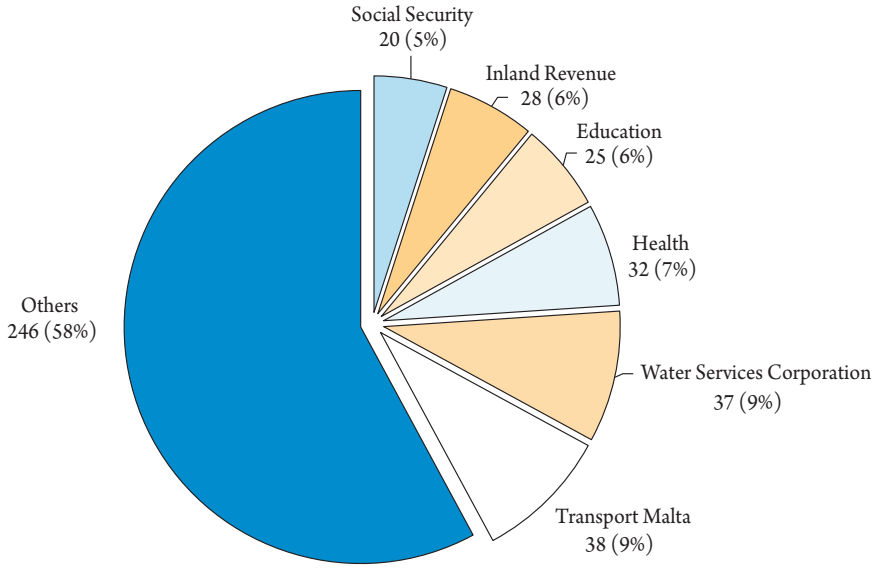
Sector	2009	2010	2011
Armed Forces of Malta	54	41	6
Agriculture	5	1	1
Air Malta	7	7	1
Corradino Correctional Facility	2	-	3
Courts	7	4	4
Customs	6	1	-
Education	38	27	25
Elderly	4	3	-
Enemalta Corporation	29	6	-
Health	36	12	32
Housing Authority	16	20	12
Inland Revenue	12	22	28
Joint Office	12	5	2
Land	13	16	11
Local Councils	20	21	18
Malta Maritime Authority	5	-	-
Malta Enterprise	1	2	-
Malta Shipyards	1	1	-
Public Administration HR Office[2]	7	6	9
Malta Environment & Planning Authority	15	11	19
Police Force	16	6	18
Public Service Commission	16	8	5
Social Security	25	27	20
Tourism	2	2	2
Transport Malta	52	45	38
Treasury	2	2	2
University of Malta	2	2	2
VAT	4	9	3
Water Services Corporation	25	29	37
Others	132	146	128
Total	**566**	**482**	**426**

[2] Following the enactment of the Public Administration Act in 2009, the Management & Personnel Office of the Office of the Prime Minister became known as the Public Administration HR Office.

highest number of grievances with 45 complaints in 2010 (9.3% of the total number of new complaints) and 38 (8.9%) in 2011.

Also during the period under review the Water Services Corporation went up to second place in the list from third place in 2010 with 37 grievances (8.7%) hanging on to its peg compared to 29 (6.0%) in 2010. At the same

Diagram C: Shares of complaints received 2011



time complaints against the health sector which featured in fourth position in the 2009 list of top five with 36 complaints (6.4%) but failed to make this list in 2010, bounced to third position in 2011 with 32 new grievances (7.5%).

On the other hand unease with the inland revenue authorities that had failed to manifest itself in this list in the previous two years took the form of 28 complaints (6.6%) and fourth place in 2011 while the education sector featured yet again although dropping from third to fourth place in 2010 and to fifth position in 2011 with 25 grievances (5.9%).

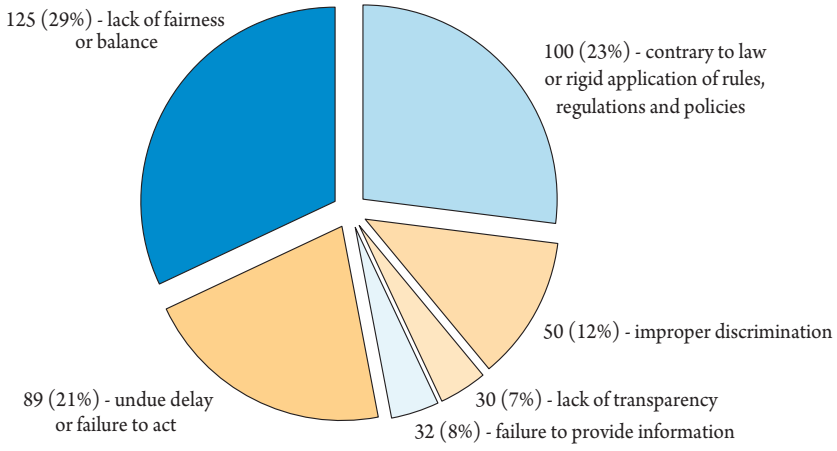
In all, the top five sources of concern to citizens attracted 160 complaints or 37.6% of the total number of incoming written complaints.

Table 2.4 shows that as usual complaints grounded on unfairness or lack of balance constituted by far the largest share of new complaints that were received during the year under review despite their drop both in absolute and in relative terms – from 153 (32%) in 2010 to 125 (29%) in 2011. There was also a strong intake of complaints that were linked together by a common ailment in the sense that they all arose from a feeling among citizens that actions or decisions by public bodies that were alleged to have harmed their interests were unlawful or based on a rigid application of rules and regulations – 100 (or 23%) in 2011 compared to 129 (27%) a year earlier.

Table 2.4 Complaint grounds 2009-2011

Grounds of complaints	2009		2010		2011	
Contrary to law or rigid application of rules, regulations and policies	123	22%	129	27%	100	23%
Improper discrimination	96	17%	57	12%	50	12%
Lack of transparency	23	4%	20	4%	30	7%
Failure to provide information	23	4%	22	4%	32	8%
Undue delay or failure to act	123	22%	101	21%	89	21%
Lack of fairness or balance	178	31%	153	32%	125	29%
Total	**566**	**100%**	**482**	**100%**	**426**	**100%**

Diagram D: Categories of complaints received (by type of alleged failure) 2011



At the same time there was a reduction in the number of complaints attributed to unnecessary delay or to a lack of decisiveness by public authorities to take the necessary action: from 101 (21%) in 2010 to 89 (also 21%) in 2011.

Table 2.5 Complaints received (classified by ministry) 2011

Ministry	2011
Office of the Prime Minister	70
Ministry of Finance, the Economy and Investment	126
Ministry for Justice and Home Affairs	29
Ministry of Education, Employment and the Family	79
Ministry for Resources and Rural Affairs	13
Ministry for Gozo	4
Ministry for Health, the Elderly and Community Care	37
Ministry for Infrastructure, Transport and Communications	44
Ministry of Foreign Affairs	3
Outside jurisdiction	21
Total	**426**

Table 2.6 Complaints by locality 2009-2011

Locality	2009	2010	2011
Attard	18	28	34
Balzan	5	4	4
Birgu	2	1	3
Birkirkara	33	26	29
Birżebbuġa	12	17	8
Bormla	3	6	4
Dingli	6	2	2
Fgura	20	9	9
Floriana	1	3	4
Għargħur	1	5	-
Għaxaq	7	5	8
Gudja	3	2	4
Gżira	6	9	7
Ħamrun	14	9	5
Iklin	5	2	2
Isla	1	1	3
Kalkara	2	3	1
Kirkop	2	1	1
Lija	-	5	4
Luqa	6	3	6
Marsa	4	6	4
Marsaskala	18	15	8

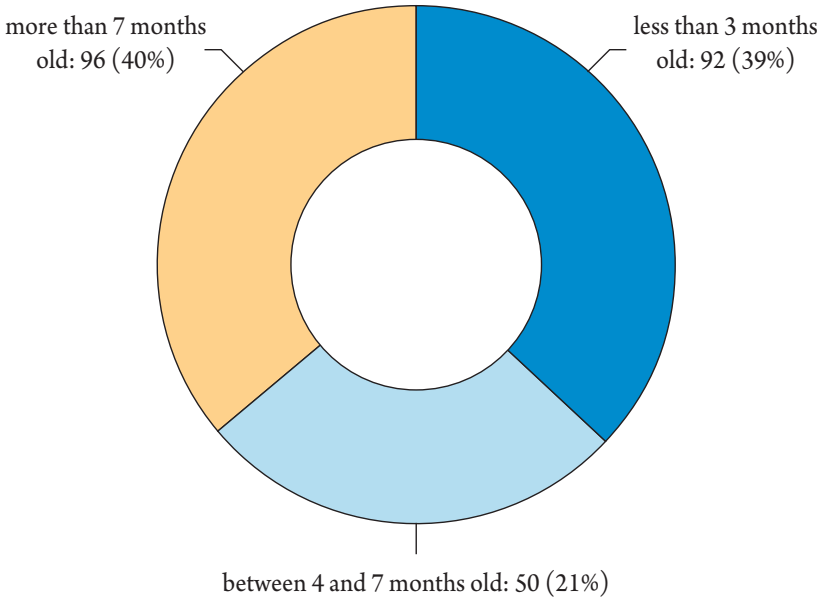
Table 2.6 Complaints by locality 2009-2011 (cont)

Marsaxlokk	4	5	2
Mellieħa	11	8	4
Mġarr	2	3	2
Mosta	22	23	14
Mqabba	7	3	4
Msida	11	4	10
Mtarfa	4	-	1
Naxxar	16	16	15
Paola	14	9	8
Pembroke	7	5	3
Pieta'	4	1	3
Qormi	20	10	8
Qrendi	6	2	2
Rabat	11	8	9
Safi	1	1	3
San Ġiljan	10	7	5
San Ġwann	12	12	14
San Pawl il-Baħar	21	19	23
Santa Luċija	3	2	2
Santa Venera	10	8	8
Siġġiewi	6	15	5
Sliema	23	19	19
Swieqi	15	8	9
Ta' Xbiex	2	-	3
Tarxien	15	14	7
Valletta	15	15	9
Xemxija	1	-	1
Xgħajra	3	-	2
Żabbar	20	16	15
Żebbuġ	10	10	10
Żejtun	7	15	9
Żurrieq	14	9	10
Gozo	44	39	19
Other	10	7	9
Overseas	16	7	9
Total	**566**	**482**	**426**

Table 2.7 Age profile of open caseload at end 2011

Age	Cases in hand
Less than 2 months	57
Between 2 to 3 months	35
Between 4 to 5 months	30
Between 6 to 7 months	20
Between 8 to 9 months	9
Over 9 months	87
Total open files	**238**

Diagram E: Percentage shares of open complaints by age (at end 2011)



Complaint outcomes

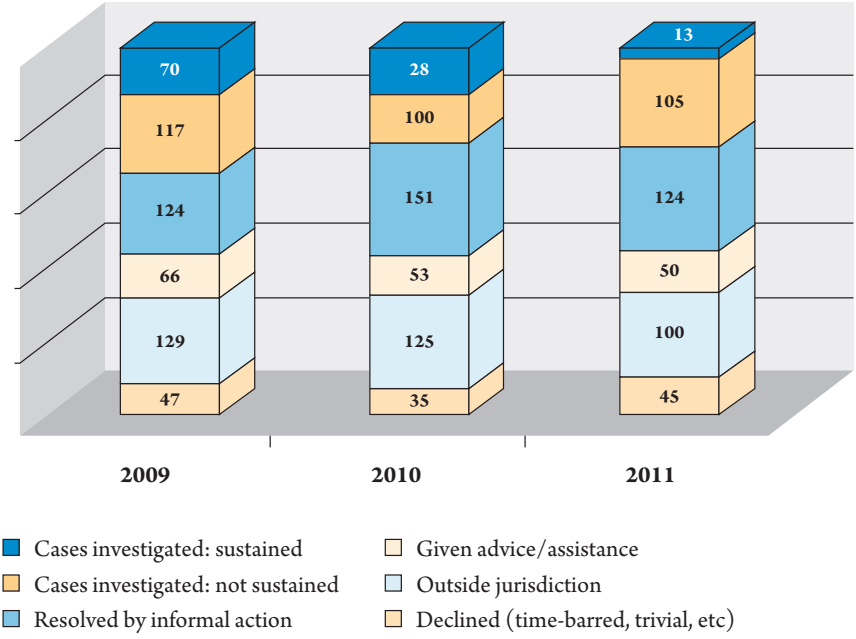
Table 2.8 provides a breakdown of grievances that were closed during the review period by type of complaint outcome.

Table 2.8 Outcomes of finalised complaints 2009-2011

Outcomes	2009	2010	2011
Cases investigated	187	128	118
of which: sustained	[70]	[28]	[13]
not sustained	[117]	[100]	[105]
Resolved by informal action	124	151	124
Given advice/assistance	66	53	50
Outside jurisdiction	129	125	100
Declined (time-barred, trivial, etc)	47	35	45
Total	**553**	**492**	**437**

In line with the pattern of previous years, one third of incoming complaints were not pursued by the Ombudsman but were dismissed outright. This happened because the body involved or the subject matter referred to in the complaint were considered out of jurisdiction although in common with other ombudsman jurisdictions in cases where considered appropriate and useful, this Office sought to refer complainants and to channel their grievances to the proper quarters. Other complaints were turned down because they were time-barred or regarded as of no real consequence to the person submitting the complaint. Taken together, complaints that were grouped in these categories amounted to 145 (33.1%) in 2011 against the comparable figure of 160 (32.5%) in the previous year.

Diagram F: Outcome of finalised complaints 2009-2011



Once this initial sift of admissibility was concluded, eligible complaints were then classified by the Ombudsman and his caseworkers according to the type of intervention that was considered most appropriate taking due account of the particular circumstances of each case. While a sizeable number of these valid cases were resolved informally in a consensual manner and brought to

a successful conclusion (124 or 28.4% in 2011 compared to 151 or 30.7% in 2010), a much smaller amount (50 or 11.4% as against 53 or 10.8% a year earlier) were deemed to require advice or assistance and once the matters that were brought to the notice of the Ombudsman were put right, his involvement was brought to an end.

During the survey period the number of cases that were accepted for a formal and detailed investigation and that culminated with the issue of a Final Opinion by the Ombudsman showed another decline – from 187 (33.8%) in 2009 to 128 (26.0%) in 2010 and 118 (27.0%) in 2011. In this regard, however, a noteworthy development during 2011 was the very small number of cases that were substantiated, fully or partly – a mere 13 that represented 3.0% of the total amount of the year's completed cases and 11.0% of the cases that underwent a formal investigation. This was the lowest number ever of sustained cases in one single year. The compliance rate with the Ombudsman's recommendations in these cases was maintained at a very high level, no doubt prompted by the Office's authoritative evaluation and review of complaint issues that are taken on for investigation.

By contrast, complaints declined by the Ombudsman since no evidence emerged of any maladministration amounted to 105 or 89% of the total number of cases that were subjected to a full-length investigation and to 24% of the year's number of finalized complaints. In these cases the Ombudsman's investigation concluded that the public bodies under scrutiny had acquitted themselves well and complainants had been unable to convince him that their claims of maladministration were valid or that their interests had been really prejudiced.

In this connection both in completed cases as well as in complaints that were turned down, the authorities that were subjected to the Ombudsman's examination to a very large extent showed full collaboration with the Ombudsman's investigative work and submitted in a timely manner the information and the documentation that was required of them to process these complaints. In this regard this experience contrasted somewhat with that of the University Ombudsman who in his contribution to this ***Annual Report*** refers to the lack of positive engagement with the management of the University of Malta that on a number of occasions showed reticence in explaining and justifying its decisions particularly in staff selection processes and in this way gave rise to unnecessary tension and misunderstandings.

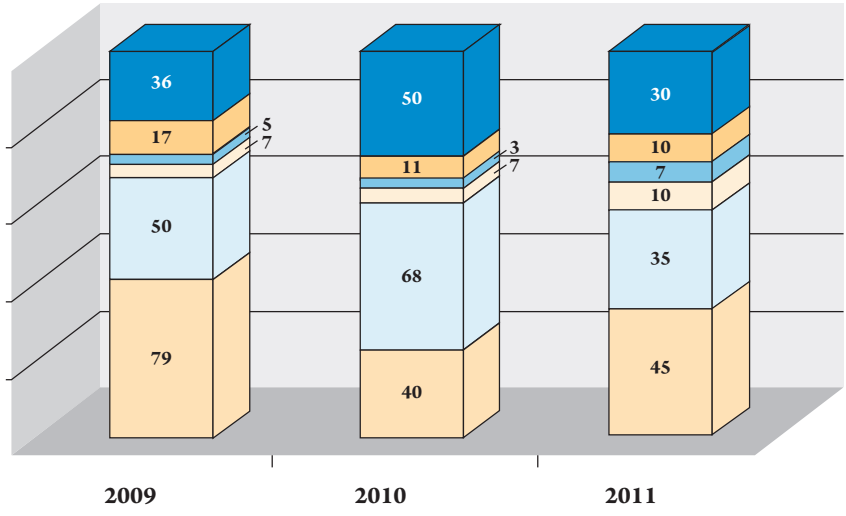
The total number of justified complaints in a given year recognizes that the role of the Ombudsman as an independent complaint handler for the resolution of grievances between citizens and the public administration authorities is combined with his other role of a mediator who seeks to bring together conflicting parties and assists them to reach an agreement. As a result, the number of these grievances is established on the basis of the amount of complaints that are upheld by the Ombudsman together with cases that are resolved by means of an informal friendly settlement with the public authorities in question that is generally brokered by his team of investigating officers. In 2011 these successful interventions amounted to 137 or 31.3% of the total number of finalized complaints during the year compared to 179 (36.4%) in 2010 and 194 (35.1%) in 2009.

An analysis by type of maladministration in sustained complaints (Table 2.9) shows that the highest number during the year under review (45 or 33%) was attributed to a lack of fairness or balance by the public bodies that were involved while delay that could have been avoided or lack of action were considered to have caused 35 (28%) instances of maladministration where the Ombudsman found in complainants' favour. At the same time administrative conduct that harmed the interests of citizens since it was considered to have been unlawful or based on a rigid application of rules, regulations and policies occurred in 30 other cases (22%). Taken together, determinations by the Ombudsman that classified maladministration as having taken root from improper discrimination, lack of transparency and failure to provide information to citizens to support a decision that had an effect on them stood at 27 (19%) in 2011 compared to 21 (12%) in 2010 and 29 (14%) in 2009.

Table 2.9 Type of maladministration in justified complaints 2009-2011

Closing status	2009		2010		2011	
Contrary to law or rigid application of rules, regulations and policies	36	19%	50	28%	30	22%
Improper discrimination	17	9%	11	6%	10	7%
Lack of transparency	5	2%	3	2%	7	5%
Failure to provide information	7	3%	7	4%	10	7%
Undue delay or failure to act	50	26%	68	38%	35	26%
Lack of fairness or balance	79	41%	40	22%	45	33%
Total	**194**	**100%**	**179**	**100%**	**137**	**100%**

Diagram G: Cases concluded and found justified 2009-2011



- Contrary to law or rigid application of rules, regulations and policies
- Improper discrimination
- Lack of transparency
- Failure to provide information
- Undue delay or failure to act
- Lack of fairness or balance

3 CASE SUMMARIES

Having the best of both worlds
(Health Division)

The complaint

Three Senior Engineers, who were responsible for the management of their respective divisions in the Engineering Unit of St Luke's Hospital (SLH), requested the Ombudsman's intervention because they alleged that the Health Division unjustly deprived them of an on-call allowance. Complainants were aggrieved because although they asked to work under on-call arrangements in the same way as two other section heads in this Unit, their request was turned down. As a result they were not eligible for an on-call allowance given to colleagues with similar duties even though they were required to take care of emergency situations and to report for duty outside normal working hours whenever the need arose.

Complainants limited their request from December 2007 when they submitted their first written request for this allowance up to September 2009 when they were transferred from the Health Division.

The investigation by the Ombudsman

Upon being asked by the Ombudsman to respond to these allegations, the Division's first line of defence was that it is the exclusive prerogative of management to deploy staff in the best interest of the organization and that employees should not interfere in these decisions; and these accusations by complainants undermined this prerogative. The Division insisted that the complaint was not related to any alleged discrimination against the three Senior Engineers but concerned the management of its manpower resources.

The Division proffered other reasons for its decision to reject complainants' request. Among others it laid store on the fact that for several years prior to December 2007 complainants repeatedly refused to work under on-call arrangements due to "*other personal commitments*". This contrasted with the attitude of colleagues mentioned in their grievance who accepted to work under these arrangements and were entitled to an on-call allowance. The Division also explained to the Ombudsman that complainants only asked to work under this system after the migration of health services from SLH to Mater Dei Hospital had taken place and this hospital had been decommissioned. As a result the chances of an emergency situation were greatly diminished while demands on them decreased substantially.

The Health Division also referred to efforts that took place between 2008 and 2009 to integrate the three complainants in the structure of the Foundation for Medical Services (FMS) which at that time had assumed a wide oversight role in hospital facilities management including project management services and hospital maintenance on behalf of the Division. According to the Division, however, these efforts failed due to complainants' "*inability to adapt*" and their "*incompatibility to work as part of a larger team with clear performance targets and objectives*." Taking into account this "*negative attitude shown for many years*" by complainants, the Health Division maintained that its decision not to include them under an on-call system as they had requested was fully justified and no injustice had been done.

Complainants did not take these representations lying down and stated that the only time that they were asked to work under this system was in July 2001. However, after an evaluation of the work of the Engineering Unit it was decided that instead of professional staff this system would apply for the Unit's technical personnel who could respond directly to hands-on emergency repairs. At the same time this decision was backed by an understanding that these employees could get in touch with complainants at any time including week ends in order to receive any engineering backup that might be required.

It was claimed that these arrangements worked well. Complainants always cooperated fully in emergency situations that arose and on several occasions they reported for emergency work after their normal working hours. In fact in 2006 and 2007 they were all given a maximum performance bonus and this belied the allegation by the Division that they had shown a negative attitude in their workplace. They insisted that this assertion was baseless and discriminatory.

While admitting that their request to work under an on-call system was made after the migration of health services to Mater Dei Hospital, complainants explained that several building engineering services at the former hospital such as goods and passenger lifts, steam raising plant, air conditioning, water treatment systems, the hydrotherapy pool and hot and cold water installations were still in operation and were still an integral part of the SLH building structure. Besides, there were several ongoing maintenance contracts while mandatory certification relative to the building was still necessary. Operational responsibilities associated with the provision of all these services including regular maintenance and upkeep to sections of the building that were still in regular use continued to fall upon complainants and so it was incorrect to state that SLH had been decommissioned since most of the building engineering services at SLH remained in operation even after the migration of most hospital services to Mater Dei Hospital.

Complainants also turned down the allegation that they refused to be involved in the migration process to Mater Dei Hospital. They claimed that while the migration process was in hand they were involved in planning and design work for the conversion and refurbishment of Karen Grech Hospital, which forms part of the SLH complex, as a rehabilitation centre. It was this workload that led them to suggest the introduction of an on-call system.

Complainants finally submitted that during the period for which they asked for an on-call allowance, they were responsible for the same range of duties as other engineering colleagues who were entitled to this allowance.

At this stage the Ombudsman sought the views of the Health Division in particular on the following issues:

- firstly, although it was appreciated that it is a management prerogative to deploy staff, yet management is obliged in the exercise of this prerogative to follow the rules and regulations of the public service and ensure there is no improper discrimination;
- secondly, given that several electrical and mechanical services in St Luke's Hospital were still in operation and that two engineers in this hospital still worked under on-call arrangements, the Ombudsman asked for a clarification as to whether engineers with the Health Division are obliged to work under this system; and
- thirdly, since the attitude shown by management might have given the

impression that it constituted a means of reprisal at their behaviour, he asked whether in the event that engineers in the Health Division are required to work under on-call arrangements, complainants' earlier refusal to work under this system could be interpreted as a breach of discipline.

In its reply the Health Division reiterated that even when St Luke's Hospital used to function as an acute general hospital, complainants repeatedly refused to work under an on-call system since this entailed an extra commitment that did not seem to interest them at that stage. Furthermore, the Division explained that even after most of the services at SLH were no longer in use, it was felt sensible to continue to deploy under this system the two engineers who earlier accepted to work under on-call arrangements: one of them was responsible for the oxygen plants at SLH that remained fully operational while the other one was responsible for the rest of the engineering services that remained on the SLH site.

The Division further explained that when SLH was fully operational, the on-call system for engineering staff was not an acquired right but depended on the exigencies of the support service level needed after normal working hours – especially in an institution such as St Luke's Hospital where the infrastructure was acknowledged to be ailing and in a relatively weak state.

At this stage the Ombudsman again asked complainants to explain the apparent inconsistency when they felt that they should work under an on-call system at a time when SLH was no longer fully operational and the demand for electrical and mechanical services for which they were responsible was on the decline and when the chances of an emergency situation after office hours had also decreased.

Whilst again denying that they ever refused to work under an on-call system and while referring to circumstances that prevailed in 2001 in the Engineering Unit when it was agreed that the hospital would be served better if this function would be delegated instead to technical staff, complainants claimed, however, that this situation changed between 2005 and 2007. During these years three of their colleagues as well as the Chief Engineer resigned from the Unit and their workload was added to complainants' duties. Yet despite these developments they were denied the on-call allowance enjoyed by these employees.

Complainants disagreed with the view of the Health Division that after hospital services migrated to Mater Dei Hospital, the possibility of an emergency situation at SLH decreased considerably. They explained that despite the fact that this building now operated at a reduced level, from a technical point of view the risk of a sudden emergency with regard to installations such as the water circulation system, heat exchangers, boilers, storage tanks, lift installations and fire fighting systems did not depend on the extent of the usage that is made of these systems.

Considerations and comments by the Ombudsman

The Ombudsman pointed out that this grievance centred on the refusal by the Health Division to accept the request by three Senior Engineers to work under on-call arrangements at St Luke's Hospital while their colleagues in this hospital were allowed to work under this system.

Having established that engineers in the public service are not entitled to work under on-call arrangements and that this system depends on the exigencies of the service after normal working hours, the Ombudsman accepted the submissions by the health authorities that it is exclusively up to them to decide whether the exigencies of the service warrant resort to on-call arrangements. At the same time, however, he insisted that these exigencies must be genuine and be backed by reliable and reasonable explanations. The Ombudsman stated that though it is solely the prerogative of management to manage its manpower and financial resources, yet in the exercise of any such prerogative management is obliged to follow the applicable rules of the public service and ensure there is no improper discrimination.

The Ombudsman referred to evidence that the on-call system, applicable to technical staff of the Engineering Unit, worked well and that on several occasions complainants intervened after their working hours. However, although according to complainants circumstances changed in 2005-2007 when several engineers resigned and their workload was assigned to them, the Ombudsman pointed out that in his opinion this could not be considered as an adequately convincing reason to explain why it was only in December 2007 that they requested to work under an on-call system as well. This timing seemed particularly odd since by that time the migration process to Mater Dei Hospital had taken place and several wards as well as operating theatres and various laboratories, the out-patients block and other facilities and amenities

had been decommissioned and only a relatively small section of the SLH complex continued to function.

The Ombudsman noted that to a large extent the Health Division rested its case on the fact that complainants repeatedly refused to work under on-call arrangements until the migration of patients and services to Mater Dei Hospital had taken place; and at that point in time the chances of emergency situations that would require their intervention after normal working hours eased considerably. Complainants, however, disputed this statement.

According to the Ombudsman, however, regardless of when complainants were asked to work under an on-call system, his impression from the way in which events unfolded was that complainants seemed to have led a sheltered working life, free of the bother of any on-call arrangements and up to the end of 2007 never expressed any wish to be included under such a system. This led him to observe that at this stage he needed to establish whether, given that for more than six years complainants had shown no interest to work under an on-call system, the rejection by the health authorities of their request in December 2007 to participate in this system like their colleagues could be considered to amount to maladministration.

The Ombudsman commented that the crux of the matter was whether the management prerogative with regard to the deployment of manpower resources was applied discriminately by the Health Division with the result that it amounted to improper discrimination or could be considered as abusive action. Another consideration was whether the decision by these authorities with regard to on-call allowances was justified in the sense that these allowances continued to be given to their colleagues while complainants were left out.

Taking all the evidence into account, the Ombudsman commented that in his view he could not but assume that complainants requested to work under on-call arrangements merely to benefit from the payment of allowances that form part and parcel of this system. He stated that this issue needed to be viewed in the context of whether complainants had an automatic right to work under this system even though in any event this had to depend on the exigencies of the service.

The Health Division was of the opinion that since when in operation on a 24x7 basis St Luke's Hospital operated efficiently without the deployment of

complainants on an on-call system, there was therefore no real need to change these arrangements at a time when hospital services were drastically curtailed. The Ombudsman understood that the health authorities believed that the chances of an emergency arising after normal working hours decreased substantially. At the same time he was aware that complainants did not share this view and felt that these risks are not necessarily related to the number of persons making use of building engineering services still in operation at SLH. Besides, there were maintenance contracts as well as the issue of the relative certification that still needed to be seen to.

Accepting complainants' suggestion to listen to the views of independent experts, the Ombudsman sought the advice of three persons with long years of experience in hospital engineering service management. One of these maintained that there was still a risk that an emergency situation would arise after normal working hours even if these installations were not in heavy use as before although he admitted that the chance of an emergency in the case of certain services was bound to lessen while in the case of boilers the possibility of an emergency situation arising at any moment could not be ruled out.

These views were to some extent confirmed by two other engineers who both held that the chances of an emergency situation after normal working hours decreased considerably once a very large number of patients migrated to Mater Dei Hospital and medical and surgical operations were no longer being carried out at St Luke's Hospital. Both engineers shared the view that the presence of patients and the organization of operations were critical factors in order to determine the likelihood of problems that might arise after working hours and that would need the recall of engineers back to duty after their normal hours of work.

In this connection the Ombudsman was also guided by the views of these two engineers who countered complainants' arguments that their presence was still required as much as before by stating that in the case of a facility being unoccupied or unused even if systems are functioning, many risks related to human intervention such as erroneous operation, accidental or malicious damage by man or omissions disappear or are grossly reduced from the risk analysis scenario. Both engineers went on to add that on a general note systems kept running in an unoccupied facility are working at reduced load levels and this reduces greatly the probability of an undesirable outcome.

Advice given to the Ombudsman on this issue was that regardless of whether a building is occupied or not, legal obligations on machinery such as lifts remain unchanged although it was obvious that while regular routine maintenance work is normally done during working hours, work in connection with certification on similar installations is not generally done after normal working hours.

Taking everything into consideration the Ombudsman stated that he was not in a position to establish the risk level that existed at St Luke's Hospital after its services migrated to Mater Dei Hospital regarding an emergency situation arising after the normal hours of work and that would require the services of an engineer. While aware that in these circumstances the chances of a risk situation had decreased in respect of mechanical and electrical services for which complainants were responsible, the Ombudsman tended to accept the view of the Health Division that once when St Luke's Hospital was running at full capacity and without any on-call arrangements with complainants and once for several years complainants felt that other arrangements could provide adequate cover to ensure that these services would operate efficiently, it hardly made sense to accept complainants' request to change these arrangements now.

All this led the Ombudsman to conclude that the decision by the Health Division to turn down complainants' request to work under on-call arrangements did not amount to improper discrimination or was tantamount to an abusive action. Neither could it be considered as an act of maladministration.

At the same time the Ombudsman commented that his evaluation did not exonerate the hospital authorities from their responsibility to make all the necessary arrangements in the event of an emergency situation since they are finally responsible for a proper management of facilities and installations under their charge and are fully accountable for their decision not to put complainants under on-call arrangements. In the final analysis it is the hospital management that shoulders responsibility for the efficient operation of hospital facilities in the event of an emergency situation while ensuring that any such situation would be resolved in an effective manner.

The Ombudsman declared that from evidence that he gathered during his investigation, it resulted that the hospital authorities were not in breach of their obligation to ensure that an efficient system was in place to cater for an

emergency situation that might arise. He went on to point out that he was satisfied that this system could be put into action regardless of the fact that complainants were not bound by any on-call arrangements and there was every indication that this decision was both reasonable and well founded.

Conclusions by the Ombudsman

The Ombudsman commented that his role in this grievance was to examine whether the decision by the health authorities to turn down complainants' request in December 2007 was justified according to the principles of good administration. The Ombudsman was required to determine whether this refusal amounted to improper discrimination against complainants or to unfair administrative action that served to prejudice their interests.

The Ombudsman gave careful consideration to complainants' view that since their responsibilities were analogous to those of colleagues who worked under on-call arrangements, the Health Division discriminated against them when it turned down their request to be included under this system. He also took into account their plea that even after the commissioning of Mater Dei Hospital, their responsibilities at St Luke's Hospital as well as the risk of an emergency situation had not decreased because the building engineering services remained in operation and they were still responsible for the day-to-day operation and maintenance of these services.

On the other hand the Ombudsman gave due weight to the main arguments by the Health Division, namely that back in 2001 and prior to the migration process to Mater Dei Hospital, complainants steadfastly refused to work under on-call arrangements; that it was not considered necessary for complainants to work under an on-call system after the transfer of most hospital services to Mater Dei Hospital since reduced usage of St Luke's Hospital eased considerably the risk of an emergency situation arising after working hours; that adequate alternative arrangements were made by the hospital authorities to cater for any emergency situation; and that human resource management is a prerogative of management and no employee or other authority is entitled to be involved in any such issue.

The Ombudsman stated that he found unconvincing the reasons given by complainants to justify the fact that they did not submit their request to work under an on-call system before the migration of services from St Luke's

Hospital to Mater Dei Hospital. He expressed his amazement that they only did so after December 2007 when the migration process to Mater Dei Hospital had been concluded and showed doubts as to whether this happened through sheer coincidence.

Taking this dateline into consideration the Ombudsman stated that he could not but conclude that complainants deliberately awaited the conclusion of the migration to Mater Dei Hospital before they asked to work under an on-call system. He pointed out that it was not difficult to understand why for six years they refused to work under these arrangements and observed that in this way during all this time they were spared the inconvenience and the added responsibilities that are associated with this system.

With regard to complainants' opinion that from an engineering point of view it was incorrect to state that after the migration process the risk of an emergency situation had abated, the Ombudsman accepted expert advice that the possibility of an emergency situation after the hospital services at St Luke's Hospital migrated to Mater Dei Hospital had decreased.

The Ombudsman stated that the decision by the Health Division on complainants could be considered as discriminatory in their regard in the sense that they were treated differently from colleagues with analogous responsibilities. He made it clear, however, that he shared the view of these authorities that it is the prerogative of management to administer available human and financial resources in the way that it considers best as long as there is valid justification of its action even though this might at first sight appear discriminatory. According to the Ombudsman what is unacceptable is improper discrimination since discrimination that is based on a valid reason does not amount to improper discrimination or to bad and wrongful administration.

The Ombudsman concluded that in his view the health authorities were fully justified to turn down complainants' request, especially given its timing. He therefore rejected complainants' grievance and closed the file.

Sequel to the complaint

In the aftermath of this decision the Ombudsman trained his sights on the Permanent Secretary at the Ministry for Health, the Elderly and Community

Care and in particular on the tenor and content of some of his replies throughout his investigation. The Ombudsman was especially concerned by an opening statement by the Permanent Secretary in one of his replies where he wrote: *"I was not aware that complainants needed to be satisfied for the Ombudsman to reach a conclusion"* which he considered to border on disrespect towards his Office.

In a strongly worded letter the Ombudsman pointed out that besides finding both the tone and the implications of this statement objectionable, this attitude revealed lack of knowledge of the role and functions of the Ombudsman. As in many other countries, the ombudsman institution in Malta has no executive power and in conclusions on grievances brought to his attention the Ombudsman should give strong and irrefutable arguments to convince the parties concerned of the fairness of his decisions, including any recommendations that he may deem fit to submit. The Ombudsman went on to explain that it is the established practice of his institution to present the viewpoints submitted by either party to a complaint to the other side so that his Final Opinion will be formulated in a way that would leave no room for any further representations, ambiguity or doubt.

The Ombudsman also referred to an instance where the Permanent Secretary made no secret of the fact that he accepted his recommendations reluctantly and although he finally accepted to implement them, he made it clear that he did not share the Ombudsman's Final Opinion.

The Ombudsman observed that while he would at all times defend anybody's right to his opinion as well as the right to contest his rulings, he wanted to point out that the Constitution and the Laws of Malta provide that there should be the office of Ombudsman, specifically to determine cases of alleged maladministration, unfairness or other administrative failure on the part of a government authority. It is therefore not the administrator who decides whether an action or a decision is fair or not. An Opinion that is expressed by the Ombudsman that identifies an act of maladministration that needs to be remedied should be accepted as an authoritative assessment of the episode under scrutiny and should be respected and as a rule implemented by the public administration.

The Ombudsman also pointed out to the Permanent Secretary that he was vexed by the concluding statement in one of his letters where he stated that "*this*

issue has dragged on for far too long and has absorbed too much of our attention and efforts, compared to more important and pressing issues within this Ministry ....." He declared that both the tone and the implied message that he had no more time for the Office of the Ombudsman showed disrespect towards the institution and it was obvious that the Permanent Secretary all along failed to understand the role and the *raison d'être* of the Office of the Ombudsman.

A reasonably adequate time window to settle a tax liability
(Inland Revenue Department)

The complaint

A couple who purchased property in a residential zone in Mosta in April 2009 for the price of €133,000 lodged a complaint with the Office of the Ombudsman to protest against the way in which they were treated by the Capital Transfer Duty Branch of the Inland Revenue Department.

The couple objected to a valuation increase of this residence by an architect appointed by the inland revenue authorities to assess its value for tax purposes after its purchase. However, since more than ninety days elapsed by the time that the Capital Transfer Duty Branch informed them that their objection was turned down, they had to pay a penalty at a higher rate than if they had paid this penalty earlier. They were taken even more aback when they found out that unless the seller too paid his share of the additional duty, they would have to settle this amount themselves in his place.

Facts and findings

During his investigation the Ombudsman found that three months after the couple purchased a new property, an architect appointed by the Capital Transfer Duty Branch to value this residence for tax purposes revalued the property and added a chargeable value of €27,000 to the price that appeared on the contract. Following this revaluation complainants received a revised bill from the department and were asked to pay €1360 as duty and the same amount as full penalty that would go down according to a scale of percentage deductions that was applicable relative to the date of payment according to law.

Complainants contested this assessment dated 18 August 2009 and lodged their objection according to law. However, much to their disappointment, the Commissioner of Inland Revenue accepted the valuation of their property by the architect sent by the Capital Transfer Duty Branch and confirmed the additional chargeable value.

Complainants pleaded that procedures by the department to process their objection took an inordinately long time to conclude. As a result, the statutory period of ninety days within which they had to settle this amount lapsed and consequently the penalty went up from €136 to €400. This led them to blame the Capital Transfer Duty Branch that they were unable to benefit from the 10% rate that they would have paid if they settled the amount of tax due during the ninety-day window according to law.

Complainants were also upset when they were notified with the assessment issued by the Capital Transfer Duty Branch to the seller of the property since he could not be found at the address that was given to the Branch. The bill was in fact originally addressed to the seller on the same date as their bill on 1 August 2009 but was forwarded to them on 19 January 2010. Since this person could not be traced, complainants were asked by the Branch to indicate his address abroad and warned that in default, if the Branch would still be unable to get in touch with him, they would be bound to settle this amount themselves.

Considerations by the Ombudsman

When asked to explain these issues, the Capital Transfer Duty Branch provided a different sequence from that given by complainants. Whereas according to the latter the Branch took eighty-three days to decide on their objection and much longer to inform them of the revised, confirmed assessment, the Branch indicated that the revised bill of tax due was issued after only twenty days from the date of objection.

The two different sequences of events as given to the Ombudsman by the two parties were as follows:

• sequence of events given by complainants

- notice of assessment issued by the Capital Transfer Duty Branch in respect of additional chargeable value of property	18 August 2009
- objection by complainants to assessment	2 September 2009
- letter by Capital Transfer Duty Branch in response to objection by complainants	23 November 2009
- date of payment by complainants	18 December 2009
- date when complainants received assessment issued by the Branch on 18 August 2009 to the previous owner of the property	19 January 2010

• sequence of events indicated by the Capital Transfer Duty Branch

- deed of sale of property registered at the Capital Transfer Duty Branch	5 May 2009
- claim issued	17 August 2009
- objection letter received by Branch	9 September 2009
- claim confirmation issued	29 October 2009

According to the Branch, the whole process from the date of the original assessment to the confirmation of the claim lasted in all seventy-one days – from 18 August to 29 October 2009. This was fully within the ninety-day legal boundary provided by law that entitles a taxpayer to pay the penalty on tax at 10% of the full original amount as assessed. The Branch also pleaded that it was not to blame if according to its sequence of events complainants had a time window of nineteen days left in which to effect payment of the additional duty at 10% since the fact that a person who is liable to pay tax raises an objection does not stop the time period on any additional duty that may be due. This was based on sub-article 56(1) of the Duty on Documents and Transfers Act.[1]

The Branch went on to state that in any case if complainants had done so, they would have avoided a situation that led to the process being carried forward

1 Sub-article 56(1) of the Duty on Documents and Transfers Act states as follows:
"If any person served with or affected by a notice of assessment wishes to contest that assessment, he may apply to the Commissioner for its revocation or revision by a notice of objection in writing specifying the grounds of the objection to the assessment and made within thirty days from the date of the service of the notice aforesaid:
Provided that the Commissioner shall extend the said period as may be reasonable in the circumstances if he is satisfied that that person was prevented from contesting the assessment owing to sickness, or absence from Malta, or any other reasonable cause."

to the third 150-day period when by law the penalty went up to 30% of the full amount. In fact from 18 August to 18 December 2009 when payment was made, a full 123 days had elapsed and by this time complainants were liable to pay the penalty established by law for defaulters who stretch their failure to effect payment into the third period.

The Ombudsman observed that complainants had also objected to a revaluation of their property by the Branch since they maintained that the price which they paid and which they declared was fair and just and represented the actual consideration paid on the deed and no further consideration had been paid in connection with this transaction. They argued that any valuation in excess of the actual sum paid to the seller arose as a result of subjective considerations by the architect appointed by the Branch to issue a valuation of their property.

The Ombudsman, however, stated that he is not in a position to investigate valuations made by competent architects who are entrusted by law to carry out such assessments since these persons are appointed by the appropriate government authorities and are expected to honor their assignments in line with their professional integrity and code of conduct. Complainants should therefore accept this valuation especially since it had been confirmed following a revision as a result of their objections.

The Ombudsman observed that complainants insisted that it was the fault of the Branch that they were hindered from settling the amount due by the end of the ninety-day period. However, the Ombudsman's investigation confirmed that the architect who reviewed the property had concluded his report and confirmed the claim within the period of time that is allowed by law. In fact complainants were notified with the department's decision reconfirming the assessment a full nineteen days before the lapse of the first batch of ninety days from the date of an assessment that is allowed by the Capital Transfer Duty Branch in respect of any additional duty claimed by the Branch.

The Ombudsman finally noted that it was in complainants' interest to check with the Branch the outcome of their objection during the ninety-day period. This meant that the Branch could not be blamed for their failure to pursue their objection as well as the confirmation of the original assessment within the period of ninety days as stipulated by law.

Conclusions by the Ombudsman

The Ombudsman remarked that the revaluation of property by the Capital Transfer Duty Branch of the Inland Revenue Department to establish tax liability regularly gives rise to complaints. He explained, however, that his Office could not investigate this system once these procedures are conducted by reputable professionals entrusted by law for this purpose so long as the rules of due process are observed.

The Ombudsman stated that in this case it was established that complainants incurred a heavier tax liability through their failure to comply with the department's request for payment and with the timetable laid down by law for settlement of this payment. He therefore ruled that this complaint could not be upheld since his Office considered as reasonably adequate the nineteen-day window within which complainants could have settled their tax liability. A prompt payment of this amount would have settled straightaway their legal obligations and enabled them to benefit from the reduced rate of penalty established by law.

The Ombudsman concluded his Final Opinion on this case by referring to complainants' protest that since the former owner of the property could not be traced, they were required by the Capital Transfer Duty Branch to pay for the additional duty liable by this person. The Ombudsman, however, agreed with the explanation given by the Branch that this action was fully in line with sub-article 49(1) of the Duty on Documents and Transfers Act which states clearly that "*… … the transferor in a transfer inter vivos and the transferee … …. shall be jointly and severally liable to pay the duty chargeable on such transfer or deed.*"

Please, sir, I want ... a lesser teaching load
(Directorate for Educational Services)

The complaint

A teacher with the Directorate for Educational Services complained with the Office of the Ombudsman that despite his medical problems, he was assigned fourteen lessons per week when according to his interpretation of the *User Manual Secondary Schools, Version 2010* issued by the Department of Human

Resource Development of the Directorate, the maximum weekly teaching load for teachers with a medical condition should consist of eight lessons. This led him to allege that he was treated unfairly.

Complainant alleged that the Directorate subjected him to further harassment when it attempted to remove his teaching load and assign him clerical duties, a proposal to which he again objected on medical grounds. He maintained that all along the Directorate had shown a vindictive attitude towards him since he did not want to retire from work but to continue with his teaching duties albeit with a relieved load.

Complainant also referred to his contacts with the Occupational Health and Safety Authority (OHSA) in order to assess his state of health and support his request for a reduced teaching load and to the advice given to him by the Occupational Physician of the Authority.

Records held at the Office of the Ombudsman showed that in 2004 complainant submitted a similar complaint in connection with his request to be assigned a reduced teaching load and the Ombudsman at that time had recommended that he should not have more than fifteen lessons per week. Although the educational authorities respected this ruling and his workload consisted of fourteen lessons, in the meantime complainant grew dissatisfied with these arrangements since his state of health deteriorated and he demanded a further reduction in this load.

Facts and findings

When asked to give an explanation, the management of the Directorate for Educational Services told the Ombudsman that the maximum number of lessons for teachers is twenty-six per week. In the last years, however, complainant had a reduced load that was rendered even lighter since some of his classes had only a few students.

The Directorate rejected complainant's claim that he was ever subjected to harassment and explained that he had of his own accord decided to work only 7.5 hours per week or 10 lessons of forty-five minutes each. This was unacceptable since in the school where he was posted he was needed to cover fourteen lessons. Besides, although complainant was required like other staff to attend professional development sessions, he repeatedly failed to attend or

would leave before the end of the session. This too was unacceptable and by no stretch of the imagination could the fact that his attention was drawn to this shortcoming be regarded as constituting harassment.

The Directorate clarified that after complainant requested an even lighter teaching load, he was asked to carry out clerical work instead of classroom duties in line with the Agreement between the Government and the Malta Union of Teachers of 23 August 2010. This could by no means be considered as an act of vindictiveness against him; on the contrary, it ensured that he would remain with the Directorate once he would agree to perform these new duties.

At this stage of the Ombudsman's investigation, in order to back his claim of injustice by the Directorate complainant sent a list with the names of other teachers with a light teaching load and with even lesser classroom teaching duties than his own even though some of them did not have any medical problems. While taking due care to respect the privacy rights of these individuals, the Directorate verified these claims but the details that it gave to the Ombudsman in respect of every teacher on this list confirmed that this information was unsubstantiated.

The Directorate explained that complainant failed to consider important issues that have a bearing on the workload of teaching staff such as the total number of lessons in any particular subject in the various schools as well as replacement lessons assigned to teachers virtually on a daily basis to take over from absent colleagues. In other instances the number of lessons assigned to these teachers in their subject areas was higher than that indicated by complainant while he also failed to take account of work of special responsibility assigned to teachers on his list, in addition to their teaching load, in line with the Agreement of August 2010.

Some time later complainant submitted to the Ombudsman a reply to a Parliamentary Question that gave "*a complete list*" of forty-two teachers on light teaching duties because of medical problems. Of these, nineteen had a load of fourteen lessons per week or even more when taking into account their main as well as their subsidiary subjects while nine other teachers were assigned more than the maximum number of eight lessons which complainant claimed that he was entitled to according to his interpretation of the *User Manual*.

On being asked for its views on the contents of this list the Directorate commented that when school timetables and the scheduling of lessons are being prepared in respect of teachers with a reduced load, several factors need to be taken into consideration such as the severity of their condition and how this could affect their ability to establish a rapport with students; the commitments of teachers with special responsibilities who are away from school on particular days of the week; as well as the need to allow a measure of flexibility in day-to-day school management to deal with contingencies that arise from time to time including the allocation of a lesser load so that staff may be given replacement lessons to take the place of their absent colleagues.

The Directorate went on to explain that the *User Manual* provides guidelines to enable Heads of Schools to determine the workload of teachers with special responsibility and teachers with medical problems. In the case of teachers who double as School Librarians, for instance, time spent in a library by these teachers in terms of lessons is included in their workload. The document therefore lists the maximum number of lessons credited to the workload of teachers with particular functions in addition to their contact lessons – such as Heads of Department (12 lessons); Guidance (12); Librarians (12); Health and Safety Officers (8); and Resource Teachers (6).

The same system applies in respect of teachers who are certified to suffer from a medical condition where eight lessons are automatically credited to their normal teaching load. This in effect means that these teachers should have a maximum load of eighteen lessons which, together with the eight lessons credited to them under these arrangements on account of their condition, would bring their weekly teaching load to twenty-six.

The Directorate confirmed to the Ombudsman that this is the way that the *User Manual* has always been interpreted and accepted by all the stakeholders in respect of teachers with additional special responsibilities or who suffer from a medical condition.

The Ombudsman was aware that before approaching his Office complainant contacted the Occupational Health and Safety Authority to inquire about his claim for a lesser teaching load. In October 2010 the Occupational Physician of the Authority certified that he was "*unable physically and mentally*" to take up a workload of fourteen lessons per week and that this was negatively affecting his physical and mental health. Upon being nudged by the OHSA

to remedy this situation, the Directorate explained that complainant already had a reduced load of fourteen lessons per week instead of the maximum load of twenty-six lessons less the eight lessons credited to him because of his condition.

When the Ombudsman sought further clarification, the Occupational Physician of the Authority pointed out that taking due account of aspects such as the nature of complainant's work, his workload and his work environment, the number of hours that he could work in his current condition without any adverse effects on his physical and mental health was a subjective decision. This meant that the OHSA was unable to issue an enforcement order to the Directorate with the number of contact hours that complainant could safely be expected to teach; and it was for this reason that the Authority formulated its recommendation to the Directorate to the effect that a remedy needed to be sought that would resolve this situation.

The Occupational Physician of the Authority further stated that the Directorate was nonetheless in this case still bound under article 10(1) of Legal Notice 36 of 2003 to carry out a risk assessment to determine the level of risk to complainant's health and establish the measures necessary to mitigate this risk.[2] It was also pointed out, however, that there are no objective guidelines that could be applied in complainant's situation and that any decision in this instance would be largely a subjective one.

The Ombudsman referred to the provisions in sub-article 4.3.8 of the Public Service Management Code on the role and functions of medical boards. The Code states that an officer on sick leave may be visited by a medical board appointed by Government, whenever it is considered expedient, with a view to ascertaining the state of the officer's health and that Heads of Department may request the examination of an officer by a medical board if they have doubts about an officer's behaviour or his state of health. The Code also lays down that a report by a government medical board prevails over that of a

2 Article 10(1) of Legal Notice 36 of 2003 (*General Provisions for Health and Safety at Work Places Regulations, 2003*) states as follows:
"*It shall be the duty of every employer and of every self-employed person to carry out, or to ensure that is carried out, a suitable, sufficient and systematic assessment of all the occupational health and safety hazards which may be present at the place of work and the resultant risks involved concerning all aspects of the work activity. Such assessments shall consider the risks to the health and safety of workers and of self-employed persons to which they are exposed whilst at work, as well as the risks to the health and safety of other persons, including visitors to the place of work, which risks arise out of, or in connection with the work being carried out, or by the conduct of the undertaking … ….*"

medical practitioner that may be presented by an officer whereas officers may also be required or permitted to retire on satisfactory medical evidence that they are incapable, by reason of some infirmity of mind or body, of discharging the duties of their office and that such infirmity is likely to be permanent.

The Ombudsman also referred to section 5(4) of the Agreement between the Government and the Malta Union of Teachers of August 2010 which states that consideration shall be given on an *ad hoc* basis to teachers who request to be relieved of classroom teaching duties on medical grounds provided they work normal general service office hours and carry out duties commensurate with their position. The education authorities, however, reserve the right to evaluate the medical condition and to review the working conditions of this concession from time to time.

Considerations and comments by the Ombudsman

The Ombudsman commented that this grievance concerned a claim that by reason of his deteriorating condition which was backed by certificates issued by medical specialists, complainant's teaching load should not exceed eight lessons per week in terms of the *User Manual, Secondary Schools Version 2010* which refers to the maximum number of weekly contact lessons that should be allocated to certain categories of teachers as well as teachers who suffer from a medical condition. The Directorate, however, held that complainant's interpretation that he should not be assigned more than eight lessons was unacceptable.

The Ombudsman referred to the Directorate's explanation that a teacher's weekly load consists of a maximum of twenty-six lessons and that the *User Manual* provides guidance to Heads of Schools to determine what is to be considered as an adequate workload for teachers with particular personal situations or who are assigned special responsibilities over and above their normal classroom teaching duties.

The Ombudsman observed that the extract from the *User Manual* referred to by complainant concerned essentially teachers who hold a position of special responsibility. Since in these instances it is not considered appropriate to allocate to these teachers a full load of twenty-six lessons per week in addition to duties associated with their special responsibilities, the *Manual* provides for a reduction in their teaching load and lists the amount of lessons credited in

respect of each position. This concession is extended to these teachers as an allowance which, added to their actually assigned weekly teaching load, would make up not more than the accepted maximum load.

The Ombudsman stated that it is wrong to consider, as complainant had done, that the maximum teaching load of these teachers is the number of lessons that appears next to each listed position in the *User Manual*.[3] Recalling that teachers with certified medical problems enjoy a similar allowance by means of a maximum reduction of eight lessons per week from their standard teaching load, the Ombudsman stated that he understood that this was how this provision was interpreted all along. Nonetheless he criticized the policy that apparently classifies teachers with medical problems among categories of teachers with special responsibilities. In his opinion this is not the proper way to present arrangements for the allocation of lessons to teachers in these particular circumstances.

Given this interpretation of the relative provisions of the *Manual*, the Ombudsman ruled that there was no way that complainant could claim that because of his state of health he was entitled to a maximum load of eight lessons per week.

Referring to the two lists submitted by complainant of teachers with a lighter load than his own together with his claim that some of them did not have any medical problems, the Ombudsman considered as plausible and acceptable the reasons given to him by the Directorate to justify the reduced workload in each of these cases.

The Ombudsman went on to state that although complainant pleaded that the condition of his health prevented him from taking his teaching load of fourteen lessons per week, in terms of policy as laid down by the *Manual* he was entitled to a reduction of eight lessons per week from the standard load

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3 The *User Manual* states as follows in page 8:
"*The maximum number of lessons* ... (to be credited to teachers with a post of special responsibility/others) ... *is as follows*:

Head of Department	*12 lessons*
Guidance Secondary	*12 lessons*
Health and Safety	*8 lessons*
Librarian	*12 lessons*
Resource Teacher	*6 lessons*
...	
Medical	*8 lessons*"

of twenty-six. This notwithstanding, he had in fact twelve lessons per week (instead of eight) less than a standard teaching load.

The Ombudsman recalled that the Occupational Physician of the OHSA confirmed that complainant was unable to take up fourteen lessons per week since this was negatively affecting his physical and mental health. However, while recommending that a remedy be found, he stopped short of giving an indication of what this load should consist of since, in his view, this was a subjective issue. While the law provides for a risk assessment to determine the level of risk to the health of an employee in an unacceptable work environment there is, however, no specific method applicable to the situation in question to carry out this risk assessment and the issue has to be settled between the employer and the employee.

At the same time the OHSA confirmed that in terms of occupational health legislation, if so required by a risk assessment an employer would fulfil his obligation at law towards an employee if he assigns alternative duties to this worker even though this might entail a reduction in the applicable work benefits. However, whether any such arrangements would be permissible would need to be viewed in the light of the Collective Agreement in force and any relevant legislation.

The Ombudsman observed that in line with the Agreement between the Government and the Malta Union of Teachers, the Directorate for Educational Services offered complainant the chance to perform office work instead of teaching duties although this meant that he would have to work longer hours. Complainant refused this offer outright since he did not want to give up teaching and produced another certificate in respect of a different medical condition and went on to claim that even these alternative duties would be detrimental to his health.

Taking everything into account the Ombudsman ruled that the problem raised by complainant was to all intents and purposes a health matter and he has no competence to determine the number of classroom lessons that his teaching load should consist of. However, since in such a situation the Public Service Management Code empowers a Head of Department to set up a medical board to ascertain the employee's state of health, he recommended that in this case this provision in the Code should be invoked to establish complainant's medical condition. The Ombudsman went on to advise that in his opinion once complainant had already roped in the Occupational Health and Safety Authority,

it would be advisable for the Authority to be involved in this medical board since similar arrangements were likely to satisfy the risk assessment required by law.

The Ombudsman stated that the Directorate for Educational Services should accept any eventual recommendation by this board that could be implemented within the general exigencies of the service. If, on the other hand, there were other genuine reasons as well as operational exigencies that made it impossible to meet the recommendations of this board, the authorities would be in order to proceed in terms of the provisions of the Code regarding retirement on medical grounds.

Conclusion and recommendations

In the light of his considerations the Ombudsman concluded that there was no evidence of any vindictive element on the part of the Directorate when it assigned complainant a teaching load of fourteen lessons per week. This load was below that which in general applies to teachers with medical problems even if there might be others with more incapacitating medical conditions and with a lesser teaching load.

The Ombudsman found no fault in the interpretation by the Directorate to the extract submitted by complainant from the *User Manual*. He stated that this extract should be interpreted within its context and within the scope of the *Manual* itself that is intended for use by Heads of Schools.

Recalling that the Directorate offered complainant alternative clerical duties although this meant longer hours of work and that complainant rejected this proposal, the Ombudsman ascertained that this offer was made with due regard to genuine exigencies of the service and met the provisions of the Agreement between the Government and the MUT.

Pointing out that complainant's medical problems were not a figment of his imagination and that he was adamant on a teaching load that would be less than fourteen lessons per week, the Ombudsman considered that he lacks the competence to determine complainant's teaching load. At the same time the OHSA where complainant had initially sought redress, acknowledged the subjective element inherent in any such decision but referred to the need in terms of law for the authorities to carry out a risk assessment of the situation even if there is no established method on how such an assessment is to be done.

In the circumstances the Ombudsman suggested that the way forward should be for the Directorate for Educational Services to apply the provisions of the PSMC and submit complainant to a medical board that would advise on his condition. He also recommended that an OHSA physician should be appointed as a member on this medical board. Following this exercise the Directorate would consider the board's recommendations within the context of the genuine exigencies of the service and the relative provisions of the Public Service Management Code and act accordingly.

Outcome

Some time after the presentation of the Ombudsman's Final Opinion, the Directorate for Educational Services set up a medical board to advise on the medical certificates that complainant had submitted.

The board, which included the Occupational Physician of the OHSA as suggested by the Ombudsman, recommended that complainant should continue with his teaching duties on the basis of an agreement that he would reach with the Directorate on the number of hours to which he may safely be exposed in a classroom situation. The board also recommended that a risk assessment be carried out as soon as possible to determine whether there was a risk to complainant's health from the ambient classroom environment.

It never rains but it pours
(Housing Authority)

The complaint

In a complaint to the Ombudsman, spouses A.B. and B.B. protested against a decision by the Housing Authority that they were no longer entitled to benefit from the subsidized acquisition of residential property under the scheme *Sale of Housing Units* that appeared in Advert Number 74 published in the *Government Gazette* on 28 November 2008. Complainants explained that subsequent to this decision, the Authority retained 30% of the sum of €9480 that they had paid by way of deposit in October 2009 and alleged that this act constituted misconduct and that the Housing Authority had committed a grave injustice against them.

Complainants explained that the Authority allotted to them a maisonette in Pembroke under its 2008 scheme for the sale of apartments and maisonettes in various localities in Malta and Gozo and that both parties signed a preliminary agreement on 30 October 2009. However, they were taken aback when shortly before the signing of the final deed of sale the Authority told them that they had been disqualified and were no longer entitled to this property.

This decision, confirmed by the Appeals Board of the Authority in July 2010 and by the Independent Revisory Board in November 2010, was taken under clause 4(f) of the scheme on the grounds that they owned other immovable property suitable for habitation purposes during the three years that preceded the date of the first publication of the scheme. Complainants argued that the Authority invoked a restrictive and rigid application of the regulations that were applicable under the scheme.

Complainants went on to state that before they submitted their application they spoke to an official of the Authority about the circumstances surrounding their case. They explained that after they bought a three-bedroom apartment in Swieqi in 2003 as their residence, they encountered serious financial difficulties and were unable to pay monthly loan instalments due to the bank. As a result they were constrained to divide this property into two smaller units and eventually sold one of them in September 2006. This meant that the Authority was aware that they owned their residence and that some time earlier they had sold part of this apartment to make ends meet. Nonetheless, despite this situation they were still urged to apply.

Facts of the case

The Housing Authority explained to the Ombudsman that after complainants' application in January 2009 was evaluated in line with its standard procedures, A.B. and B.B. were informed that this application qualified for the allocation of a maisonette in Pembroke subject to further verification of their assets and legal searches.

The Authority admitted that complainants' application indicated that they owned their place of residence, an apartment that they bought in 2003, which they had split a few years later in two smaller units including a two-bedroom flat where they lived. Upon verification the Authority confirmed that this apartment was inadequate for the needs of complainants' family and their

application was processed on these grounds. The Housing Authority went on to explain that complainants' application included a signed declaration stating that they did not possess any other property or assets exceeding €40,000 in the previous three years. Complainants then signed a preliminary agreement for the allocation of a maisonette in Pembroke on 30 October 2009 although this was subject to further verification by the Authority.

In mid-December 2009 searches by the Authority on complainants' assets revealed that in 2003 complainants bought a three-bedroom apartment for €75,000 and that in 2006 they converted this building into two smaller residences. During the same year complainants sold one of these apartments for €88,500 and kept the other as their residence.

One of the conditions of Advert Number 74 was that applicants should not have owned any property in the three years prior to the publication of this Advert on 28 November 2008. This meant that since on 6 September 2006, the date of the sale, complainants owned their residence, this rendered their application invalid. As a result the Authority refused to consider this application any further.

Complainants reacted swiftly to this decision and approached the Appeals Board of the Authority. They contended that they were constrained by a series of unforeseen circumstances to divide their residence in two smaller units and to sell one of them since otherwise they would have had almost no income to live on and to pay their pending bills. They explained that the full-time employment of A.B. as the main breadwinner was reduced to a four-day week and his part-time job was terminated while B.B. was declared redundant. In addition A.B. was involved in a serious car accident in 2007 and was on unpaid sick leave for six weeks. These circumstances rendered complainants' situation desperate and they resorted to a bank overdraft for their daily necessities.

Complainants insisted that all along they never tried to hide from the Authority the fact that they owned property that they were constrained to divide in two smaller units and that when they submitted their application they were residing in one of these units. They pleaded that they had provided the necessary documentation to the Authority to confirm the dire circumstances that they had been living through in the last few years. Notwithstanding this, on 8 July 2010 the Appeals Board reaffirmed the decision of the Authority and

turned down their protest while the Independent Revisory Board confirmed this decision four months later.

The Ombudsman's scrutiny of relevant files at the Housing Authority established that in their application in response to Advert Number 74 of 2008, A.B. and B.B. had submitted the necessary explanations to the Authority about the conversion of their residence. They had also given full details to the Authority about the predicament in which they found themselves in recent years.

In view of these circumstances, complainants' application was referred to the Chief Executive Officer of the Authority who instructed his staff to process this application regardless of the fact that A.B. and B.B. owned their residence. When this application was successful and complainants were awarded a maisonette in Pembroke, they were warned, however, that the final contract would only be signed after the Authority would verify all the documents related to the researches and to capital assets in line with the conditions of the scheme.

The promise of sale between the Authority and complainants for the purchase of the maisonette on 30 October 2009 stated that it was taking place under the conditions laid down in Advert Number 74 published in the *Government Gazette* of 28 November 2008 that formed part of this promise of sale and of the eventual sale of the property. Another condition was that in the event that after this preliminary agreement it would result that the beneficiary did not conform to the conditions of the advert and was not entitled to the property allocated to him or that the beneficiary gave wrong information to be eligible to participate in the scheme, the Housing Authority would be free to consider this promise of sale as null and void. In any such case the beneficiary would only be refunded 70% of the sum paid to the Authority on the preliminary agreement while the Authority would retain the remaining 30% as an administrative charge and to cover other expenses incurred due to the negligence of the applicant.

In order to qualify for the allocation of premises under the terms of Advert Number 74, applicants needed to satisfy several other conditions concerning the ownership of property. Among others, applicants were required to ensure that three years prior to the date of the first publication of the advert in the *Government Gazette* up till the date of the notification of the allocation of the premises they did not own any immovable unbuilt property either in whole

or in part ownership or on perpetual emphyteusis and on which a building permit for habitation purposes had been issued or could be issued by the Malta Environment and Planning Authority.

The Housing Authority also had the right to conduct verifications regarding applicants covering the last three years prior to the date of the advert. In addition the Authority reserved the right in its absolute discretion to disqualify applicants if it resulted that during this period applicants had sold property that belonged to them and acquired capital which would have otherwise disqualified them from being eligible to take part in the scheme despite the fact that this capital was not yet evident from the verifications conducted.

The Ombudsman noted that in line with procedures on similar allocations and following the signing of the preliminary agreement, the Authority proceeded to gather information regarding complainants' assets and liabilities. Searches at the Land Registry confirmed the version that was given by A.B. and B.B. regarding their Swieqi property.

Upon being asked to explain the reason why they divided their residence in two units, complainants mentioned their financial difficulties and explained that they used the proceeds from the sale of the second unit to settle their outstanding debts and capital gains tax. Their problems were further compounded when a year after this sale, A.B. was involved in a serious car accident which left him with a permanent disability of 8% and necessitated the purchase of an electric car. Complainants admitted that they were facing outstanding expenses as well as pending utility bills.

On 9 March 2010 the Housing Authority informed complainants that since they were in breach of one of the conditions in section 4(f) of Advert Number 74 of 2008, they were no longer entitled to acquire the property allocated to them earlier. Upon confirmation of this decision by its Appeals Board, the Authority in July 2010 sent in full and final settlement a cheque representing 70% of the deposit paid by A.B. and B.B.

Complainants refused to accept this decision. They argued that the Housing Authority acted unfairly towards them when it withheld 30% of their deposit and insisted that when they discussed their situation, an official of the Authority advised them to go ahead and to send their application. A.B. and B.B. stated that they even took a bank loan to pay the deposit upon the signing of their preliminary agreement with the Authority.

In view of these circumstances complainants asked for a refund of the whole deposit from the Authority. This request was, however, turned down on the grounds that they were merely being required to observe one of the stipulations in their contract, namely that the Authority would retain 30% of the money deposited on the promise of sale if for some reason the sale would fail to materialise.

Considerations by the Ombudsman

The Ombudsman pointed out that two issues needed to be addressed in this complaint: firstly, whether the Housing Authority was entitled to disqualify complainants' application; and secondly, in the event that this was a correct decision, whether A.B. and B.B. should be refunded the whole amount of their deposit or be made to forfeit 30% of this amount.

With regard to the first issue: the Ombudsman referred to complainants' admission that when they had found themselves hard up, they decided to divide their residence in two separate apartments and sold one of them in September 2006. According to the Ombudsman, however, the reasons that led them to divide their residence and sell part of it were irrelevant for the purpose of his investigation.

The Ombudsman observed that in terms of Advert Number 74 applicants who owned habitable premises in the three years that preceded the date of its publication in the *Government Gazette* – that is between 28 November 2005 and 28 November 2008 – were not eligible. It was therefore evident that when complainants submitted their application under the Scheme, they were even at that stage in breach of one of its conditions. As a result they could not expect the Authority to finalise in their favour the transfer of ownership of the maisonette that was allocated to them.

While recognizing that this allocation took place before verifications were made by the Housing Authority of documentation submitted by A.B. and B.B. and of other information that emerged from its researches, the Ombudsman agreed, however, that the Authority is right to carry out these checks after the signing of a preliminary agreement since these involve additional work and expenses.

The Ombudsman remarked that it was pertinent to point out that complainants failed to prove that before or at the time that they filed their

application under the scheme they informed the Authority that until September 2006 they owned a three-bedroom apartment. He stated that while he was sure that complainants were in good faith, in their explanatory note they emphasized that their residence was small and had become inadequate for the needs of their family but failed to mention that at one point within the period indicated in the scheme they owned adequate premises.

Once the Ombudsman established that the Housing Authority was justified to disqualify complainants, his next step was to examine whether it acted in a correct manner when it only returned 70% of the amount that A.B. and B.B. had paid by way of deposit.

In this regard he pointed out that the Authority acted in accordance with section 7(4) of the scheme that laid down that if after the signing of the preliminary agreement the Authority would find that a beneficiary is in breach of its conditions, this person would not be entitled to any property that might have been allocated earlier. In similar circumstances the Authority would consider the preliminary agreement null and void and the beneficiary would be refunded 70% of the sum paid on this agreement while it would retain 30% of this sum.

The Ombudsman pointed out that a similar, but not identical, condition appeared in paragraph 4 of the preliminary agreement that had been entered into between the Authority and complainants.

The Ombudsman, however, admitted that it was his opinion that given the difficult financial situation in which complainants found themselves since 2006 and the hardship that they had to face, the Authority should reconsider its decision to retain 30% of the deposit and instead refund the amount paid by A.B. and B.B. in full. This would enable them to settle the loan that they had taken to pay the deposit to the Authority and look for other property on the open market.

Conclusions and recommendations

At the end of his review of the whole situation the Ombudsman declared that he could not uphold complainants' view that in their case the Housing Authority had acted unfairly. On the contrary the Authority had acted correctly all along and followed the terms of the contract both when it disqualified A.B. and B.B. from participating in the scheme and also when it invoked the retention clause.

The Ombudsman, however, recommended that in the absence of any conclusive proof of bad faith on the part of complainants, on strictly humanitarian grounds the Authority should release the amount that it had retained and refund to them 30% of the money paid by way of deposit that they had forfeited.

Outcome

The Housing Authority was receptive to this recommendation given the sensitive nature of the case. A few days later the Chairman of the Authority informed the Ombudsman that the Board was in agreement with his conclusions and that procedures were in hand for a prompt refund of the outstanding deposit of 30% to complainants.

Ramon's unfulfilled aspiration to improve his lot
(Employment and Training Corporation)

The complaint

Ramon, an Executive with the Employment and Training Corporation (ETC), alleged in a complaint with the Ombudsman that the Corporation failed to act in accordance with the provisions of the Employment and Training Services Act when in mid-March 2010 it issued a permit to Malta Enterprise (ME) to issue an open call for applications to fill the post of Manager in its Business Service Centre. The requirements for this position consisted of tertiary qualifications in Business Administration, Management, Commerce or equivalent together with a minimum of four years experience in service provision.

Complainant explained that although employed with the ETC, his name featured on its Register of persons seeking employment and specifically on Part Three that consists of individuals already in gainful occupation who would like to find alternative employment. As a result, when Malta Enterprise informed the Corporation about this vacancy, the ETC submitted a list of twenty-one persons on Parts Two and Three of its Register (including complainant) as potentially suitable candidates and asked the ME management to forward a report on the outcome of interviews held with any of these persons as soon as possible. At the same time the Corporation advised Ramon, like all other candidates on this list,

to submit a letter of introduction and a *curriculum vitae* to Malta Enterprise in connection with this vacancy. Complainant duly complied.

A few days later Malta Enterprise management informed the Corporation that after having gone through the applications that were submitted by only three candidates out of this list, it was found that only Ramon could be considered for an interview since the two other candidates lacked the necessary experience for the post.

Complainant went on to explain, however, that even before his interview took place and before the conclusion of the statutory referral procedure mentioned in the Employment and Training Services Act, the Corporation accepted a request by Malta Enterprise to be allowed to issue an open call for applications for this post on the grounds that there was only one suitable person for this vacancy. Although the ETC gave this permit on the understanding that complainant would be given preference over other applicants under an external call, Ramon felt hard done by. He argued that in terms of subarticle 15(4) of the Employment and Training Services Act[4] once the ETC had submitted the name of a suitable candidate, the Corporation should not have allowed Malta Enterprise management to reject his nomination and go ahead with different arrangements to recruit a person for this post.

Ramon went on to plead that under subarticle 15(5) of the Act,[5] Malta Enterprise was obliged to give its reasons in writing for rejecting an applicant who was referred by the ETC. Furthermore, the Corporation was empowered to order Malta Enterprise to employ this candidate in the occupation for which his name was submitted if after due investigation it would result that ME rejected this person without just cause. According to Ramon, since Malta Enterprise gave no reasons for rejecting his application while the ETC ignored its obligation at law and allowed Malta Enterprise to issue a public call, there was a clear breach of the Employment and Training Services Act.

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4 *"If upon a request for employees made to the Corporation by a Government department or any other employer … …, the Corporation is unable to submit suitable applicants, the department or other employer may recruit the employees required in virtue of such other arrangements as the Corporation may authorize in any case or class of cases."* (subarticle 15(4) of the Employment and Training Services Act).

5 *"A Government department or other employer … … rejecting an applicant submitted by the Corporation shall specify in writing the reasons for rejection. Where in any case the Corporation, after due investigation, is satisfied that the department or employer has rejected an applicant without just cause, it may order the department or employer concerned to give employment to the applicant concerned in the occupation for which he was originally submitted by the Corporation."* (subarticle 15(5) of the Employment and Training Services Act).

Facts and findings

The Ombudsman found that the way in which events unfolded as recounted by complainant was to a large extent correct and reliable. During his investigation the Ombudsman confirmed that subsequent to the open call for applications Ramon applied again for this post and was interviewed in mid-May 2010 but again failed to make the grade. Feeling upset, he asked the Employment and Training Corporation to explain why Malta Enterprise had been exempted from giving any feedback to the Corporation about his application. He also inquired why the Corporation allowed ME to issue an open call for applications before procedures concerning his eligibility were concluded.

The Ombudsman found that the Corporation told Ramon that its practice since 1990 has been that if the number of eligible candidates whose names it submits to an employer is below or is equivalent to the vacancies that need to be filled, it would allow the employer to issue an open call for applications as long as any candidate submitted by the Corporation would be preferred over other applicants under this call.

In his reply Ramon alluded to subarticle 15(4) of the Employment and Training Services Act and argued that once the ETC submitted the name of a suitable applicant to Malta Enterprise, the Corporation should not have authorized ME to issue an external call for applications; and this call was in his view *ultra vires*. He insisted that the law does not lay down that the ETC needs to submit the name of more than one eligible applicant when there is only one vacancy at stake and that since of the list submitted by the ETC only his application was eligible, this meant he was suitable for the job and ought to have been chosen while Malta Enterprise should not have been allowed to issue a public call.

On being approached by the Ombudsman the ETC explained that this permit was issued under subarticle 15(2) of the Employment and Training Services Act[6] and referred to its standard condition that in similar cases preference should be given to its candidates over any other applicants.

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6 "*Where the recruitment of employees by the Government or any other employer ... is in connection with the employment of –*
(i) persons required to fill posts, on the basis of a contract for a definite time requiring a special trust or posts for which academic or professional qualifications are necessary; or
(ii) persons engaged from outside Malta,
the Corporation may cause or authorize recruitment, whether through referral by it or otherwise, under such conditions or in such manner as the Corporation may deem appropriate." (subarticle 15(2) of the Employment and Training Services Act).

The Ombudsman found that although Malta Enterprise advertised this post in April and August 2010, in early September the Corporation was still unaware of the outcome since ME failed to inform the ETC that complainant's application had been rejected. He also found that when six months after the issue of the permit ME management asked that its validity be extended, the Corporation accepted this request with no questions asked despite his ongoing investigation. When the Ombudsman queried this action at a time when the issue was under scrutiny and pointed out that this could be considered as, even if unintentionally, reflecting lack of respect for his Office, the Corporation immediately suspended the renewal of this permit.

As he probed the matter further the Ombudsman found from Malta Enterprise that when the four applicants under the external call were interviewed in mid-May 2010, both complainant with 46% as well as the first placed candidate with 56% were turned down. The Ombudsman also ascertained that ME management gave full details to the Corporation about marks awarded to Ramon under each of the five assessment criteria based on the selection board's evaluation of his merits and the Corporation was satisfied that the board's decisions were justified.

The Ombudsman took cognizance of the ETC's view that taken as a whole article 15 of the Employment and Training Services Act should not be construed as meaning that all applicants whose names are forwarded to a prospective employer to fill a vacancy would necessarily serve his requirements. Employers are allowed discretion in their choice of job seekers who would best suit their needs and applicants who harbour any doubts on a selection process can seek redress provided by law.

The ETC management further contended that subarticle 15(5) of the Act allows the Corporation a measure of discretion in that the ETC "*may order the … employer concerned to give employment to the applicant concerned in the occupation for which he was originally submitted by the Corporation*". The Corporation argued that the Act uses the word "*may*" instead of "*shall*" so as to strike a balance between curbing the abusive rejection of an employee for no justifiable cause and permitting on the other hand discretion to an employer in the selection of employees for his workplace.

The Ombudsman noted, however, that while Ramon based his arguments on subarticles 15(4) and 15(5) of the Employment and Training Services Act,

he failed to refer to subarticle 15(2) which could apply in this case since the request for the position of Manager in ME's Business Service Centre listed as a requirement the possession of tertiary qualifications together with the required experience. This subarticle could reasonably be interpreted as sanctioning resort to any procedures that the ETC may deem appropriate when a vacancy is to be filled, as in this case, by a person with tertiary qualifications. Given that, according to the Ombudsman, this is a standalone provision, he found no grounds to conclude that the ETC acted in breach of the law when it allowed Malta Enterprise to issue an open call for applications.

The Ombudsman went on to observe that without prejudice to the above considerations, it was possible that the interpretation by the ETC of subarticle 15(4) of the Employment and Training Services Act might not have been fully correct. The ETC stated that under its policy when the number of eligible persons on its Register does not exceed the number of vacancies, it authorizes an external call on condition that the person on the Register is given preference. However, since subarticle 15(4) refers to situations where the ETC is "*unable to submit suitable applicants*", the Ombudsman ruled that in this instance it was not applicable since the Corporation had submitted the names of several persons whom it considered suitable for the vacancy in question.

The Ombudsman went on to point out, however, that subarticle 15(4) refers to a situation where the ETC is "*unable to submit suitable applicants*" in the context of "*a request for employees made to the Corporation*" where in both cases the plural is used. Taking these circumstances into account Ramon's argument that once there was only one vacancy, one suitable applicant would be enough for this applicant to be considered by the employer making the request to the ETC is a viewpoint that should not be discarded.

The Ombudsman, however, recalled that when the ETC submits names of persons to a prospective employer, its role is not to determine who is most suitable to fill a vacancy but merely to put forward names of persons on its Register who could be considered suitable for this job opportunity. Complainant rightly or wrongly considered himself suitable for this post while he was also on Part Three of the ETC's Register – and this entitled his name to be submitted by the Corporation to Malta Enterprise.

In the Ombudsman's opinion, however, the role of the ETC to identify prospective eligible employees who possess qualifications required by an

employer does not equate with considering these candidates as suitable for these posts. Clearly it is the employer who has the ultimate responsibility to determine whether an applicant in possession of the required academic qualifications and experience is suitable enough to fill a vacant post in his workforce.

The Ombudsman gave due weight to Ramon's argument that in terms of subarticle 15(5) Malta Enterprise was obliged to give reasons in writing for its refusal to accept an applicant whose name was given by the Corporation and that if after investigation the Corporation considered that there was no just cause for such rejection, it could order the employer to recruit this applicant. Since by the time that complainant submitted his grievance Malta Enterprise had not yet given any such reasons, he claimed that the Corporation ignored its obligations at law and should not have authorized ME to recruit through a public call.

The Ombudsman recalled that the ETC submitted to Malta Enterprise the names of twenty-one persons on its Register who in its view were suitable for the vacancy in question and that only three sent their applications; and of these, complainant was the one who was considered eligible for an interview. In view of this, ME asked the Corporation to be allowed to issue a public call but although following this call complainant and three other applicants were interviewed, again none were successful.

The Ombudsman pointed out that even if for the sake of argument Ramon was right to insist that he should have been interviewed before the open call was published, the fact remained that he had still been interviewed. This meant that his right to an interview had not been prejudiced while his interests had been safeguarded. Although the result of the interview that Ramon was not suitable to fill the post was not to his liking, this did not render the selection process less credible or less trustworthy.

With regard to Ramon's claim that Malta Enterprise took a long time to react to his nomination by the Corporation as a possible candidate, the Ombudsman pointed out that as soon as his Office raised this issue, ME straightaway provided full information on the selection process including marks given to applicants. This confirmed that complainant failed his interview and convinced the Ombudsman that Malta Enterprise had a valid cause to reject his application.

Conclusions and recommendations

In the light of the facts that emerged during his investigation the Ombudsman concluded that in terms of subarticle 15(2) of the Employment and Training Services Act, the ETC was free to apply the procedures that it deemed fit since an academic requirement was required for the post in question.

He also concluded that complainant was incorrect to maintain that he was suitable to fill this post. Although eligible for this position by virtue of his being on the Register and by possessing the required qualifications and experience, this did not automatically equate with suitability for the post. It is an employer who has the right to determine who is suitable to fill a vacant position in his organization following an evaluation of the merits of potential employees even if the law provides that the ETC has to be informed of the outcome of a selection process and to be satisfied that an applicant whose name it has submitted is not rejected without just cause. In this case the Ombudsman accepted the Corporation's belated explanation that ME handled this issue in an acceptable manner.

The Ombudsman, however, went on to declare that without any prejudice to his conclusions, once the ETC submitted the names of potential applicants to ME and at a later stage approved the issue of an open call, the Corporation should not have waited to be prompted by this Office to ask Malta Enterprise management for the outcome of the first selection process. In his view the ETC had not acted correctly when it renewed the permit even though at that stage it was still unaware of Ramon's performance and also when it knew about the Ombudsman's ongoing investigation on issues arising from the permit. This behaviour attracted a critical comment by his Office.

The Ombudsman pointed out that ETC policy to authorize an employer to issue a public call for applications despite a pending application by a person on its Register whose name it would have submitted for the employer's consideration, may not necessarily reflect the spirit of the law. He recommended that the ETC should seek legal advice on its interpretation of the relative provisions of the law.

Additional comment by the Ombudsman

The Ombudsman stated that his investigation found that persons in full-time employment who wish to move to another job can apply to be placed in Part Three of the Corporation's Register and in terms of the law and current ETC policy, this may give them an edge over other applicants for vacant posts. This means that in theory at least most if not all interested persons in full-time employment could apply to be on Part Three of the Register and in this way gain advantage over other applicants for a vacant post.

Upon being given to understand that the Corporation is aware of persons who used this system to their advantage, the Ombudsman remarked that this could lead to an abuse. He therefore advised the ETC management to consider whether the law should be tightened to prevent any such abuse while ensuring that any positive aims that were intended by this provision are not unduly compromised.

When the recommendations of an Appeals Board were brushed aside
(Malta Information and Technology Agency)

The complaint

A Data Protection Analyst with the Malta Information Technology Agency (MITA) complained with the Office of the Ombudsman that the agency treated her unfairly on various counts.

In her first grievance complainant referred to a ruling in her favour by an internal Appeals Board that her performance appraisal for 2008 based on her Performance Management and Development Programme (PMDP) should be cancelled and she should be reassessed in line with the agency's *Handbook for Employees* that lays down guidelines for the process for the performance appraisal of MITA employees. Complainant alleged, however, that when her Department Manager conducted a reassessment of her performance, he merely confirmed the original assessment and did not even bother to follow the process laid down in the *Handbook* despite the recommendation by the Appeals Board.

In her second grievance complainant claimed that a call for applications for the next higher post of Project Leader was due to be issued in June 2010. However, to her disappointment she found that the Chief Executive Officer (CEO) of the agency in the meantime had issued instructions that only employees in possession of a university degree could take up this post and other higher positions in MITA.

Complainant regarded this directive as a bar to her career progression and as a discriminatory move against her. She pointed out that up to January 2010 the CEO awarded several direct appointments in agency positions such as Analysts, Project Leaders, Consultants, Department Managers and Managers to employees not in possession of a university degree.

She went on to claim that a university degree was not necessary for the position of Data Protection Manager, the next higher grade after the post of Project Leader in the agency, while even the incumbent Project Leader did not possess a university qualification.

By way of redress complainant requested the Ombudsman to recommend the upgrading of her Performance Management and Development Programme so that her classification would do more justice to her overall contribution at her workplace and reflect her work ethic and commitment. This would mean that the assessment by her superiors that she met the requirements of her position be raised to a higher rating.[7] She also requested that she would be promoted Project Leader.

Facts and findings

In March 2001 complainant joined the Malta Information Technology and Training Services Limited (the precursor of MITA) as Data Protection Analyst and had served ever since in the Data Protection Unit. Whereas there were originally three Data Protection Analysts in this Unit who were responsible to a Project Leader who would in turn report to a Line Manager, as the years went by, however, complainant remained as the only serving Data Protection

7 MITA's system of annual performance appraisals for its staff up to early 2010 was regulated under the *Performance Management and Development Programme – a Handbook for Employees, version 4.1* dated January 2008. Under these norms for overall staff performance evaluations, the final review ratings were divided in five categories: performance that is exceptional; that exceeds position requirements; that meets position requirements; that requires improvement; and that is generally poor.

Analyst. With the retirement of the Project Leader, the Unit was left with only three employees: complainant; one Line Manager; and one Department Manager.

Early in 2009 MITA management started to consider proposals for the divestment of various units that formed part of the agency including the Data Protection Unit and by September it appeared likely that the Office of the Prime Minister (OPM) would take over the functions of this Unit. In this regard one of the pending issues concerned complainant's role in the new setup since management felt that at such a late stage in discussions on the transfer of the Unit, it would seem unorthodox to fill the senior post of Project Leader in a unit whose control it was shortly due to relinquish and when complainant and her Line Manager were already reporting for work at the OPM.

Complainant's appraisal for 2008 ranked her exactly in mid-position with a performance that was considered to meet position requirements; but feeling upset with this assessment, she submitted an appeal to the agency's Appeals Board. In this case, the Board agreed to limit its review as to whether the appraisers had followed correctly the procedures laid down in the *Handbook* and whether the rating faithfully reflected complainant's performance. In accordance with MITA internal policy, upon the conclusion of its review process, the Appeals Board could recommend any of the following options: confirm the original assessment rating; cancel the original rating and request a re-assessment; itself recommend a new rating; or recommend any other appropriate solution.

In its verdict on 28 August 2009 the Board stated from the outset that it felt that it was not in a position to assess the merits of complainant's rating. It went on to find that there could have been irregularities in the manner in which comments were included in complainant's Appraisal Form by her superiors after she had already signed this form and without being allowed the possibility to review these comments and put forward her remarks. The Appeals Board also concluded that criteria adopted in complainant's appraisal were not consistent with those listed in the *Handbook*. In the light of these findings the Board recommended that complainant's original assessment should be cancelled and that a re-assessment, based on procedures outlined in the *Handbook*, should be carried out.

In a subsequent Memorandum the Appeals Board clarified that although the *Handbook* and the Appraisal Form set a list of criteria and other objective measurements to determine an employee's overall performance rating, the main yardstick that seemed to have been adopted in complainant's appraisal was whether she performed duties over and above those set out in her position description in a consistent manner. The Board considered that on the whole this appraisal resulted in a discrepancy between the information included in complainant's PMDP form and the final overall rating given to her. The Board further noted that the reassessment procedure adopted was in breach of the *Handbook* since again a decision was reached without a previous discussion with complainant and feedback to her regarding her performance.

The Appeals Board again stressed that the Appraisal Form itself explains that an employee's rating should be based on objectives that were set and on the performance of the employee as well as agency values. The Board also referred to the *Handbook* that provides a more exhaustive checklist of elements that need to be taken into account such as the behaviour and attitude of the employee; the employee's performance on the basis of the position description; and objectives set at the outset of the assignment.

Taking into consideration the various guidelines for the evaluation of an employee's performance, the Appeals Board expressed the view that an appraisal should take the following main criteria into consideration:

- rating of company values;
- degree of attainment of objectives;
- performance in the light of the employee's position description; and
- sick leave quota over a period of three years.

Guided by these yardsticks, the Appeals Board felt that results achieved by complainant under the first two criteria should remain the same as those given by the board that drew up her original performance appraisal and accepted by complainant and there was no reason to change these results. The Board went on to state, however, that it felt that both parties ought to discuss whether complainant's performance met or somewhat exceeded or consistently exceeded what was required of her by her position description and also consider her sick leave quota.

Delving deeper into the case the Appeals Board remarked that since under the first two criteria complainant's performance was commendable, the persons who drew her performance appraisal needed to substantiate their final rating that she only met position requirements since this meant that her score under the two other criteria had depressed considerably her overall score. The Appeals Board was of the view that complainant should be given clear reasons for this evaluation especially in view of the creditable result that she achieved in relation to the first two criteria relating to company values and objectives.

Despite this detailed Memorandum by the Appeals Board the Ombudsman, however, found no evidence to show that after the Board cancelled complainant's original assessment, there had been a proper reassessment based on the *Handbook* for MITA employees to evaluate her performance.

To gain a deeper insight the Ombudsman spoke to complainant's Department Manager who admitted that since he had not served in this position for long, in his reassessment of her performance he had discussed with her Line Manager the attainment of the set objectives. This led him to conclude that since complainant's workload was at par with that of other employees and was also in line with her position description, her original rating that she met position requirements should remain unchanged.

On his part complainant's Line Manager confirmed that following the decision by the Appeals Board, no new assessment was carried out and that after having discussed with him the points raised in complainant's appeal, the Department Manager merely confirmed the original rating. The Line Manager insisted that complainant could not be awarded a higher rating because she had not carried out work above her load or identified new work systems that made the Unit more effective.

During his investigation the Ombudsman found that the decision by the Appeals Board that discussions should be held with complainant and that an explanation should be given to her, was simply ignored. Contrary to what he declared to the Ombudsman, the Department Manager failed to abide by the provisions laid down in the *Handbook* and also failed to observe the instructions of the Appeals Board.

The Ombudsman also noted that the Appeals Board stated that the Line Manager admitted that complainant's overall performance rating was given

on the advice of her Department Manager that an *exceeds* classification should only be given to employees who show a consistent level of commitment and perform tasks that are over and above duties set in their position description.

The Ombudsman found that the Appeals Board considered complainant's allegation that the classification of employees' performance in the agency was not based on merit but was done instead under a system whereby employees awarded a relatively high classification would receive a lower rating in the subsequent year when it would be the turn of those left out in the previous year to be awarded a high classification. The Appeals Board, however, was unable to confirm that MITA management followed such a practice. In this regard documentation seen by the Ombudsman provided satisfactory evidence to support the statement by MITA management that its 2008 ratings were not given by rotation as had been alleged but were based on individual performance and on a comparative assessment of the merits and strengths of employees.

Referring to the directive by the agency's CEO that a university degree was required for the post of Project Leader, the Ombudsman stated that he could very well understand why complainant felt upset by this decision. At a time when the agency's Project Leader was shortly due to retire and she was still reading for a first degree, she felt that this directive jeopardized her career prospects and prejudiced her aspirations for a higher position in MITA.

The agency's HR Office confirmed to the Ombudsman that in June 2009 MITA's Chief Executive Officer instructed that academic qualifications would henceforth be required for certain posts within the organisation and that this requisite had to strictly enforced. This stand was adopted because in some earlier internal calls, there were instances when selection boards gave positive consideration to the experience of candidates already employed at MITA but who lacked the necessary academic qualifications.

Upon learning that discussions on complainant's career progression had preceded these instructions, the Ombudsman examined appointments and promotions during the previous two years together with the academic requirements attached to these posts. From this list the Ombudsman found that in several appointments made after the CEO's directive, in posts where a degree was required the persons who received these appointments did not possess any such qualification.

The Ombudsman found that in his Memorandum on 26 June 2009 in the context of a review of employee selection procedures, the CEO expressed his concern that some of these procedures reflected practices that were likely to compromise the competencies of agency staff particularly in terms of formative academic qualities which give professional standing essential for certain positions. The CEO instructed that with immediate effect, including calls that had already been issued, applicants for posts from the grade of Systems Engineer upwards[8] had to be screened against all the eligibility criteria and not just academic qualifications that appeared in the position description while waivers of requirements were to be considered in exceptional circumstances only and had to be clearly motivated by objective reasons. He also instructed that in any such instance, resort by a selection board to its discretion had to be fully justified in its final report. The CEO also made it clear that in staff selection and promotion processes, experience cannot be marked as equivalent to academic qualifications when it is rated as a separate evaluation criterion.

The Ombudsman recalled that during a meeting on this complaint the CEO placed the issue of complainant's career progression to a large extent in the context of the agency's apparent reluctance to fill a senior position at a time when the process to transfer the Data Protection Unit to the OPM was still under way. At no stage during this meeting, however, was any reference made by the CEO to the fact that complainant could not be promoted because she had not completed her university studies.

The Ombudsman also referred to his contacts with the Operations and Programme Implementation Directorate at the OPM that was involved in discussions with MITA management on the transfer of the Data Protection Unit. This Directorate confirmed that there would be no objection to accept employees in this Unit in the grade that they were considered to merit on the agreed cut-off date.

In the course of the Ombudsman's investigation a controversy arose between the parties to the grievance when complainant alleged that a member of the agency's senior management declared that she would not be promoted to Project Leader once she had taken her case to the Office of the Ombudsman. On his part this person explained that his words were to the effect that once

8 The grade of Project Leader in MITA is on the same level as that of a Systems Engineer.

the case was the subject of an investigation by the Ombudsman, it made sense to await his ruling before moving forward.

Considerations and comments

The 2008 appraisal of complainant's performance

The Ombudsman explained that the first aspect of this complaint centred on whether MITA management complied with the recommendations by the Appeals Board that the evaluation of complainant's performance during 2008 should be cancelled and that this assessment should be started afresh in view of a glaring discrepancy between the information included in complainant's appraisal in her PMDP form and the final rating given to her. From evidence gathered by the Ombudsman it resulted that when MITA management re-assessed complainant's rating, no new assessment was carried out; and this was in breach of the agency's *Handbook*.

With regard to the decision by the Appeals Board on complainant's appeal, the Ombudsman declared that this Board acted within its mandate in terms of MITA policy which states that an Appeals Board has four options, namely to confirm an original assessment; cancel an original assessment and request a reassessment; itself recommend a new rating; or recommend any other solution.

The Ombudsman took this opportunity to admit that he did not feel comfortable with some of these options and in particular with the option where the Board may cancel the first assessment and request that a reassessment be done by the original assessors since this might not in essence vary significantly from the first review. He noted that in this case the Appeals Board reached its conclusions and delivered its own rating on some elements of the assessment process while it recognised that it was unable to determine a couple of other elements. He stated that once the Board has the mandate to alter a rating, there is nothing to stop it from seeking an explanation on these elements with complainant's superiors and reach its own conclusion on what it regards as a fair and final rating.

Complainant's career progression

This aspect of the complaint was linked to complainant's understanding that subsequent to the CEO's instructions in mid-2009, her career prospects

were suddenly blocked because she could not move on to the post of Project Leader since she was not yet in possession of a degree. Her astonishment was greater when it was known that other agency employees were appointed to higher posts even though not in possession of a degree and it was unknown why these requirements were waived.

The Ombudsman pointed out that information given to complainant by the agency's HR Unit was not in line with the circular issued by its CEO. Concerned that decisions to select candidates for various positions even though they failed to meet the eligibility criteria and the academic qualifications for these posts could contribute to the risk of deterioration in the quality of staff, the CEO directed that any waiver of requirements was to be considered only in exceptional circumstances. Any such decision had to be motivated by objective reasons while the use of the selection board's discretion in these situations needed to be fully justified.

In the Ombudsman's opinion this directive implied that contrary to the message conveyed by the agency's HR Unit to complainant, the policy regarding exemptions from academic qualifications for certain positions in MITA did not change but was henceforth to be strictly enforced. The possibility that complainant would advance in her career was not in this way blocked since waivers from requirements were still possible only in exceptional cases and as long as they would be motivated by objective reasons.

This issue acquired greater importance during the Ombudsman's investigation when the process to hive off the Data Protection Unit continued to move apace while the post of Project Leader for which complainant nourished aspirations, became vacant as the holder retired. While appreciating MITA's caution on any unilateral decision to fill this position at this stage in the process to transfer the Data Protection Unit, the Ombudsman recalled, however, that the OPM had indicated that it would find no difficulty to accept staff of this Unit in a grade that would reflect their functions and capabilities.

Taking these circumstances into account the Ombudsman stated that in order to determine whether complainant should advance to the post of Project Leader, MITA management had to consider whether this post still needed to be filled once the Unit would move to the OPM. Another decision that had to be taken was whether complainant was suitable for the post given her past performance in the Unit and MITA's policy for career advancement. The

Ombudsman commented that in reaching this decision, account should be taken of past efforts by MITA management to consider ways how complainant could improve her status in the agency and of the fact that discussions on this issue had started before the issue of the CEO's instructions in mid-2009.

In this connection the Ombudsman observed that he disagreed with the implication by MITA management that its hands were tied once the case was under scrutiny by his Office. If an employee is considered to possess enough merits to deserve a promotion, an administration that is under scrutiny need not await the Ombudsman's decision. Making just and fair administrative decisions to resolve a dispute amounts to good administration and is to be lauded and what is to be condemned is any discrimination on the grounds that an employee would have exercised the right to have recourse to the Ombudsman in terms of the law.

Conclusions and recommendations

Taking everything into account the Ombudsman upheld complainant's allegation that the recommendation by the Appeals Board to cancel her original rating for 2008 had been ignored.

Regarding complainant's fears that her career prospects were jeopardized, the Ombudsman concluded that the information given to her by the HR Unit that she could not be promoted to Project Leader because she did not possess a degree was inaccurate. Instructions by the agency's CEO were a response to recommendations by internal selection boards that MITA officials be promoted even though they lacked requisites that appeared in the calls for applications. These instructions demanded strict adherence to MITA policy but did not automatically exclude complainant from moving on in her career; and this was confirmed by the subsequent appointment of several employees in grades that were at the same level or even higher than that of Project Leader.

The Ombudsman ruled that the agency's CEO acted wisely when he exercised caution in filling the vacancy of Project Leader at a time when the Data Protection Unit was on the verge of joining the OPM. While appreciating the concern shown on the award of a promotion to complainant as Project Leader when discussions on the transfer of the Unit were still under way, he recalled, however, that even at that stage the OPM made it clear that it would find no objection to a promotion to complainant as long as this was due on her own merits.

The Ombudsman stated that he was not in a position to confirm or reject complainant's allegation regarding rotation in annual performance ratings given to agency employees. However, statements made to him and that are protected by the Data Protection Act provided no evidence of any rotation in respect of these ratings for 2008.

During his investigation the Ombudsman found that the management of the agency seemed to labour under the impression that in general an administration may suspend what would by all accounts be considered as a fair and equitable decision if circumstances linked to this decision would at that time be under his scrutiny. According to the Ombudsman, this is a wrong attitude and a wrong approach.

Good administration demands that if taking a pending decision could resolve an outstanding issue, the administration should not hesitate to act even before the Ombudsman's Final Opinion. What is unacceptable in similar situations would be a decision by an administration while an investigation is under way that would in effect close the door to any eventual recommendation by the Ombudsman as a fair remedy to a complainant in the event that the grievance would be sustained.

The Ombudsman finally recommended that the CEO of the agency should ask the Appeals Board to take it upon itself to determine complainant's final rating for 2008 in line with its mandate under MITA policy. He further recommended that MITA should reconsider its policy that the Appeals Board can request the original, rather than new and independent, assessors to carry out a reassessment of an evaluation of an agency employee; and the Ombudsman was pleased to note that MITA management indicated that it would consider this proposal.

The Ombudsman recalled that consideration was already being given to complainant's career progression in June 2009 while the OPM indicated that it would not object if she were to be promoted before the Data Protection Unit was hived off from the agency. He recalled the recommendation made earlier in favour of complainant's promotion by a MITA senior official and suggested that a decision on her position in the Unit should be taken by the agency management before discussions on the transfer of the Unit came to an end so that she would start her role in the new set up with a clean sheet. Any such decision should give full weight to complainant's merits as well as the

need to retain the position of Project Leader in the light of MITA's policy on the career advancement of its employees.

Outcome

A few days after the submission of the Ombudsman's Final Opinion, the Chief Executive Officer of the Malta Information Technology Agency informed the Ombudsman that the Appeals Board had been directed to determine complainant's final rating. Furthermore, resource requirements for the Data Protection Unit subsequent to its transfer to the Office of the Prime Minister had been determined and since it was agreed that there was a need for the post of Project Leader, an internal call for applications to fill this position had been issued and was due to be processed according to established recruitment procedures.

Prematurely positioned PV panels
(Malta Resources Authority)

The complaint

The Ombudsman received a complaint from the owner of a household when Enemalta Corporation turned down his request for payment for electricity supplied to the national grid by a means of system of photovoltaic panels that he installed on the roof of his residence.

Facts of the case

Complainant explained that in early October 2010 with a grant offer letter the Malta Resources Authority (MRA) approved his purchase of several photovoltaic panels with a peak capacity of 10.08kW. When installation works were completed within the agreed period and formalities with the Authority were finalized as confirmed by a letter sent to him in mid-January 2011, an MRA official reportedly told him that the next step would take place within a fortnight when the Authority would approach him and ask him to pay Enemalta an administrative fee of €105 for the installation of a meter that would monitor supply delivered by his PV system to the Corporation's electricity distribution network. However, when the MRA failed to contact him while Enemalta refused to accept payment, complainant discovered that the Authority had not yet issued the feed-in tariff.

Early in March 2011 complainant wrote to the MRA and blamed the Authority for stalling the whole process by its failure to publish this tariff. Rejecting this charge, the Authority informed him that at that stage it was only possible for him to apply under the new Feed-in Tariff (FIT) Scheme established under Legal Notice 422 of 2010 and as amended by Legal Notice 70 of 2011.[9]

When asked by the Ombudsman to explain, the MRA submitted in its defence that since complainant had not applied for payment of a feed-in tariff in respect of electricity generated from his PV installation in terms of the applicable legislation, the Authority was unable to consider his request. The MRA pointed out that complainant had instead only applied for the issue of a grant by the Authority for the purchase of a PV system together with a notification of electricity generation using PV panels.

The MRA explained that complainant failed to notify the Authority of the installation of this system prior to its construction as required by law and had only notified the Authority after these works were completed. The MRA was therefore in no way to blame for his belated application. The Authority went on to explain that notification of a PV system with the Authority does not give the owner any right to connect the system to the electricity grid as had occurred in this case since it is Enemalta Corporation, as operator of the country's electricity distribution system, that can authorize these connections.

The Authority also pointed out that payment of a feed-in tariff is only due from the time when the owner of a PV system first produces electricity from his solar photovoltaic installations and his panels are connected to the distribution system with the appropriate protection and metering equipment which in terms of the law is provided by Enemalta Corporation to measure the quantity of electricity supplied. Enemalta, however, only provides this equipment after the submission by an applicant of all the necessary documentation including an application for a PV connection; notification of the PV system as approved by the MRA; and a feed-in tariff form, also as approved by the MRA. In this case complainant submitted his notification to the MRA on 10 January 2011 when the Feed-in Tariff Scheme was closed and so he was ineligible to participate.

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9 *Feed-in Tariffs (Electricity generated from solar photovoltaic installations) Regulations, 2010* (Legal Notice 422 of 2010) as amended by *Feed-in Tariffs (Electricity generated from solar photovoltaic installations) (Amendment) Regulations, 2011* (Legal Notice 70 of 2011).

The MRA management went on to observe that complainant was mixing up two separate processes which are also governed by different procedures, namely the process leading to the issue of a grant on the purchase of photovoltaic panels under a grant scheme for PV installations and the process leading to eligibility for the payment of a feed-in tariff. Whereas the grant scheme is applied in terms of details published by means of a notice in the *Government Gazette* on 22 July 2010 (*A Grant for the Purchase of Photovoltaic Systems in the Domestic Sector*),[10] the Feed-in Tariff Scheme operates separately under the *Feed-in Tariffs (Electricity generated from solar photovoltaic installations) Regulations, 2010* and as amended in 2011.

The MRA emphasized that whenever a household generates electricity, it must be informed beforehand by means of the submission of a notification form. The installation of a PV panel too requires prior notification to the Authority, irrespective of the grant by the Authority under the purchase scheme; and it is only after installation works are completed that a household owner should apply for the payment of a feed-in tariff.

Upon being brought into the picture Enemalta Corporation explained to the Ombudsman that complainant's connection to the national grid was done without its authorization and was unlawful. By way of further explanation Enemalta stated that the delay between complainant's application on 25 April 2011 and the installation of protection and metering equipment one month later was due to industrial action by employees assigned to these works although the Corporation did not consider this interval unreasonable. Moreover, even though complainant's position had in the meantime been regularized, Enemalta reserved the right to take action in respect of his unlawful connection to its grid.

During his investigation the Ombudsman ascertained that complainant failed to follow procedures established by the MRA and Enemalta Corporation with regard to payment to producers of electricity generated from PV panels installed in their households. Although complainant installed his PV system on 21 December 2010 and claimed to have connected it to the distribution

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10 The second paragraph of this notice states as follows:

"2. *Duration of the scheme*

Applications for this call under the scheme may be validly received as from the 28th July 2010 to the 10th August 2010, at 1.00 p.m. This scheme may be modified or terminated before that date by means of a notice in the Gazette. This scheme may be renewed as may be deemed necessary by the Malta Resources Authority also by means of a notice in the Gazette."

system with the permission of the MRA, this was a mistaken belief. The permission granted to him by the MRA was limited to the installation of PV panels in his residence since the connection of this installation to the distribution system could only be done following approval by Enemalta of a formal application for this purpose – and file records seen by the Ombudsman showed that complainant only submitted his application to the Corporation towards the end of April 2011, some four months after the installation of his PV panels. In fact it was only after Enemalta processed this application and after a PV import/export meter was installed in complainant's residence on 25 May 2011 that he could be credited with electricity production according to the tariffs in force on that date.

On being made aware of this sequence of events, the Ombudsman appreciated the difficulties posed by complainant's request to Enemalta Corporation to pay him for electricity that he generated by means of his PV system. This request was submitted prior to his application for the installation of the necessary protection and metering equipment by Enemalta under the Feed-in Tariff Scheme and even prior to the publication of the revised FIT Scheme in March 2011. It was therefore understandable that this situation would cause problems to Enemalta and he readily understood why complainant only started to receive payment as from 25 May 2011.

Regardless of these drawbacks complainant insisted, however, that it was unacceptable that he supplied free electricity to the Corporation prior to this date on the grounds that at that time the Feed-in Tariff Scheme was suspended and no metering equipment had yet been installed in his residence. Enemalta countered by stating that complainant should not expect to benefit from his unilateral decision to connect to its grid in violation of legal and technical requirements and to boot at a time when the Scheme was no longer in force.

Complainant referred to his *Application for connecting a PV unit to the grid* that was presented to Enemalta Corporation on 7 January 2011 where the warranted engineer of the company that supplied and installed his PV system and who carried out inspection and testing works certified that the project in complainant's residence, implemented in accordance with sound engineering practice, ensured correct operation of the PV unit and its proper connection to the grid. He also certified that the results were satisfactory and that the system design was in line with current best practice and had been grid connected according to Enemalta's requirements. The system

was also certified to have been installed in a manner that complied with legal requirements.

Complainant also referred to a statement by this engineer that he had no option but to connect the installation to the grid since he could not otherwise have tested and certified the system as demanded in the Corporation's application to connect a PV unit to the grid given that without the grid voltage, the system could obviously not be tested.

According to Enemalta, however, there is a fine distinction between a connection to its grid for testing purposes and a permanent connection. The Corporation explained that after complainant's engineer was allowed to test for the purposes of certification, he should have then disconnected the system. Enemalta also insisted that applications for participation in the Feed-in Tariff Scheme are subject to conditions set by the relevant regulations and that an application may not be made with reference to a Scheme established in a previous year and that in the meantime was no longer applicable.

Enemalta management also made it clear that it would not consider any back payments to complainant since this would amount to the endorsement of an illegality. Complainant should not have connected his PV system to the grid since this was illegal and also gave rise to safety issues.

The Corporation was adamant that complainant was labouring under a false impression if he thought that the payment of a feed-in tariff was due to him as of right after an installation had been connected to the grid. This tariff only becomes due after an application is approved by the Authority following a process that must take account of requirements laid down in the Regulations. Furthermore, in this case it was not possible to determine the amount of electricity transferred to the grid at a time when no meter had as yet been installed in complainant's residence.

Considerations and comments by the Ombudsman

The Ombudsman pointed out that the legal instruments relevant to this complaint were Legal Notice 422 of 2010 on Feed-in Tariffs as amended by Legal Notice 70 of 2011; the Electricity Regulations, 2004; and guidelines set by the MRA in 2010 on a scheme for a grant for the purchase of PV panels in the domestic sector.

During discussions with Enemalta and MRA representatives the Ombudsman confirmed that after receiving a grant offer letter for the purchase of a PV system but before going ahead with installation works, a household owner is required to file an application with the Authority to participate in the Feed-in Tariff Scheme. It is only after the system is in place that the Corporation would install an import-export meter to measure the flow and volume of electricity supply and that the connection to the electricity grid would be possible.

Having due regard to these legal instruments the Ombudsman pointed out that at law Enemalta Corporation and the Malta Resources Authority seemed to be correct on several points.

Regulation 3 of the Electricity Regulations, 2004 makes it clear that depending on the amount of electricity that a new photovoltaic installation will generate, the owner of a household is required to notify the Authority of his intention to install a PV system before the plant is installed.[11]

At the same time according to Regulations 2, 3 and 6 of the *Feed-in Tariffs (Electricity generated from solar photovoltaic installations) Regulations, 2010* the installation of metering equipment is a pre-requisite for the payment of a feed-in tariff to energy producers. The installation of this equipment requires a prior application to join the Feed-in Tariff Scheme together with the payment of an administrative fee. Furthermore, approval of an application for a grant for the purchase and installation of a PV system is a scheme in its own right and gives no claim to payment under the Feed-in Tariff Scheme.

The Ombudsman recalled complainant's allegation that an MRA official had told him that he would soon be asked to pay the fee for the installation of the meter to measure the amount of electricity that he would supply to the grid although he later found that the FIT Scheme had yet to be issued. This employee, however, did not recall that he ever gave any such advice.

At this stage the Ombudsman declared that in his view this episode was not a crucial element in the determination of the complaint since regardless of what

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11 *"3. (1) No person shall:*
(i) generate electricity;
(ii) supply electricity; or
(iii) carry out any of the functions of distribution system operator,
except under licence of the Authority and on such terms and conditions as may be specified in the licence … …" (Electricity Regulations, 2004).

really happened, this employee had no authority to bind the MRA and Enemalta Corporation in a way that did not conform to the regulations. Furthermore, Enemalta was right to state that the FIT Scheme does not confer any rights to participants except that of being paid for the energy that they would produce and supply to the Corporation as long as this is done according to established procedures and regulations.

The Ombudsman also referred to complainant's well-founded observation that under *Part B – Request for Reimbursement* of the PV Grant Scheme (Promotion of renewable energy sources in the domestic sector), an engineer responsible for the installation and commissioning of a PV system in a household is required to declare that he has done this work and connected the panels to the grid. He admitted, however, that he found somewhat unconvincing the submission by the Corporation that an engineer is expected to connect, certify and then disconnect the installation from the grid.

According to the Ombudsman the wording of the *Request for Reimbursement* refers to an installation that "*has been grid connected*" and the obvious literal meaning of this regulation is that an engineer should first connect an installation, declare as such and leave the installation connected in order to fully satisfy the conditions of the Grant Scheme. Clearly an engineer cannot declare that he has connected an installation on a permanent basis when he has only done so temporarily. On the other hand, not to connect to the grid as the Corporation implied that complainant should have done, meant non-fulfillment of the conditions of the Scheme and, as a consequence, non-payment of the grant.

The Ombudsman pointed out that it seemed fair to conclude that complainant was expected to connect to the grid as part of the Grant Scheme. Taking into account the wording of documents related to the Scheme and the alleged, but unproven, advice given to him by an MRA employee, one could accept as a plausible procedure that in the normal course of events, at least in practice, such connection to the grid by complainant would have been followed by an application to join the FIT Scheme and by the installation of the metering equipment and in turn by payment by Enemalta Corporation for the amount of electricity supplied. Indeed this seemed to be the way that the two schemes (the PV Grant Scheme and the Feed-in Tariff Scheme) operated in practice.

The Ombudsman stated, however, that this sequence was not followed in this case. Since the FIT Scheme closed on 31 December 2010 and was not renewed for several months, complainant was unable to apply for metering equipment

that would measure the flow of electricity generated by his PV system. This led him to supply electricity to Enemalta's grid without the proper equipment and without much prospect of payment.

At this stage the Ombudsman made reference to the administrative procedures that needed to be followed by applicants in connection with the project for the promotion of renewable energy sources in the domestic sector that was part-financed by the European Regional Development Fund. The PV Grant Scheme was divided in two parts and consisted of Application Part A that had to be submitted before the purchase and installation of the PV system and Application Part B (*Request for Reimbursement*) that had to be filled after the receipt by the applicant of the grant offer letter by the MRA in response to Application Part A and after the purchase, installation and commissioning of the PV panels. Once these procedures were followed and once Enemalta would issue the permit to the household owner to sanction the connection to its grid and also install the metering equipment to record the electricity supply, the way would then be clear for a permanent connection to the Enemalta grid. These arrangements would enable an applicant to receive the amount due under the Grant Scheme and allow him to join the FIT Scheme in a short time and in a seamless manner.

The Ombudsman recalled that the MRA employee mentioned by complainant was unable to recall his advice. It was significant, however, that this person did not exclude the possibility that he could have given instructions to complainant on how to proceed that were different from established procedures. This might have happened since, according to the Ombudsman, there were indications that it seemed an accepted practice that the MRA allowed applicants to connect to the grid without having followed the proper procedures that ought to have preceded this stage.

In the view of the Ombudsman this practice, contrary to the regulations, would justify the MRA's decision to change the declaration that needed to be presented by an installation engineer under the 2011 Grant Scheme. Under the new version the installation engineer was required to declare that the system design, construction, inspection and testing were in compliance with current best practice and that the system may be grid connected according to the Electricity Regulations. The Ombudsman stated that the words "*may be grid connected*" now made it clear beyond any doubt that completion of Grant Scheme procedures should in any event take place before the connection of the PV system to the grid.

The Ombudsman declared, however, that things were done differently at the time of complainant's installation when it was tolerated practice for an engineer to connect to the grid without having previously notified the Corporation and sought its approval. However, as long as the FIT Scheme was open and meters were available, this irregular situation would be remedied within a few weeks.

The Ombudsman stated that it appeared likely that complainant was ill advised on how to obtain the grant and start getting paid for the electricity that he supplied to Enemalta Corporation. However, ignorance of the law is no excuse; and even if complainant himself was not familiar with the regulations, his engineer ought to have been aware of the way the system worked before a PV installation in a household could be wired up to the Corporation's grid.

On the other hand, however, documents presented to his Office and doubts that arose as to what the MRA official really told complainant together with changes in the 2011 Grant Scheme indicated that complainant was not the only one who was unaware of how procedures were expected to roll out. Indeed it was likely that complainant could have followed incorrect and illegal procedures to which the Authority and the Corporation both closed an eye for quite some time.

Conclusions by the Ombudsman

The Ombudsman stated that it was obvious that complainant could not expect to benefit from a scheme that did not exist at the time that he installed a PV system in his household. Once the FIT Scheme was closed, the Corporation was correct to hold that it had no basis at law to pay complainant.

The Ombudsman also observed that he could not accept the view that neither complainant nor the suppliers of his system were aware that no connection can be made to the grid without permission from Enemalta Corporation. It should have been obvious to them that doing so was manifestly illegal insofar as it meant tampering with the infrastructure of a public utility without prior authorization. Neither could it be argued that Enemalta made an unlawful enrichment by making use of electricity produced by complainant although on the other hand the Corporation clearly benefited from the fact that the FIT Scheme was in abeyance at that time and that it took a month to process complainant's application for a meter after the FIT Scheme reopened.

The Ombudsman pointed out, however, that:

- it is a general principle of law that one cannot benefit or take advantage from an illegal act that one has committed;
- the FIT Scheme does not confer a right but is a concession given to consumers to benefit financially as long as certain conditions are observed; and
- the contractual relationship under the Scheme between a consumer and Enemalta Corporation comes into effect only when the generated electricity is legally produced and supplied to the Corporation by beneficiaries of the Scheme.

The Ombudsman concluded that in view of these considerations the grievance could not be upheld even though there were indications that the MRA did not help to clarify this situation and that complainant had been left in the lurch. Notwithstanding this failure, however, in the circumstances complainant and his supplier should have refrained from connecting the PV system to Enemalta's grid unless they had all the necessary permits from the Corporation.

Recommendations by the Ombudsman

Although the Ombudsman turned down the grievance, he recommended that in the light of the facts that emerged during his investigation the authorities involved should consider not to press charges or to take any action against complainant for the illegal connection of his PV system to its grid. There were in fact reasonable doubts that he might have been misled by advice given to him by an official of the Malta Resources Authority itself.

Subsequent to the issue of the Ombudsman's Final Opinion, both Enemalta Corporation and the Malta Resources Authority agreed not to take may further action in this case.

Responsibility for the defective adjustment of a fuel dispenser in a petrol station
(Enemalta Corporation)

The complaint

The owner of a petrol station reported to the Ombudsman that Enemalta Corporation refused to reimburse the loss of €673 that he made on the sale of diesel in the first half of January 2011 due to mistaken settings on the cash display of his fuel dispenser by a Corporation technician who set the price at €1.12 instead of €1.21 per litre.

Facts of the case

The owner of the filling station explained that on 3 January 2011 an Enemalta technician adjusted his fuel pump to reflect the latest change in the price of diesel. Ten days later he discovered that the new price was inadvertently set at €1.12 per litre but by the time Enemalta made the necessary correction to the installation on 14 January 2011 he had sold 7,480 litres at a loss of €0.09 per litre, amounting to a shortfall of €673. When complainant lodged a claim to make good for this loss, the Corporation lost no time to reject his claim and refused to accept liability since it held that the alleged loss could not be imputed to its actions.

When asked by the Ombudsman to give an explanation the Corporation claimed that its technician was unable to carry out his job properly because the unit price on the cash and volume display of complainant's fuel dispenser was "*totally illegible*" and despite repeated verbal requests by its technician to refresh the digits on this display, this maintenance never took place. Since this task was complainant's responsibility, the Corporation was not answerable for the consequences.

During a meeting with Enemalta officials the Ombudsman learnt that while like all other fuel pumps the pump in question, an old mechanical installation, was owned by the Corporation, it was the responsibility of the owner of the petrol station to maintain the metering system in proper working order and ensure that the digits were legible. Complainant, however, did nothing of the

sort and it was claimed that the Enemalta technician could hardly distinguish these digits whenever he would call at the station to adjust fuel prices.

Enemalta held complainant fully responsible for this mishap because he did not double-check the work of its technician and stated that the fact that it took him ten days to realize the error was an indication of the poor state of the price display on his dispenser. In a further bid to defend itself the Corporation pointed out that although it was responsible to adjust the price mechanism in fuel pumps, however, it could not refuse to supply fuel to any service station, even to installations that were known to be defective.

During a site meeting complainant denied that Enemalta ever warned his pump attendants that the digits on his pump were not clear and needed to be maintained. He even gave to the Ombudsman a signed declaration by his attendants that they were never told by Enemalta to clean the digits that appear on the face of the station's fuel pump system which, though admittedly somewhat dirty, were still legible.

Complainant explained that the upper digits of the pump system that can be seen by consumers who call at his station show independently of the system's internal mechanism. Whenever the price of fuel is changed, an Enemalta technician would adjust the lower numbers on this mechanism and this adjustment would be reflected straightaway on the upper digits; and even if these upper numerals were not very legible, the lower ones could be seen clearly.

Complainant insisted that Enemalta Corporation misinterpreted his argument. He never claimed that his fuel pump had been set mistakenly by the Enemalta technician to deliver a higher amount of fuel than the amount demanded by clients. His grievance arose because his pump was set to deliver 1 litre of diesel for €1.12 instead of €1.21 and was not at all concerned with the digits on the display of the pump. He expressed amazement that the Corporation seemed more interested in shifting blame to the digits of the pump counter when this was extraneous to the issue and pleaded that in this case he was the person who bore the brunt of Enemalta's error.

Complainant further insisted that double-checking is only done when a fuel dispenser needs to be calibrated and that calibration is not done every time the price level is changed, something that happens practically every month. Enemalta always saw to the calibration of his fuel pump and after

every calibration an Enemalta employee would seal the pump because the Corporation is responsible to ensure that clients are given the correct amount of fuel that they purchase.

During a second site visit by representatives from the Office of the Ombudsman and Enemalta Corporation, the technician who adjusted the fuel pump did not hesitate to admit that he was responsible for the error that gave rise to the discrepancy when he adjusted the wrong digits of the price per litre display. He also stated that the counter that showed the price per litre, though in full view of consumers, could not be seen clearly because two of the four digits were faded although he went on to admit that on the other hand whenever the cogs in the lower section of the price mechanism would be moved, the price per litre shown above them would immediately respond to any such change. While admitting that each cog was numbered clearly and that the error occurred because he altered the wrong cogs, he insisted that he often asked the pump attendants to maintain the faded digits on the screen and observed that if all these digits were clearly visible it would have been much easier to notice the error straightaway.

During this visit the Ombudsman found that since this incident happened, Enemalta employees were no longer responsible for the adjustment of prices in fuel pump mechanisms and owners have to see themselves to any such adjustments. However, when the Corporation was responsible to adjust price levels on the display of fuel dispensers, its technicians used to adjust all the pumps in Malta and Gozo in one day. This needed to be a quick job and technicians simply could not afford to linger in any of these stations; and on the basis of mutual trust that developed between the technician who would call at complainant's station and his employees, he would merely adjust the mechanism and leave without any double-checking by either party to ensure that the work had been done accurately.

On his part complainant continued to deny that his attendants were ever warned that the digits of the price per litre on the cash and volume display needed to be made more visible. Since most of his clients are drivers of commercial vehicles who normally purchase large amounts of fuel, often running into hundreds of euros at a time, it is likely that they hardly ever bother about the price per litre display on the pump. This admittedly made it harder to detect the error that in fact only came to light when a client asked for a small amount of fuel.

Enemalta Corporation, however, continued to maintain that the mistake by its technician arose because not all the digits of the price mechanism were clearly visible and that if complainant maintained the fuel pump in proper working order, the mistake would not have occurred. The Corporation insisted that it was complainant's duty to double-check the work done by its technician and once he was aware of the problem on the digit display, he should have taken added care to remedy the situation. Once he failed to do so, he should bear the consequences of his action including the loss that arose following this mistake.

Considerations by the Ombudsman

At the onset of his investigation the Ombudsman stated that the technician who adjusted the price mechanism at complainant's station had acknowledged his mistake and admitted that on this occasion he adjusted the wrong levers to reflect the new price. This happened at a time when Enemalta Corporation was still responsible for these adjustments and was the sole authority that could adjust fuel dispensers to reflect changes in the price of fuel.

The Ombudsman also referred to complainant's admission that his employees were so used to the system for the adjustment of the pricing mechanism that they would allow the Enemalta technician to carry out these adjustments without any supervision and without even bothering to check his work since they trusted this person and felt sure that he would do his work properly. They also admitted that they did not measure the volume of fuel that was being dispensed to clients by the pump since this had become a routine task and all along they assumed that the price mechanism would be adjusted correctly.

According to the Ombudsman all evidence showed that the incident was caused by a simple error and that there was no issue of bad faith or malicious intent on either part. It was obvious that the material physical error was attributable solely to the Enemalta technician – and as a result the issue that needed to be resolved was whether the Corporation could be held wholly responsible for the consequences of this mishap or whether complainant himself contributed to the mistake and, if so, to what degree.

Factors to be considered

The Ombudsman explained in his Final Opinion that it was understandable that, considering the frequency with which fuel pumps are adjusted, the

Corporation's technician and complainant's pump attendants were so used to each other and to trust one another blindly that this led these employees to feel no need to supervise the technician's work. This absolute trust, however, carried an element of risk and also meant that in the event of a mistake the parties involved should bear the consequences and accept responsibility.

The Ombudsman observed that on his part complainant too has an interest as well as a duty to check that no error would occur whenever the price mechanism is being adjusted since it is his duty to ensure that his clients receive the correct amount of fuel from his pump for the price that they pay. It is also Enemalta's duty to ascertain that pumps in service stations register the correct measure since it is obliged by law to ensure that prices showing on fuel pumps reflect the correct, official regulated amount.

Familiarity with procedures is no excuse for not being as diligent as one should normally be. Failure to be diligent could in fact be considered to amount to negligence and the party responsible for any such failure has to shoulder any consequential responsibility.

The Ombudsman referred to Enemalta's claim that if the dials on the display counter were clear, its technician would have noticed his mistake immediately and taken corrective action while even the pump attendants might have noticed the error much earlier. He recalled the Corporation's statement that it often brought this fact to the attention of complainant's employees and requested them to ensure that the digits on the display panel would be legible although these employees denied that Enemalta had ever done so.

Pointing out that he was not in a position to determine which version was correct, the Ombudsman observed that this issue was only marginally relevant to the determination of responsibility. In his view what was relevant in this situation was the duty of complainant to ensure correct metering in the sale of fuel to clients. The Ombudsman held that complainant cannot disclaim responsibility merely on the grounds that he assumed all along that the Corporation's technician did his job well and that it was customary for his staff not to verify that pumps were showing the correct reading after being adjusted by the Enemalta technician.

According to the Ombudsman there could be no doubt that that at the time of this incident the Corporation was responsible to adjust prices in fuel

pumps while on his part complainant was in duty bound to maintain the fuel dispensing mechanism in a good state of repair. Complainant was also responsible for all other matters such as ensuring that the digits on the price display screen were legible and carrying out all maintenance and repairs on fuel pumps. This in turn meant that Enemalta Corporation could not be held responsible for any fault in these dispensing machines or for any defective machinery.

Shared responsibility

The Ombudsman remarked that complainant could not plead lack of responsibility on the grounds of his claim that Enemalta did not bring defects in his pump to his attention. Complainant had to assume this responsibility in full if, because of these defects, the amount of fuel dispensed from his pump did not reflect the value of the money charged to customers. In this connection there was no doubt that the fact that the digits were not easily legible was a serious fault that not only hindered the Enemalta technician in his work but also seemed to prejudice complainant's clients who have every right to be able to read, without any difficulty, the price of the fuel that they purchase apart from visually checking the quantity of fuel being dispensed. The Ombudsman commented that whether clients actually do so in practice is irrelevant since what is important is that clients ought to have every opportunity to read such information without any hindrance, if they so wish.

The Ombudsman went on to point out that at the same time the Corporation has the duty to ensure that an adjustment made by its technician in complainant's fuel dispenser would reflect correctly the price and volume of fuel established by regulation. It is also the duty of this technician not to carry out any adjustments and prevent complainant from selling fuel from his dispenser if he is not certain what the digits on the panel show or if they are partly obliterated. The Ombudsman stated that evidence seemed to point out that the technician was aware of the bad state of the numerals on the panel especially since, according to the Corporation, on several occasions he asked complainant's pump attendants to remedy the situation – and in his opinion this admission alone sufficed to burden the Corporation with a measure of responsibility.

The Ombudsman observed that it is a basic principle of law that a person entrusted to provide a service should not do so if he has the slightest doubt

that, for any reason, he is unable to render the service competently, efficiently and according to the rules of the trade. According to the Ombudsman the Enemalta technician had no right to take any risks in this respect and if he decided to go ahead, he did so at his own expense.

Conclusions and recommendations

Taking into account these considerations on the issue of responsibility that arose in this complaint, the Ombudsman concluded that complainant must bear the consequences of his omissions such as his failure to ensure that numbers on his cash and volume display counter were legible and to check that the Enemalta technician adjusted the price of fuel properly. He observed that he could not accept the argument that complainant should be excused because fuel was sold in large quantities from his pump; on the contrary, in view of this he had even more reason to be careful and to supervise adjustments in the price mechanism of his dispenser.

At the same time the Ombudsman expressed the view that the Corporation's technician could have avoided the mistake had he been more attentive even though the numerals on the display of the fuel dispenser were not clear. Indeed, this situation ought to have alerted him to be even more careful. It also meant that the Corporation could not avoid the fact that it was its employee who admitted that he adjusted the wrong dials despite his long experience in this work. The Ombudsman stated that if this employee harboured any doubts about complainant's equipment, he was in duty bound to double-check, if necessary through a material, physical test independently of the dials in the machine and should not have adjusted the pump mechanism unless and until the numerals were clear enough for him to do his work correctly.

The Ombudsman concluded that the Corporation and complainant were, in varying degrees, responsible for the loss of €673 that complainant claimed to have suffered as a result of the defective adjustment. While noting that the Corporation did not contest this amount, he ruled that it was complainant who had to shoulder the greater part of the responsibility since after all it was his duty to maintain his pump in a proper state of repair. It was also his duty to ensure that the mechanism and the displays were absolutely clear so that the Enemalta technician could carry out his work properly.

The Ombudsman went on to point out, however, that at the same time Enemalta contributed substantially to complainant's loss because its technician

had the duty not to carry out his work if circumstances hindered him from providing his service according to the rules of the trade. It was his duty to refuse to make the price correction once he could not be sure that despite his experience, he could guarantee that subsequent to his intervention the dispenser would deliver the correct amount of fuel according to the reading given. The Ombudsman went so far as to state that this technician was even duty bound to prevent complainant from making use of this dispenser.

The Ombudsman concluded that in his opinion responsibility for this incident should be borne as to 60% by complainant and 40% by the Corporation; and this led him to recommend that the Corporation should pay complainant the sum of €270 in full and final settlement of his claim. Shortly afterwards Enemalta management indicated that it was prepared to abide by the Ombudsman's recommendation and paid this amount to complainant.

4 ANNUAL REPORT FOR 2011 BY THE UNIVERSITY OMBUDSMAN

This is the third report since the appointment of the current University Ombudsman in November 2008. It contains three sections: the first deals with the lack of transparency and accountability at the University of Malta in contrast to the citizens' "*right to know*"; the second section contains three case summaries that illustrate the points raised in the first section; while the third provides information and data in graphic form of the complaints dealt by the Office of the University Ombudsman in the year under review.

Transparency, accountability and the citizens' "*right to know*"

The three cases contained in the second section to this report relate to complaints lodged by individuals who sought but failed to get employment as academics at the University of Malta. These cases have been chosen to highlight an issue that has escalated into a notable source of contention between the university authorities and the Office of the University Ombudsman.

The problem pertains to the need for greater transparency and accountability in the selection and employment of staff by the institution. The issue arose when unsuccessful applicants for academic posts requested but were denied adequate feedback on their failure to be employed. Faced with a blank wall, these individuals decided to lodge complaints with the University Ombudsman.

The issue

The University's current practice is to dispatch a letter of regret, simply informing candidates that they had not been selected.

In reply to recommendations by the University Ombudsman, the University now discloses the names of the selected candidates as well as the criteria for

selection and their respective weighting.[1] It declines to provide feedback on the evaluation of complainants' credentials in contrast to the selected candidate.

The University Ombudsman considers this attitude and practice as maladministration since candidates are entitled to information that impacts on their lives in general and on their careers in particular. It goes without saying that the data they seek should not impinge on the privacy rights of other individuals involved.

The stand by the University Ombudsman on this matter has been guided by earlier considerations and decisions on similar complaints investigated by Malta's Parliamentary Ombudsman, by the directives of the European Ombudsman as well as by the principles embraced by the European Union on its citizens' "*right to know*".

The University Council responded to the objections by the University Ombudsman by establishing three sets of guidelines for members of selection boards engaged in staff recruitment.[2] These *Guidelines* contain lucid, detailed instructions on the selection procedure. They are replete with examples to render the complex process of staff selection into a rational and just exercise. Yet, the *Guidelines* are incomplete because they omit directions on the contents of selection boards' final reports which should include information sought by unsuccessful or successful candidates. In other words, the University seeks to ensure that justice is done but fails to show that justice is being done. The University's selection process may be fair, untainted and non-discriminatory but it is neither transparent nor accountable.

The University's stand and the concerns of the University Ombudsman

The University presents three arguments to justify its rejection of the request by the University Ombudsman for more details and justifications of its decisions.

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1 These are *relevant academic qualifications*; *relevant teaching experience*; *aptitude and suitability*; and *performance during interview* with a weighting of 30% for each of the first three criteria and 10% for the fourth one.

2 University of Malta (2011): *Guidelines for members of selection boards in the recruitment of resident academic staff*; *Guidelines for members of selection boards in the recruitment of academic staff at the Junior College*; and *Guidelines for members of selection boards in the recruitment of administrative, technical and industrial staff*.

One argument asserts that evaluations and rankings based on purely numerical values (that is marks allocated on the four selection criteria) are artificial and manipulative. The Office of the University Ombudsman agrees that this will be the case in haphazard or deliberately corrupt evaluations. However, the rigorous implementation of the University's own *Guidelines*, coupled with the calibre and professionalism of selection board members, should serve as sufficient guarantees to ensure an objective and judicious as well as a correct choice of candidates. Only naive members of a selection board would rely on purely numerical totals to select staff.

The University also claims that providing justifications and feedback on candidates' attributes encourages litigation. The opposite is often the case. The type of complaints against the University that reach the University Ombudsman are lodged by individuals who protest against lack of information and against the institution's refusal to be transparent. The mystique stimulates suspicions and allegations of foul play, even when these are unfounded. In any case, the University should not fear litigation when the selection process is rigorous and non-discriminatory. The essential point is that no selection board should regard itself beyond review and non-answerable to a higher authority. The principles of transparency and accountability provide every candidate with the right to appeal. Transparency and accountability in all public transactions are not a concession but a right.

The University's third argument lauds the need for confidentiality and trust in academic peers. This is an outdated attitude. The traditional blind trust that the community may have had in august national institutions such as the University has long evaporated in an era of social communications, demands for open administration and people's "*need to know*".

University education itself has contributed towards this phenomenon. Trust in academic peers can no longer be taken for granted. It is bestowed and enhanced when academics act, and are seen to act, from a high moral ground expounding specialised knowledge and expertise coupled with fairness, correctness, transparency and accountability. The Maastricht Treaty, to which Malta is a signatory, puts it succinctly: "*Transparency of the decision-making process strengthens the democratic nature of the institutions and the public confidence in the administration.*"[3]

3 European Union: The Maastricht Treaty, Declaration number 17 (7 February 1992).

Recommendations

The *Guidelines* by the University Council contribute significantly to delineate the process for a fair and valid selection of staff and in this respect the University Ombudsman welcomes them. Regrettably, however, as they stand these *Guidelines* do not deal sufficiently with the basic issues of transparency and accountability that have arisen in complaints lodged against the University. A second step towards greater transparency and accountability is needed in the form of more detailed staff selection reports. These should:

(a) motivate or justify the choice of the selected candidates; and
(b) provide the board's evaluation of the credentials of non-selected candidates when they seek it.

So far the Rector of the University has not agreed to an earlier version of these recommendations and has informed the University Ombudsman that "*... whilst Council agrees that the University administration should respond to queries by complainants and by your Office more expeditiously, and whilst always considering practical suggestions for improvement, Council has reconfirmed the selection process currently adopted as described in the Guidelines.*"[4] In other words, the University will not budge, which is a pity because it is doing itself and the community a disservice.

Institutions, young and old, providing tertiary level education in Malta will strengthen the public's trust in them when they demonstrate in no uncertain way that they have nothing to hide; that their decisions are taken without fear or favour; and that these can be fully justified. Academics will strengthen their autonomy when people feel confident that they are not patronised or treated with bias. An aura of mystique leads to opposite results.

The duty of the University Ombudsman is to ensure that fairness, equity, transparency and accountability rule all administrative and managerial processes undertaken by the three education institutions that fall under his remit.

The second section of this ***Annual Report*** that is presented below and is entitled ***Selected cases***, demonstrates that even if fairness and non-discrimination in

4 Letter by the Rector of the University to the University Ombudsman dated 20 February 2012.

the selection of academic staff at the University of Malta are being observed, transparency and accountability are lacking. The *status quo* is untenable and it behoves the Office of the University Ombudsman and the university authorities to seek a solution to the current impasse, if necessary by moving to a higher level of intervention.

Selected cases

Unnecessary secrecy breeds suspicion

The complaint

An applicant for a full-time academic post in Geography at the Junior College asked the University Ombudsman to examine her allegation that the university authorities treated her unfairly when a candidate with academic qualifications that were similar to hers but with much less years of teaching experience was appointed to this position at her expense.

Complainant lamented that her request to the University for information about the selection board's evaluation of her credentials in relation to the selection criteria served no purpose because the academic management of the institution refused to present these details.

The third aspect of this complaint was based on an allegation that a member of the selection board had a clear conflict of interest since it was widely known that he had a close working relationship with the successful candidate.

Facts of the case

After the issue in September 2010 by the University of a call for applications for a full-time academic post in Geography at the Junior College, complainant was asked to attend an interview together with six other short-listed candidates in the last week of the month.

File records for this post seen by the University Ombudsman showed that the selection board consisted of the Pro-Rector of the University as the Chairperson of the Junior College Board; the Principal of the Junior College; the Head of the Geography Department at the Mediterranean Institute at the University; the Subject Coordinator of Geography at the Junior College; and a member of the

University Council (who, however, was unable to attend the meeting). Other records confirmed that the board applied the University's standard criteria and weighting in the process for the selection of academic staff namely, relevant academic qualifications (30%); relevant teaching experience (30%); aptitude and suitability (30%); and performance during interview (10%).

With regard to the first two selection criteria that are firmly anchored to an objective evaluation of candidates' relevant academic achievements and teaching proficiency, the University Ombudsman found that the attributes of the successful applicant and of complainant could be summed up as follows:

- ***relevant academic qualifications:*** both candidates had an honours degree and a post-graduate certificate in education but whereas complainant had a Masters degree in Geography, the selected candidate had a Masters degree with Distinction in the same subject while she had also been a lead speaker and made a joint academic presentation with the Head of the Geography Department at two conferences held in Malta. Furthermore the successful applicant had been accepted for a PhD programme in a British university which she planned to complete in 2016.
- ***relevant teaching experience:*** complainant possessed thirteen years teaching experience, ten of which consisted of teaching Geography at advanced and intermediate level at a higher secondary school while the chosen candidate had six years teaching experience, four of which were spent teaching Geography at advanced and intermediate level in a secondary school.

The University Ombudsman found that the selection board recommended that the candidate who was ranked first in the final order of merit be appointed to the post while complainant was placed in second position.

Convinced that the selection board undervalued her teaching experience, in mid-April 2011 complainant asked the University Rector for details about the evaluation by the selection board of her merits and demanded a breakdown of her overall mark under each of the selection criteria. Two months later the University Secretary wrote to complainant and after indicating the four criteria that served as the basis for the assessment of candidates by the selection board, went on to state that these criteria "… … *whilst recognizing the importance of relevant teaching experience, also took into account other important aspects such as academic qualifications, aptitude and suitability for the post and*

how candidates performed and presented themselves at the interview.
From the twenty-one candidates that applied, you were placed second.
I hope this reassures you that the selection board did take your strengths into account."

Not unjustifiably, complainant was not reassured at all by this reply and asked the University Ombudsman to intervene in order to shed light on the whole issue. However, when the University Ombudsman sought information on marks obtained by complainant and by the successful candidates under the selection criteria, the University gave the usual stock reply that such details are not generally kept. A check of the relevant university file confirmed that this was indeed the case.

Observations by the University Ombudsman

The University Ombudsman commented that in correspondence on this grievance and on analogous cases, the University Rector manifested his irritation that he "*persistently*" requested information that the University did not retain on record. These details concerned the evaluation by selection boards of academic and other credentials of short-listed applicants who attended interviews for university positions.

Straightaway the University Ombudsman made it clear that in his view this attitude by the University is not justified. At a time when public institutions lay so much stress on transparency and accountability, people have the right to know details behind decisions that leave an impact on their lives, their destinies as well as their livelihood. Furthermore, he insisted that his requests for information and his efforts in favour of transparency are in conformity with EU principles and practice and are in line with the drive by the European Ombudsman to promote transparency in administrative practice across the Union.[5] The University Ombudsman insisted that his Office is obliged by its mandate to persist in delving for information that the university management, for reasons of its own, wrongly and repeatedly refuses to provide to people who have a right to ask for and to be given these details.

In this connection the University Ombudsman referred to a document issued by the University in 2011 that established guidelines for the marking and ranking of candidates in selection processes for academic staff at the

5 Diamandouros Nikiforos (2012): *The European Ombudsman: More pro-active transparency in the EU administration*, New Europe online, 2 January 2012.

Junior College based on evaluation and discussion to reach a consensus.[6] In his view, however, although these guidelines provide a fair, rational and accountable method for the selection and employment of staff members at the Junior College and despite this step forward, the university management still declined to make this information available to complainant who made a legitimate petition against her final result.

The University Ombudsman observed that on several occasions when he requested information on marks obtained by candidates under the selection criteria and their total mark, the University would come back with the standard reply that these details had not been retained. This led him to comment that this statement indicated that this data was available during the selection process and that failure by the board to keep these details on file was unjustified. He questioned why selection boards are expected to go to great lengths to reach a consensus in their deliberations and then the university authorities proceed to eliminate evidence that would show how the exercise had been conducted in practice.

The University Ombudsman went on to declare that in cases where the selection process is found to conform to legitimate university regulations, procedures and practices, he would unquestioningly accept decisions reached by staff selection boards. He recalled, however, that notwithstanding this he is still at liberty under his mandate to ask for marks awarded to candidates and the motivation leading to these decisions. By way of example the University Ombudsman pointed out that it is within his jurisdiction and perfectly reasonable for him to ask how a selection board had reached and established an order of merit and to expect a clear, plausible and well-argued explanation.

The University Ombudsman recalled that in this complaint the first two candidates in the final order of merit had practically equivalent qualifications. On the other hand complainant's teaching experience outweighed that of the selected candidate. Despite this close match, the report by the board not only failed to provide any explanation or any justification to support its choice but also gave no indication of the reckoning that placed complainant in second place.

In the circumstances the University Ombudsman ruled that once the information that he requested from the university authorities and which he had every right to ask for was not made available to him, he was unable to determine

6 *Guidelines for members of selection boards in the recruitment of academic staff at the Junior College.*

whether complainant was treated unfairly or whether her teaching experience had been undervalued. This was undoubtedly a serious shortcoming on the part of the University and the failure to provide the requested information was unreasonable and unacceptable. Equally unreasonable and unacceptable was the attitude by the university management that seemed to expect complainant to accept its decisions unquestioningly and meekly as if coming from an unmistakeable source.

Complainant's third grievance raised questions on the validity of the composition of the selection board. In the course of his investigation the University Ombudsman found that the Head of the Geography Department at the Mediterranean Institute had co-supervised the Masters dissertation submitted years earlier by the selected candidate. It also emerged that this board member had worked closely with the successful applicant on a joint academic presentation and even accepted to act as one of her referees.

The University Ombudsman readily acknowledged that in an institution such as the University of Malta that operates in a small island community it is perhaps inevitable that academics and their ex-students, engaged in the same discipline, would collaborate on various projects. However, it is clearly a questionable practice for a staff member to accept to sit on a selection board that has to choose between an erstwhile working collaborator and other applicants who are in the running for the same academic position at the institution.

The University Ombudsman observed that in this case the presence of the Head of the Geography Department on the selection board became even more precarious when he accepted to act as his colleague's academic referee and also issued a testimonial to support the application of this candidate. He made it clear that in similar circumstances this person should have refrained from serving on the board due to a possible conflict of interest. This is recognized practice in similar situations and this person should have had no hesitation to do so. The University Ombudsman went on to state, however, that at the same time it was important to clarify that this observation was not meant to cast any doubts on the integrity of the individual concerned who may have acted all along in good faith.

The University Ombudsman went on to point out that despite these observations it was reasonable to assume that even if this member of the board showed any signs of bias during the selection process, the presence of the

other members together with their indisputably sound judgement would have served to balance any partiality that this person might have shown. Indeed, according to the University Ombudsman, this consideration would carry even greater weight if the chairperson and the other members of the selection board were aware of their colleague's relationship with the selected candidate and his acceptance to act as her academic referee. He observed that unfortunately the report of the board failed to shed any light on this issue although the fact remained that the selection process would have been more correct – and the board would have been seen to have acted in a more correct manner – if the Head of the Geography Department himself opted to stay out entirely of the selection exercise.

The University Ombudsman also expressed his unease at the presence on the selection board of a member with the rank of Assistant Lecturer in the College. In his view this situation was a cause for concern especially since Schedule II *Statutes, Regulations and Bye-Laws* (of the University of Malta) of the Education Act stipulates in Statute 7.1 *Appointments of staff with formal teaching and/or research duties* that selection board members should hold senior positions. Apart from the Rector or his nominee as chairperson and a member of the University Council, the Statute requires selection boards to include under 7.1(3):

"*three members of staff with formal teaching and/or research duties appointed by Senate, normally including the head of department concerned (or, in the case of posts specifically intended only for an institute, or other entity of similar nature, the director of that institute or the chief officer of the entity concerned) and another head of department from outside the Faculty:*

Provided that when it is envisaged that the appointee is to give significant service to a second Department/Institute/Centre or other entity of similar nature, the chief officer of the entity concerned is to replace the head of department from outside the Faculty".

The University Ombudsman pointed out that this section of the Statute clearly excludes junior staff members such as Assistant Lecturers from serving as selection board members to judge the suitability of candidates for other Assistant Lecturer positions. It was also his understanding that boards appointed to select Junior College academic staff would normally include the Subject Area Coordinator. In this regard the University Ombudsman observed

that it was unlikely that the University lacked the necessary expertise among its senior academic staff to judge the suitability of applicants for a relatively junior post in Geography.

Conclusions by the University Ombudsman

The University Ombudsman concluded that the evidence showed that whereas the chosen candidate had slightly better academic qualifications than complainant, on the other hand complainant had several more years of teaching experience at post-secondary level. He made it clear, however, that he was aware that teaching experience is not the only or the determining factor in an academic selection process.

The University Ombudsman went on to admit that his investigation was seriously hampered by the lack of details on marks obtained by complainant under the various criteria on which the selection was based. He was, therefore, not in a position to uphold or to refute complainant's contention that the board undervalued her teaching experience. This situation led the University Ombudsman to observe that in the absence of evidence that the assessment of her credentials and the evaluation of her performance during her interview by the selection board were unreasonable or based on incorrect data or manifestly unjust, he had to respect the unanimous decision of the board.

Taking everything into account the University Ombudsman admitted that he could not conclude that the process was unjust or that its integrity had been violated. The lack of details to back the selection process, though clearly a serious defect that ought not to have been allowed, did not invalidate the selection exercise and the only conclusion that he could draw was that the process lacked even a modicum of transparency.

The University Ombudsman stated with regard to complainant's second grievance that the selection board's report as well as the letter sent to her by the University Secretary did not contain the information that she was fully entitled to demand. He observed that as long as the details that complainant asked for did not impinge on the data protection rights of other candidates, she had every right to know the basis on which she had been judged and how the selection board had established her second position in the overall order of merit.

Consequently, the University Ombudsman upheld the section of her grievance concerning the refusal by the university authorities to provide details regarding the evaluation of her credentials against the standard criteria. The fact that the University claimed yet again that it was unable to provide this information reflected poor administrative practice that denied access to important information that she had every right to ask for.

The University Ombudsman commented that on several occasions he made it clear to the university management that he was not at all satisfied with the practice of denying information to candidates about their performance during an interview and about the evaluation of their merits during a selection process especially when consensus exists that candidates have a right to ask for these details. He remarked that he looked forward to the day when the University of Malta would accept his recommendation to introduce more transparency in these matters and remove the shroud of secrecy with which the university management seems to prefer to surround these issues.

With regard to the section of the complaint regarding the composition of the selection board the University Ombudsman referred to his misgivings about the presence of the Head of the Geography Department as a member of the board for the post in question. According to him, the close working relationship of this person with one of the candidates compounded by his acceptance to act as her academic referee could potentially have given rise to a case of conflict of interest.

The University Ombudsman also expressed his reservations about the presence of an Assistant Lecturer in Geography at the Junior College on the board to select a colleague in a similar grade when Statute 7.1(3) of Schedule II of the Education Act states that only senior academics should sit on academic selection boards.

Despite his generally negative evaluation of these circumstances the University Ombudsman pointed out, however, that the three other members of the selection board who constituted a majority agreed to place the selected candidate on top of the final order of merit of short-listed candidates. As a result he felt that it would be unwise of him to throw overboard their decisions and to recommend that their work be invalidated. Since the two members who drew his criticism constituted a minority in the selection panel and since the final selection of the successful candidate was unanimous, the University Ombudsman stated that it would be inappropriate for him to declare that the selection process was invalid.

A candidate's right to know

The complaint

The University Ombudsman received a complaint from a candidate for a full-time resident academic post in Environmental Management in the International Environment Institute of the University of Malta who claimed that his application was rejected unfairly. Complainant also protested about poor communication from the university authorities who completely ignored his request for information about the evaluation of his credentials for this position and of his performance during his interview by the selection board.

Findings by the University Ombudsman

The University Ombudsman found that in the last week of April 2010 the University of Malta issued a call for applications for a full-time resident academic post in Environmental Management at the International Environment Institute.

Complainant's application for the Environmental Management post passed the initial sift. Together with ten other shortlisted candidates he was interviewed in mid-July 2010 by a selection board that applied the University's standard assessment criteria and rated applicants against weightings that reflect the relative importance of each one of these criteria, namely relevant academic qualifications (30%); relevant teaching experience (30%); suitability and aptitude (30%); and performance during interview (10%). A fortnight later, however, complainant was dismayed to learn from the Office for Human Resources Management and Development of the University that the selection board had turned down his application.

At this stage complainant asked the University about the evaluation of his credentials and about his performance during his interview and inquired about the candidate who was selected for the Environmental Management post. However, since he considered unsatisfactory the reply given to him on 20 December 2010 he complained directly with the Rector of the University. This too was to no avail as the University did not even bother to acknowledge his grievance or to send a reply and left him with no other option but to approach the University Ombudsman.

Even efforts by the University Ombudsman to resolve this impasse faced a brick wall and his request to the university management to shed more light on the allegations by complainant did not have a successful outcome. The reply by the University Secretary dealt only with a few issues raised by complainant and failed to provide meaningful information on the selection board's assessment of his academic and other credentials.

During this stage of his investigation the University explained to the University Ombudsman that the Institute of Earth Systems was formally set up on 20 May 2010 when the University Council approved the merger of the International Environment Institute with the Institute of Agriculture. As a result of this merger, a full-time resident academic post in Earth Systems that had been advertised a few weeks earlier was suppressed and the selection process was halted in its tracks while the evaluation of applicants for the Environmental Management post had to be done in the context of changing academic requirements that were brought about as a result of this merger.

These developments led the University Ombudsman to ask for further details concerning the selection process including marks awarded to complainant under each of the four selection criteria and his placing in the final order of merit as well as the identity of the successful candidate and his overall mark. The reply by the University Secretary, however, was again short on details and although a copy of the report by the selection board was made available, no reference at all was made to the marks obtained by complainant during his interview or to his final placing or to the overall mark obtained by the selected candidate since, in the words of the Rector to the University Ombudsman in a letter on 20 December 2011, the University "*does not hold*" such information.

Observations by the University Ombudsman

The University Ombudsman observed that this long chain of unacceptable answers by the university authorities led complainant to convince himself that the University successfully conspired to keep him out of the various academic posts for which he had applied in the last few years. This perception was fanned by his exchanges with the university management that led nowhere and by the institution's repeated refusal to provide the information that he requested and to which he had a right as well as its reluctance to give these details even to the University Ombudsman.

The University Ombudsman observed that the University argued that one justifiable reason for not providing any details on assessments by academic selection boards on the credentials of candidates and their performance during their interviews stemmed from the conviction that this practice could lead to endless litigation with unsuccessful candidates who would refuse to accept decisions by these boards. The University Ombudsman admitted, however, that although this possibility existed, yet in his view this case was another example where the opposite held true. Unnecessary tensions and suspicions could easily have been defused, and probably dispelled, had details requested by complainant been made available when he first asked for them.

The University Ombudsman stated that he was confident that appropriate feedback on the board's evaluation of complainant's academic credentials and of his performance throughout his interview would have reassured him that there was no bias at all against him during the selection process. Even if this information might not have been entirely to his liking, the University would at least have done its best to demonstrate that its selection process was above board and was throughout its various stages transparent, fair and accountable. The University Ombudsman emphasized that by ignoring complainant's repeated requests, the university management merely contributed towards an erosion of his faith in its system for the recruitment of academic staff.

The University Ombudsman observed that matters might possibly have taken a different turn if the university management had informed complainant from the outset, rather than many months later, that the Education Act invests in the University Council the power and the duty to amalgamate and to create and suppress academic posts according to the academic and administrative exigencies of the institution and in its best interest. According to the University Ombudsman this could easily have been done and it was quite likely that this information would have reassured complainant that the University's actions were legitimate and well-intentioned and not meant to thwart his aspiration to join the institution's academic community.

The University Ombudsman referred to the statement by the University Rector that since the University "*does not hold*" the information requested by complainant on the selection board's assessment of his suitability under the selection criteria, he was therefore unable to give these details. In the absence of this information the University Ombudsman stated that he was not in a position to draw any conclusions on this aspect of complainant's grievance.

He was equally unable to state whether the University treated him fairly or whether indeed there had been any discrimination against his interests.

The University Ombudsman took this opportunity to deplore this state of affairs, especially the lack of details in the selection board's final report and the lack of feedback to complainant. As he had already done on several other occasions, he stated that this utter lack of transparency by the University in these matters was unacceptable and put the university's academic organization in a bad light. It is the remit of the University Ombudsman to ensure that justice in the management of the university affairs is not only done but is also seen to be done – but since for reasons that were not possible to fathom this information was lacking, he was unable to perform properly his function to scrutinize university operations.

The University Ombudsman pointed out that although the Office for Human Resources Management and Development kept up regular communication with complainant, the same could not be said of the University Rector and the University Secretary. Requests for information not only by complainant but also by the University Ombudsman to these two university officials either took a considerable time, sometimes even months, to be answered or were simply ignored. The University Ombudsman commented that such practices do not reflect well on the university administration and merely serve to generate suspicions and mistrust, if not downright accusations of arrogance.

Conclusions and recommendations

In his Final Opinion the University Ombudsman concluded that in the absence of any records by the University on this selection process, he was not in a position to sustain or to refute complainant's allegation that the university authorities conspired to deny him a full-time resident academic post.

At the same time, however, he wished to make it clear that during his investigation on this complaint no evidence emerged that the University purposely contrived to harm complainant's interests. The university authorities acted in conformity with the law and Council acted fully within its power and there was no indication that its actions were intended to discriminate against complainant or to treat him unfairly. This opinion was strengthened by the fact that at no time was complainant able to provide any evidence to the contrary. Consequently, the University Ombudsman ruled that he could not sustain this part of the complaint.

The University Ombudsman also went on to uphold complainant's contention that the University refused to give him information regarding the evaluation of his credentials and his performance during his interview by the selection board. He insisted that complainant had every right to have access to these details since they were relevant and important for the purpose of his career progression.

The University Ombudsman made it clear that on several earlier occasions he stated that the University is in duty bound to promote transparency and to provide individuals with information about decisions that impact directly on their lives, their livelihood and their future careers. The University has no right to deny such information to persons who ask for these details and he recommended that the university's practices in this regard be changed forthwith so as to reflect modern standards of good governance, transparency and accountability.

The University Ombudsman also upheld complainant's claim about the poor quality of communication with the University. This lack of communication was amply mirrored in this case when even his requests for information were met with delays and hesitation. He emphasised that requests to the University for information should be dealt with in a reasonable time and in any event should never be ignored.

Outcome

Subsequent to this Final Opinion, the University Council urged the administration of the institution to respond to individual complaints and to inquiries from the University Ombudsman without delay. At the same time Council, whilst always willing to consider practical ways to improve recruitment procedures, confirmed that at this stage current procedures should not be altered.

On his part the University Ombudsman made it known to the University Rector that while he did not share the decision by Council to retain the current method to report and record recruitment procedures, at the same time he appreciated efforts to facilitate communication with persons who submit complaints and also with his Office.

Report by a selection board that lacked supporting evidence

The complaint

An applicant for a position in the Junior College lodged a complaint with the University Ombudsman regarding the staff selection process for this vacancy on the grounds that the University of Malta denied him information to which he was entitled about his performance and about his standing in the waiting list for this post.

Complainant went on to express his disappointment at the fact that he was denied information about the methodology used by the selection panel to establish the final order of merit and alleged that this secrecy implied that there might have been discrimination against him in the selection process.

Findings by the University Ombudsman

The University Ombudsman found that after complainant applied for a full-time academic post in Environmental Science at the Junior College, he was asked to attend a selection interview together with nine other short-listed applicants. A few weeks later the Director for Human Resources Management and Development wrote to inform him that he was unsuccessful but had been placed on the waiting list should a vacancy arise within a year.

Soon after receiving this letter complainant requested details about his placing on this list as well as the criteria and the methodology used by the board to determine the overall order of merit. However, despite several reminders, for reasons that remained unknown the University failed to provide this information and complainant had no other option but to request the University Ombudsman to intervene on his behalf.

Upon being asked to explain this repeated failure to respond to complainant's request, the University Secretary passed on to the University Ombudsman details regarding the call for applications for the post in question; the applications submitted by short-listed candidates; as well as a copy of the report by the selection board which included the selection criteria for good measure. This led the University Ombudsman to understand that these criteria as well as their respective weighting were the standard ones namely,

relevant academic qualifications (30%); relevant teaching experience (30%); aptitude and suitability (30%); and performance during interview (10%).

From the assessment report the University Ombudsman found that on the strength of their *curriculum vitae* the ten short-listed candidates satisfied all the requirements in the call for applications and that complainant was placed fifth in the final order of merit. He was, however, taken aback by the statement by the University Secretary in the concluding part of his letter that he was unable to provide, as requested, marks given under each of the four criteria to short-listed candidates since *"…. the marks on each criterion obtained by all the candidates who were interviewed are not documented as the selection board discussed the outcome of the selection process and presented its common recommendation on the final order of merit to Council."*

Observations by the University Ombudsman

The University Ombudsman observed straightaway that it was unacceptable that despite several reminders as well as his own direct intervention, it took the university authorities more than seven months to provide complainant with the information to which he was entitled in the first place. He made it clear that in his view these delaying tactics merely served to reinforce complainant's suspicion that something was amiss.

The University Ombudsman referred to previous analogous cases where he stressed that candidates who are called to attend an interview have an inalienable right to ask for and to be given feedback on their performance as long as this information does not intrude upon the privacy rights of other candidates. He insisted that for the sake of transparency and accountability the University is in duty bound to provide information such as marks awarded under the respective selection criteria to candidates who seek these details.

The University Ombudsman went on to express his conviction that the vast majority of staff selection exercises at the University are conducted fairly and in accordance with established criteria and procedures. Once this was so, he was at a loss to understand why the institution was so reticent about giving information that would further demonstrate that it adopted correct practices throughout all the stages of its staff selection process.

The University Ombudsman expressed his unreserved concern at inadequate record keeping by the university authorities on the performance of candidates during their interviews. He declared that he was deeply perturbed by the admission by the University Secretary that the selection board kept no records and no documentary evidence of its proceedings but merely submitted its recommendations on the final order of merit to Council after having discussed the outcome of the selection process.

The University Ombudsman stated that he strongly disagreed with this system. Conventional, commendable interview practice as well as the principles of fair play dictate that the performance of each candidate during an interview in relation to the set assessment criteria and to their respective weighting should be recorded at every stage so that track could be kept of the way in which the whole selection process unfolded. He insisted that unless these records are kept, it made no sense to allocate weightings to selection criteria.

The University Ombudsman went on to comment that the outcome of a staff selection process ought to emerge from a considered, fair and objective judgement by members of the selection panel of the academic and other credentials presented by candidates as well as of their performance during their interview against the weighted criteria. Once this phase is over and examiners are able to form their evaluation of candidates' abilities, aptitudes and suitability backed by marks awarded under each of the four guidelines, it would then be possible to use these accrued appraisals to provide a platform for a common recommendation on the final order of merit.

The University Ombudsman stated that he found it singularly odd and highly unlikely that, as reportedly happened in this case, members of a selection board would rely solely on their personal evaluation and on their memory of a candidate's performance and true potential without the backing of supporting records and documentary evidence to assist them in an objective manner to reach their final evaluation of each candidate's abilities and weaknesses.

The University Ombudsman made it clear that he is unreservedly in favour of proper record keeping. He insisted that documentary evidence ought to be kept throughout all the stages of a selection process and that all these papers should be registered and filed once the process is over. These arrangements would not only enable the institution to meet transparency levels that are at all times necessary in a staff selection process but would also allow the University

to provide a full explanation to applicants who might wish to follow up their performance and learn about any strengths or weaknesses that might have characterised their interview.

According to the University Ombudsman if all the steps in the selection process under scrutiny had been properly documented and if these records had been safely kept, the request for clarification by both complainant and by himself would have been dealt with straightaway. The hesitation by the University to bring these details to light merely confirmed that this information was not available and served to cast doubts on the credibility of the whole exercise.

In the absence of proper record keeping by the University in such a sensitive task as a staff selection process, the University Ombudsman admitted that he could not ascertain whether doubts raised by complainant were well founded or not. He was equally not in a position to reassure complainant that this selection process was faultless. According to the Ombudsman, however, the manner in which the board conducted this process eliminated any possibility of verification of the procedures adopted and seemed to have failed to observe the basic principles of transparency.

Conclusions by the University Ombudsman

In the light of his findings the University Ombudsman concluded that the letters by the Director of the University's Office for Human Resources Management and Development to complainant as well as the letter that he received from the University Secretary failed to provide complainant with the information that he was fully entitled to request regarding his own performance. The final report by the selection board too was silent on this score.

The University Ombudsman stated that complainant was entitled to all relevant details with regard to his performance during the selection process and to his placing in the final order of merit as long as this information was presented in a manner that did not invade the privacy rights of other candidates. On these grounds University Ombudsman upheld this section of the complaint. He also upheld complainant's grievance about the undue length of time that it took the university authorities to respond to his request for information about the selection process insofar as it concerned his performance and final standing.

The University Ombudsman concluded his Final Opinion by making it clear that in the light of the details that emerged about the way in which the selection process was held, he was unable to uphold or to reject complainant's suspicions that his prospects in this exercise were dented because he was the subject of discrimination. In the absence of evidence that would show beyond any reasonable doubt that the assessment of complainant's credentials and the evaluation of his performance during his interview were unfair, unreasonable, based on an incorrect evaluation of data or manifestly unjust, his hands were tied and he had to respect the unanimous decision of the members of the board. Indeed, the unanimity of this decision could possibly be regarded as the only saving grace in this exercise.

The University Ombudsman finally pointed out that the lack of documentation to back the work done by the selection board rendered the whole process defective. This shortcoming, however, did not invalidate the selection process and he accepted the board's conclusion that complainant deserved to be placed fifth in the final order of merit.

Recommendations by the University Ombudsman

The University Ombudsman stated that in an earlier case that was analogous to this complaint, he submitted to the University a set of recommendations on reports that should be drawn by staff selection boards and on the need to ensure that on the basis of details included in these reports, the University would be able to provide information to candidates who, upon the conclusion of this process, would like to know about their performance.

The University Ombudsman pointed out that he had been given to understand that the university authorities considered his proposals and agreed to implement them. This was a constructive development since when the University renders its decision making process more open, transparent and accountable, this would strengthen its moral authority. Any such authority would not be based on the traditional role of the institution as a centre for the generation of knowledge. On the contrary it would be grounded on coherent, justifiable analysis and reason. This process will not erode the standing of the institution in the eyes of citizens but will make its autonomy even more credible to the country as a whole.

Outcome

In his reaction to the request by the University Ombudsman to indicate what action the institution planned to take on the recommendations in his Final Opinion, the Rector of the University explained that he had met complainant together with the chairperson of the selection board. During this meeting they explained in detail the procedures adopted by the University in accordance with its guidelines for selection processes that were approved by Council and complainant seemed satisfied with this explanation.

On his part, however, complainant expressed his reservations regarding the share of 40% of the total number of marks in interviews with short-listed candidates for purely subjective criteria such as "*aptitude and suitability*" (30%) and "*performance in interview*" (10%), which in his view was much too high. In particular he referred to the fact that he had never been appraised by any of the members of the selection board during any of his teaching sessions. Complainant also pointed out that although he now understood better the methodology used by the University in its staff selection and recruitment process, he remained dissatisfied with this approach since he believed that it would lead to inconsistencies and injustices.

At a subsequent stage the Rector informed the University Ombudsman that Council had urged the administration of the institution to respond to complaints and to requests for information from the University Ombudsman more expeditiously, whenever possible. Council, however, whilst pointing out that it was always willing to consider practical ways to improve the current recruitment procedures, re-confirmed that these procedures "*should not be altered at this stage.*"

Personal note

I take this opportunity to thank Chief Justice Emeritus Joseph Said Pullicino and the entire staff of the Office of the Parliamentary Ombudsman for their generous support, advice and assistance in my efforts to carry out my work. Without their unstinting aid and helpful countenance my undertakings would have been much harder to execute.

Charles Farrugia
University Ombudsman **12 May 2012**

Statistics

Table 4.1 Complaint intake by institution 2009-2011

Institution	University of Malta	MCAST	Institute of Tourism Studies	Outside jurisdiction	Total
2009	61	14	5	-	80
2010	46	10	6	-	62
2011	**51**	**8**	**3**	**2**	**64**

Table 4.2 Complaint grounds 2009 - 2011

Grounds of complaints	2009	2010	2011
Unfair marking of academic work	15 (19%)	16 (26%)	20 (31%)
Special needs not catered for	-	1 (2%)	1 (2%)
Promotion denied unfairly	8 (10%)	2 (3%)	6 (9%)
Post denied unfairly (filling of vacant post)	4 (5%)	5 (8%)	4 (6%)
Unfair/discriminatory treatment	41 (51%)	27 (44%)	27 (42%)
Lack of information/attention	12 (15%)	8 (13%)	3 (5%)
Own-initiative	-	3 (4%)	3 (5%)
Total	**80 (100%)**	**62 (100%)**	**64 (100%)**

Table 4.3 Outcomes of finalised complaints 2009 - 2011

Outcomes	2009		2010		2011	
Resolved by informal action	11	19%	15	24%	21	33%
Sustained	2	3%	5	8%	4	6%
Partly sustained	3	5%	6	9%	3	5%
Not sustained	23	39%	15	23%	16	26%
Formal investigation not undertaken/discontinued	17	29%	16	25%	12	19%
Investigation declined	3	5%	7	11%	7	11%
Total	**59**	**100%**	**64**	**100%**	**63**	**100%**

Table 4.4 Complaints by institution classified by gender and status of complainant 2009 - 2011

Institution	University of Malta			MCAST			Institute of Tourism Studies			Total		
	2009	2010	2011	2009	2010	2011	2009	2010	2011	2009	2010	2011
Students:												
male	28	27	13	2	4	1	1	1	3	31	32	16
female	21	10	29	1	2	2	-	1	-	22	13	31
Staff:												
male	9	8	5	8	3	2	3	3	-	20	14	8
female	3	-	4	3	-	3	1	-	-	7	-	7
Total complaints by students and staff	**61**	**45**	**51**	**14**	**9**	**8**	**5**	**5**	**3**	**80**	**59**	**62**
Own-initiative cases	-	1	-	-	1	-	-	1	-	-	3	-
Outside jurisdiction	-	-	-	-	-	-	-	-	2	-	-	2
Total	**61**	**46**	**51**	**14**	**10**	**8**	**5**	**6**	**5**	**80**	**62**	**64**

Appendices

Appendix A

Speeches at the opening of the Fifth Conference of the Association of Mediterranean Ombudsmen

St. Julian's, Malta
30 May 2011

Speech by Chief Justice Emeritus Joseph Said Pullicino, Ombudsman of Malta

Mr President
Professor Dreyfus

I thank you for your incisive, introductory messages that put the theme of our meeting in its proper focus. This augurs well for its success. As Parliamentary Ombudsman for Malta and as the host of this Conference I welcome you all to my country and hope that you will have not only a fruitful and successful meeting but also a pleasant time in Malta.

We shall of course be doing our best to look after you and make your stay a memorable one. Indeed we all hope to have you back here as tourists for a longer stay. Staff of my Office are at your disposal and you should feel free to seek their help and advice, if and when required.

Honourable Speaker and Honourable Prime Minister

I will be brief and will limit my welcoming address to a few comments to put us all in the right spirit and in the right frame of mind for this Conference.

I will refer you first to our logo that we designed especially for this meeting.

You are of course in the very centre of our Mediterranean Sea. The round circle 'O' stands for Ombudsman. It embraces together the two basic strong colours of our region: the deep blue of the Mediterranean Sea and the bright gold of the North African landscape that converge in the centre where the islands of Malta are situated.

The eight pointed cross was for centuries identified with religious confrontation, war and strife in our region. It is today universally associated with the history of my country and symbolizes the virtues of hospitality, courage and solidarity that are synonymous with the Maltese people. It provides a precise and definite indication of the venue for this meeting in Malta.

May I be allowed to digress briefly: why not continue to use this logo for future meetings of our Association? Suitably adapted by substituting our Maltese symbol with another that could represent the country where the meeting is being held, we would capture the mood of our region and the deep and sustained search for the values that our institutions promote and aspire to project in the whole region.

You have also received in your conference material a small token as a memento of this meeting. It is a crystal paperweight which has engraved in it the logo of our meeting and one of the watchtowers adorning the majestic bastions of our fortified cities. The watchtowers were intended to provide a first, valuable warning signal against an invasion by an enemy force.

We chose it to symbolise instead the primary functions of the Ombudsman as a front line defender of individual rights and freedoms.

It is our earnest hope that Ombudsmen and Mediators both in the Mediterranean and afar will continue to watch out for potential threats or actual violations of these rights and freedoms through maladministration, abuse of power and corruption. I trust you will find this small token to your liking and, above all, thought provoking.

I now turn to the theme of our meeting.

When it was suggested, during a meeting in Athens in December 2009, that the 5th meeting should be held in Malta, I suggested that on this occasion the Association should shift its attention away from the serious issue of irregular

migration, that had seemed to ease somewhat during that year, and that we should rather focus on the primary function of the Ombudsman to promote and safeguard good governance and democracy. Little did we then realise that this topic would gain such enormous significance as a result of the dramatic socio-political developments that have been taking place in our region during these last months. Indeed I can reduce my short introductory message to just one word that encompasses the current situation we are living in – Change.

It is clear that what is happening in our region is neither accidental nor transitory. Strong currents have unleashed popular movements that clamour for democracy and freedom on the one hand and improved living conditions on the other. They are movements spurred on by the irresistible force of history and will not be easily stopped or silenced.

In this evolving scenario, as Ombudsmen, we are called upon to react positively to insistent requests that institutions in our respective countries, entrusted with the administration of public affairs, should provide adequate protection against maladministration and abuse of power that often curtail and indeed prevent the proper exercise of fundamental rights and freedoms. These are challenges that we all have to face in varying degrees. These challenges call for change, possibly deep change.

Dear colleagues

Allow me to quote from a keynote address delivered by Sir John Robertson, then Chief Ombudsman of New Zealand and former President of the International Ombudsman Institute, during an international conference on the Ombudsman Concept in 1995, the same year when the law setting up the ombudsman institution in Malta was approved by the House of Representatives. Sir John Robertson is well known to Malta because he was entrusted by the Government to advise on the drafting of the country's ombudsman legislation.

In the words of Sir John: "*The Ombudsman as an institution has three essential elements in its favour – independence in operation, flexibility in dispute resolution and credibility with the public and organisations subject to its jurisdiction. The institution can never remain static while the social environment in which it operates is in a constant state of change. The institution must be developed and moulded in harmony with that social environment. Every Ombudsman has a duty to assess*

continually the changes in the social environment and adjust the institution to meet them. The making of these adjustments in a timely way goes to the very heart of credibility."

These thoughts were relevant in 1995; they are even more relevant today. The social environment around us is in a state of flux and continuous, sometimes dramatic, evolution. Systems of government have been shown to be in some countries oppressive and in others completely inadequate. In some countries in our region the role of the Ombudsman, as the citizens' watchdog in the way in which government and its officials work with and are accountable to the governed, needs to be strengthened. In others, the institution itself needs to be overhauled.

Mr President

I believe that the time is ripe for each one of us to reassess the structures and workings of our institutions; to verify whether they adequately respond to today's changing realities; whether our services are accessible to all citizens that are in need of protection; whether we can realistically claim that we are providing an effective, autonomous, investigative machinery to identify maladministration and check abuse of power and injustice; and whether the legal status and authority we enjoy are such as to command the respect of the executive for our reasoned opinions and compliance to our recommendations.

Our exchange of experiences during this meeting should help identify shortcomings and establish what needs to be done to strengthen our institutions. It is my conviction that as we discuss these issues we shall come to realise that, even if in varying degrees, we all essentially face the same basic problems. We all feel the urgent need to outreach the more vulnerable areas of society that are most in need of protection and the need for structural reform to make our organisations more efficient and effective. We need to find ways and means of ensuring that our recommendations, both to give adequate redress to an aggrieved citizen and to improve the public administration, are accepted and implemented.

Having identified the problems, our meeting should seek to propose solutions to meet the challenges of our changing social environment.

I firmly believe that our Association can contribute in a small but important way to strengthen the ombudsman institution in our region. Rather than proposing grand solutions that might be impossible to realise, it would perhaps be wiser to promote modest initiatives that each of our institutions could, within its limitations, realise also in conjunction with others. The cumulative effect of such joint initiatives would not only create a culture of real reform and innovation in our ombudsman institutions but would also promote a greater awareness of the right to good administration. It would bring about a tangible improvement in the service that we provide to citizens in the exercise of our functions.

It is with this sense of purpose and clear direction that I propose that we tackle the tasks ahead.

Thank you.

The Ombudsman Chief Justice Emeritus Joseph Said Pullicino makes his intervention on the occasion of the official opening of the Fifth Conference of the Association of Mediterranean Ombudsmen in Malta on 30 May 2011.

Speech by Dr Michael Frendo, Speaker of the House of Representatives, Malta

Mr President
Honourable Prime Minister
Excellencies
Ladies and Gentlemen

I welcome you to Malta on the occasion of the Fifth Conference of the Association of Mediterranean Ombudsmen – a meeting that happily coincides with the year of the 15th anniversary of the setting up of the ombudsman institution in Malta in 1995 and of the 90th anniversary of the inauguration of the Maltese Parliament in 1921.

The setting up of the Maltese ombudsman institution fifteen years ago, unanimously approved by Parliament, was a significant step in this process of political and administrative evolution. Irrespective of the constitutional background and system of government that prevail in our countries, citizens everywhere aspire to good governance by those entrusted by law to govern them. Indeed the right of the individual to good administration is today recognized by many countries as a basic right.

People rightly expect government departments, public sector organizations and authorities to be administered properly and judiciously. Citizens have the right to demand these standards and to expect both national and local authorities to fulfill their responsibilities fairly, effectively and on time.

This expectation inevitably leads citizens to conclude, quite rightly, that they should at all times also be served by a workable system of administrative justice that provides them in turn with appropriate redress when things go wrong – as indeed they often do – and they are subjected to injustice as a result of delay, inefficiency and the distress that often result from maladministration. It is today recognized worldwide that the ombudsman institution is considered to be a vital and effective instrument that reinforces good governance and that contributes to give substance to the right to good administration that citizens are entitled to.

Undoubtedly the role of the ombudsman institution is to reinforce good governance and democracy. This dual thrust in the mission of an Ombudsman can only be achieved if the Ombudsman uses his full influence and authority

to protect citizens in their day-to-day contacts with officials in the various areas of public administration.

In my opinion – and I am sure that I share this view with a very large majority of Maltese citizens – during the last fifteen years, the Office of the Ombudsman in Malta, even though it does not have a specific human rights mandate, has amply shown that it is an effective, honest broker between citizens and the public administration.

It is also right to acknowledge that the Ombudsman has gained widespread recognition for the way in which he exercises his function. He has also won the trust of the people for the manner in which his Office conducts its investigations without fear or favour.

Equally the public administration and the public authorities that fall under the Ombudsman's jurisdiction are increasingly appreciative of the potential of the institution to build bridges of cooperation and understanding between them as service providers and citizens as their customers. This appreciation manifests itself not only by means of an almost wholesale acceptance of recommendations submitted by the Ombudsman but also, and perhaps more significantly, by the consideration given to recommendations that address systemic areas of maladministration that require remedial action across the board.

The extent to which an ombudsman institution can serve as an effective tool to promote good government and democracy, depends largely on a genuine willingness of the public administration and authorities that fall under its jurisdiction to collaborate with the institution and accept and implement recommendations that are based on well motivated opinions.

Parliament too, on its part, should provide the Ombudsman with the status that is due; with the support and backing that he needs; with the attention that he deserves; and with the means that he requires to exercise his functions properly. It needs to ensure that the right of citizens to good administration does not exist merely on paper but is respected, observed and acknowledged.

The entrenchment in 2007 of the Office of the Ombudsman in the Constitution of Malta by a unanimous resolution of the House of Representatives is a clear manifestation of the pledge by the Maltese Parliament to ensure that in my country, citizens will not be arbitrarily deprived of their right to resort to, and benefit from, an independent institution that can effectively audit decisions

and actions by the public administration and by pubic authorities and that safeguards citizens against maladministration, injustice and abuse of power.

The relationship between the ombudsman institution and Parliament remains a continuing challenge for all of us.

This is a key issue that surely will be at the forefront of your discussions throughout this Conference. The role of the Ombudsman in reinforcing good governance and democracy can only be sustained and rendered even more effective if ways and means are found to ensure not only a healthy relationship between the Ombudsman and the public administration and the authorities that fall under his jurisdiction but also a good working relationship between the Ombudsman and Parliament.

And in this context, as the Maltese Ombudsman assiduously asserts, Parliament should be the ultimate arbiter on the validity of conclusions and effectiveness of recommendations drawn by the Ombudsman.

This symbiotic relationship between the defender of the people and Parliament is the foundation stone of this eminent institution that has become an integral part of the framework of any modern democracy.

I wish you a most successful conference. Thank you.

Dr Michael Frendo, Speaker of the House of Representatives, delivers his speech during the opening ceremony of the Fifth Conference of the Association of Mediterranean Ombudsmen at the Radisson Blu Resort, St Julian's (30 May 2011).

Speech by Dr Lawrence Gonzi, Prime Minister

Mr President
Mr Speaker
Excellencies
Distinguished guests

This Conference comes indeed at a unique and defining time not only for our region but also for the world at large.

Like many other countries, southern European states are still recovering from the worst financial and economic crises that have caused widespread unemployment. These crises have themselves highlighted the damaging effects of poor governance particularly in economic institutions. At the same time, most North African countries are experiencing an unprecedented awakening of their peoples clamouring for democracy, freedom and good governance.

It is therefore a privilege for me to be with, and welcome to Malta, a group of people whose efforts do so much to promote good government and to uphold and improve the rule of law.

With determination and thoroughness, you carry out your duty to protect our citizens against maladministration and the abuse of power, whether this is intentional or through error, negligence or foresight. Your task is not always easy but it is absolutely essential – essential not only at a national level but even more so at a regional and international level.

Events over the past three years have confirmed that globalisation is a reality affecting us all. People are now inter-connected as never before. Concurrently, nation states are increasingly powerless to act alone in the face of global forces.

The crisis in sub-prime markets in the US triggered a worldwide recession.

Conflict, poverty, water shortages and abuse of power in Africa are all leading to greater migrant flows into Europe.

This inter-dependence has underlined the need for multilateral cooperation.

Against this backdrop, your presence here is indeed heartening and encouraging. It signifies the collaboration that exists between the Mediterranean countries in promoting good governance through the institution of the Ombudsman.

Spanning different political, cultural and social backgrounds, there is amongst you recognition that respect for the rule of law remains a key cornerstone of both good governance and democracy.

In a globalized world the nation state remains an essential building block to global security and governance. Indeed, it is the weakness of some states, not their strength, which poses one of the biggest threats to global stability. As we have witnessed on a first-hand basis over the past months, democracy cannot exist solely on paper. The state needs to effectively protect its citizens; to ensure that they live under fair laws, enjoy basic freedoms and have a right to good administration. It is your responsibility within your own countries to deliver on this ambition.

A system of checks and balances needs to not only be in place but, more importantly, accessible for people to seek redress. In our path towards strengthening governance and deepening democracy in Malta, we recognized the importance of the Ombudsman fifteen years ago. Following its success and contribution in strengthening our governance structures, my Government put forward an amendment to the Constitution to entrench the institution of the Ombudsman in Malta's Constitution.

In our commitment to enhancing and strengthening our governance structures we have taken numerous measures. Parliamentary scrutiny was established through the setting up of the Public Accounts Committee which is chaired by the Opposition. The fight against corruption was also strengthened through the Permanent Commission against Corruption. Internal measures were also taken to strengthen the public service including an audit directorate with investigative powers and more recently the Public Administration Act. In addition, the Whistleblower Act which is at Parliamentary stage, will further enhance our governance structures and adherence to the values of transparency and accountability.

Ladies and gentlemen

Upholding and strengthening the rule of law will protect the rights of the individual. It will also lead inevitably to the spread of democracy, improved accountability and better government.

However, it is no automatic panacea. It has to be home grown and not imposed. It has to respect domestic cultures, traditions and norms.

The transition to democracy that we are witnessing must anchor the importance of accountability, transparency, the independence of the judiciary and fundamental freedoms of speech, movement and assembly. Also essential is a strong civil society to help ensure good governance.

Although the challenges are many, your presence here today is encouraging.

A genuine effort must be made by all of us to ensure that the right to good administration will not only be enshrined in the laws and constitutions but more importantly will filter right down to every aspect of our national public administrations and to our citizens.

I am confident that this fifth meeting evidences our common humanity and shared responsibility in reinforcing good governance and democracy.

Thank you.

The Prime Minister Dr Lawrence Gonzi addresses the opening session of the Fifth Conference of the Association of Mediterranean Ombudsmen in Malta on 30 May 2011.

Appendix B

Fifth Conference of the Association of Mediterranean Ombudsmen

Summing up by Dr Edward Warrington, Rapporteur
31 May 2011

During the past two days I have heard several references to the Ombudsman's great skill at listening. I hope that your patience does not run out now. On my part, I promise not to try your patience!

I would like to begin this summary with the third point in your programme, the plenary of yesterday afternoon – *The Ombudsman in the context of a changing economic and social environment*.

I will summarize this changing economic and social environment by reminding you of something that you yourselves have perhaps read a long time ago, in university days or even in school.

"*It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way … … It was the year of Our Lord one thousand seven hundred and seventy-five … …*" – the eve of the American Revolution and not long before the French Revolution.

I thought that this quotation from *A Tale of Two Cities* by Charles Dickens summarized the paradoxes, the tensions, the ambiguities and the opportunities that ordinary people in the Mediterranean are experiencing at the present

time and that your institutions experience in discharging their role. The picture that I have just painted reminds me that the challenge is not simply the challenge of change.

We are living in times of much greater uncertainty, far greater exposure to risk, greater instability – social, economic, political, cultural – than my generation and yours has experienced. There is a palpable atmosphere of crisis, of diminished confidence and trust. In those situations people become radicalized. Political and administrative elites can become cynical and business leaders become even more tempted to corruption. But it is also a season of hope, a time of emancipation, with promise of ever greater possibilities of development.

This time of complex change calls for better crafted policies and more intricately designed policy instruments. It calls for innovative approaches to governance – ones that rely on markets and civil society associations as much as, or perhaps more than, the State. Because we work in the public domain, you and I, it is important to be aware of the changing distribution of power in our political systems, within and across borders, among governing institutions at all levels of government.

For an institution like the Ombudsman, all of these changes, these shifts in the balance of power, may mean that roles must be adapted, expanded; that operating procedures should be reviewed; and that you should be aware of new constraints or opportunities for your institutions.

This brings me to the principal theme of your conference: the role of the Ombudsman in promoting good governance. I thought I might summarize the two days' discussions by reflecting on the three names by which your institutions have been referred to.

The one that I am most familiar with is 'the Ombudsman'. In its modern form, this is an institution originating in Scandinavia and from the 1960's taking root in the English-speaking world. The Ombudsman is traditionally more concerned with maladministration rather than fundamental rights and freedoms. The Ombudsman traditionally works with a well-performing, stable administration, an administration that is perhaps a little over-mighty and impersonal but basically well disposed.

Many of your institutions are known as 'the Mediator', the *Médiateur, the honest broker,* to borrow a phrase used by Mr Justice Said Pullicino at the start of the conference. The *Médiateur* intervenes on behalf of citizens who are often helpless before arbitrary, even corrupt, public officials. The *Médiateur* is more concerned than the traditional Ombudsman with fundamental rights and freedoms, perhaps even intervening where the Courts and others scrutineers are unable to provide remedies for one reason or another.

Yesterday, for the first time, I heard another name for your institution – *le Défenseur*, 'the Defender'. This suggests to me a more active role, perhaps a more political role and therefore riskier, a greater identification of the Ombudsman, the *Défenseur*, the *Médiateur*, with popular grievances, complaints, concerns, demands – an interest in the concerns and complaints of groups as well as individual citizens. In practice your institutions combine all three roles: the dominant role would be determined by the facts of a case, by a country's political and social circumstances, by the constraints and opportunities provided by the political and the administrative culture.

So much of yesterday's discussion and today's was concerned with how these changes are impinging on Ombudsmen: the most significant insights came to me from listening to the experiences of individual countries, experiences that bore witness to the vitality and flexibility of this institution.

I heard, for example, of an important innovation in which different Defenders or ombudsman-type institutions are consolidated, as in France, into an Office with greater powers, broader jurisdiction.

What impressed me most, perhaps, was this: it quite plain that the common core characteristics of the ombudsman institution are well understood and by and large respected in all the countries represented around this table. By that I mean independence and the personal integrity of the individual holding the office and the trust of ordinary people in the Ombudsman.

But there are then very distinctive national patterns – regional Ombudsmen in Italy instead of a single national Ombudsman; in many of the central European countries or countries in the Middle East an orientation towards human rights; a unique combination of audit and ombudsman functions in Israel; and many others. This interesting juxtaposition of clarity about core characteristics and great diversity and adaptability in different settings is a formula for success and for the continuing relevance of the Ombudsman.

But other things were mentioned as well – for example, the importance of adjusting the traditional patterns of communication with ordinary people to the new technologies and the new habits and media of communication. Additional possibilities of cooperation with other oversight institutions were mentioned, both locally and internationally – the very last intervention was precisely about that.

But, perhaps even more important, is that the legal frameworks that empower oversight institutions like the Ombudsman, are becoming more robust, more diversified. They now include provisions to protect human rights; instruments to investigate and prevent corruption; new administrative codes; freedom of information and its counterpart, data protection; protection for whistleblowers; and the appearance of market regulators. Above all, perhaps, ordinary people – even the poor and the marginalized – are ever more aware of their rights and ever more ready to assert them.

There is a tissue of institutions, a robust network of institutions and instruments, which scale up the Ombudsman's efforts on behalf of ordinary people. But your question asked about ways of promoting good governance in the distinctive circumstances of the Mediterranean – so permit me a few reflections about this.

The ombudsman institution is one of the few political institutions of the modern world that was not invented in the Mediterranean. But I think that there is a key feature of the Ombudsman that is especially relevant to the Mediterranean – and that is the Ombudsman's role as the mediator, the honest broker.

The Mediterranean, regardless of culture or religion, or whether East or West or North or South, is traditionally a zone in which individuals use intermediaries to approach public authorities. The mediator, intermediary or broker has been a pervasive feature of Mediterranean life from the very start of civilization in this area. Traditionally this role is discharged by a trusted person who embodies the influence of moral authority, not of power, not the crude realities of power, and this is, I think, precisely the Ombudsman's position in public administration.

The Ombudsman uses the influence that comes from the institution's moral standing and not the power that comes from legal authority. However, there is a fundamental, very significant difference between the Ombudsman and the traditional Mediterranean broker: the traditional Mediterranean broker's role subverts state institutions and processes; it corrupts them; it weakens them; whereas the Ombudsman reinforces the legitimacy of the State's institutions and processes. To borrow a religious phrase – the Ombudsman could be regarded as a sign of contradiction.

The Ombudsman works informally, behind the scenes, quietly, using persuasion instead of laying down the law or undermining the rule of law. The Ombudsman is a trusted broker in an environment that is too often characterized by mistrust or cynicism. The Ombudsman's day-to-day work generally addresses maladministration, petty complaints, but cumulatively creates conditions that are more favorable to the enjoyment of rights and freedoms. The Ombudsman exists in the eyes of complainants to resolve grievances, but the way the Ombudsman works – using the law instead of subverting it – also has a pedagogical effect. It shows ordinary people and officials the benefits of the rule of law, the efficacy of personal integrity and the possibility of operating legally to resolve grievances.

The Ombudsman is an example of stability and regularity, but it is also an extraordinarily flexible, adaptable and innovative institution. The Ombudsman investigates complaints but works without adversarial procedures – which would be the job of the Courts – and without raising scandals, which is often what the media does.

I conclude by reminding you of the key resources which you mentioned. It is a short list but a significant one. You laid great emphasis on the institutional independence and the personal integrity of the Ombudsman. You spoke about operating capacity and the role of your Association in enhancing operating capabilities especially in developing countries.

Another resource is the credibility of the investigations, the reasoning and the recommendations of the Ombudsman. All of these produce the trust that is a defining characteristic of the Ombudsman – the person and the institution. There are additional resources to tap: for example, more and more possibilities of networking with other institutions within a country and across borders, and perhaps the political awareness of all of you which is a subtle combination

of boldness and prudence in the way that you address profoundly political issues.

May I suggest some risks that come with your role.

As I heard you speak, particularly yesterday, I thought of the risk of over-extending your mandate; the risk of politicizing your institutions, particularly in countries where a democratic transition is underway. You yourselves mentioned the risk of becoming isolated not only from the public that you serve but also perhaps from other oversight institutions. In view of these risks, I commend to you another important resource, which is periodic self-appraisal and self-criticism.

I close by reminding you of some issues that you are already dealing with, which perhaps deserve greater thought and study.

The first is your social concern or orientation. More and more the Ombudsman is coming to deal with the effects of poverty, vulnerability and exclusion from social, economic and political life. What attitude will you adopt towards this set of issues?

Perhaps you need to think harder about the Ombudsman's role in situations of democratic transition or political crisis and disturbance. You may need to think about emerging rights issues, such as rights to access key resources like water, or rights issues associated with emerging lifestyles and, a particular concern of mine, the new security apparatus which is taking hold under the cry of 'protection against terrorism'.

Your last thoughts, and mine too, concern the role of this Association. I am not going to remind you of the discussion which you have just had. The Ombudsman, as I said, was not invented in the Mediterranean but is an institution particularly adapted to Mediterranean culture. So your last question would be – what more can the Association do to enhance the role, the capabilities and the adaptation of this institution to the challenge of fostering good governance and human dignity in one of the world's most creative and also most problematic regions?

Thank you.

Appendix C

Round-table debate at the Palace, Valletta on 2 June 2011 on the relationship between the Ombudsman and Parliament

Summary record of proceedings

During a meeting of the Public Sector Ombudsmen (PSO) Group of the British and Irish Ombudsman Association (BIOA) that took place in Malta early in June 2011, members of the Group participated in a round-table debate on the relationship between the Ombudsman and Parliament chaired by Dr Michael Frendo, Speaker of the House of Representatives. This summary record of proceedings reports on the issues and on the main presentations that were made during the meeting.

At the start of the discussion the **Ombudsman Chief Justice Emeritus Joseph Said Pullicino** stated that the role of the Ombudsman goes beyond the investigation of individual grievances and the redress of injustice and that as an officer at the service of Parliament there was need to establish a stronger synergy with this institution since this would serve as a means of bestowing greater value to his Office.

The Ombudsman also pointed out that although he was not in favour of being given the power to enforce his own recommendations, yet whenever his proposals for redress are not taken on board, regardless of whether they concern an individual complaint or wider systemic maladministration, Parliament would do well to engage itself in the issue under scrutiny and reach a political decision that would then bind all the parties concerned. The Ombudsman lamented the lack of a high level of political maturity in the country and expressed the hope that improved standards of reasoned political debate would in turn permit a cross-party discussion on similar issues.

The Ombudsman went on to observe that once Parliament had bestowed constitutional status upon his office, this meant that he had been given constitutional authority to determine if an injustice or an act of maladministration had been committed and to have his recommendations implemented by the public bodies involved. Backed by the entrenchment of his institution in the Constitution, the Ombudsman's decisions ought to be respected unless there are serious and valid reasons that would justify the dismissal of his recommendations for redress.

On his part the **Speaker, Dr Michael Frendo** referred to the ombudsman institution as a natural partner of Parliament and agreed that the relationship between these two institutions in Malta needs to be developed further. At the moment contacts between the Ombudsman and Parliament are limited to the annual scrutiny of the *Ombudsplan* by the House Business Committee and to the submission of periodic reports by the Ombudsman – and at best this could be regarded as a somewhat superficial bond.

The Speaker also brought up the Ombudsman's proposal that in sustained cases where his recommendations are not accepted by a public authority, it should be Parliament that would decide these cases and indicated that in his view the role of Parliament in these instances should be limited to an airing of the views of all the parties involved in front of a parliamentary committee.

Ms Ann Abraham, UK Parliamentary and Health Service Ombudsman[1] explained that in her ongoing relationship with Parliament in Westminster she has the benefit in her role of a dedicated committee – the Public Administration Select Committee, established in 1997 and charged through Standing Order No. 146 of the Standing Orders of the House of Commons with a broad, cross-department remit.[2] This allows the Committee to examine quality and standards of administration within the civil service in the UK and to scrutinize the reports of the Parliamentary and Health Service Ombudsman and in effect maintain an oversight of Parliament's relationship with her Office on behalf of the House of Commons.

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1 Ms Ann Abraham served as Parliamentary Commissioner for Administration and Health Service Commissioner (Parliamentary and Health Service Ombudsman) between 4 November 2002 and 31 December 2011. She was succeeded by Dame Julie Mellor.

2 The ***Annual Report 2009*** by this Office gave ample coverage to the functions and work of the Public Administration Select Committee (vide pages 16-17).

Ms Abraham went on to explain that if she finds herself in a situation where she cannot share the government's reaction with regard to her recommendations as a result of an investigation, she has specific powers to refer to Parliament by means of special reports. This gives rise to a parliamentary process where the issues at stake are given an airing by the Committee and where government officials and even ministers can in effect be asked to appear in front of the Committee to give evidence. This enables the Committee to issue a report with its views on the matter in question and contributes towards taking the debate to a wider parliamentary domain when it is submitted for discussion on the floor of the House. In this way the Committee not only tests the Ombudsman's conclusions but also assists Parliament to hold the executive to account on individual cases or even wider issues.

The UK Parliamentary and Health Service Ombudsman expressed her view that on a range of issues her institution was able to bank on evidence from cases that she had seen and from the experience of citizens who sought her help to contribute to the thinking by Parliament on matters of policy and practice which are very much evidentially based.

Speaking from her own experience, Ms Abraham observed that in the Ombudsman's relationship with Parliament it is key and hugely beneficial to have a committee which is charged specifically on behalf of Parliament to ensure that the channel of communication that would also provide oversight of the Ombudsman's work is in one place. Ms Abraham declared that the Public Administration Select Committee has at all times been very conscientious and diligent and its work has been not only beneficial for her office but also for citizens whose cases her institution has looked at over the years.

In his intervention **Dr José Herrera MP** referred to the unanimous decision by Parliament to entrench in the Constitution the offices of Auditor General and of Ombudsman as a sign of the prestige enjoyed in the country by these two institutions and of the moral standing and authority of these two officeholders which place upon the government of the day the obligation to give due respect and importance to their pronouncements.

Referring to the issue regarding the enforceability of the Ombudsman's recommendations, Dr Herrera insisted that the Office of the Ombudsman is not an administrative court and argued that the Ombudsman's inability to enforce his own recommendations should not be taken to mean that these

proposals have no weight. Although admittedly there is no legal sanction or other deterrent if the Government decides to ignore the advice of the Ombudsman, nonetheless any administration would be unwise to go ahead with any such decision since this could be expected to have its repercussions on the day of political reckoning by the electorate.

The sanction to the Government for failure to accept the Ombudsman's recommendations may therefore to a large extent be considered of a political nature and a government that rejects the proposals of the Ombudsman is in all likelihood to be held accountable by the electorate in the ballot box. An administration that fails to heed the words of the Ombudsman would then have to answer politically for its actions to the electorate.

While admitting that Malta so far lacks a tradition in the administrative wing of its judicial organs where an administrative corpus is still in the process of evolving, the Opposition spokesman for justice expressed himself against the view that the Ombudsman would involve himself in this field. In his opinion the Ombudsman should continue to observe his traditional role and serve as the Officer of Parliament, tasked to scrutinize administrative actions and decisions while responsibility to check the extent to which the Ombudsman's recommendations are accepted will fall fairly and squarely upon the electorate. In this way enforcement of the Ombudsman's decisions will be measured and tested by means of the people's willingness to hold the country's leaders politically accountable for their actions on polling day.

At this stage **Mr Tom Frawley, Northern Ireland Ombudsman** referred to the work that was done in the UK by the Law Commission on Public Services Ombudsmen[3] and on the role of Ombudsmen in the landscape for administrative justice as a whole.

Making a distinction between findings and recommendations, the Law Commission was proposing that recommendations submitted by Public Services Ombudsmen should continue to be part of the political process in the sense that while remaining non-binding and questions regarding their implementation should fall within the political domain, the accountability of politicians who are responsible for this process will remain a matter that will be given due weight and that will be up for consideration by the electorate at an

3 This report was published on 14 July 2011.

opportune moment. On the other hand the findings of facts by Ombudsmen and their findings of maladministration should not be dismissed on the grounds of cogent reasons but be binding and have the weight of law while the way to challenge these findings would be by means of judicial review.

Mr Frawley went to comment that while it should remain the government's prerogative not to implement the recommendations of the Ombudsman, at the same time there needs to be a forum where Parliament can scrutinize Government and its decisions – and direct access to Parliament or to a committee of Parliament such as that enjoyed by the UK Parliamentary and Health Service Ombudsman through the Public Administration Select Committee is vital to the success of ombudsman institutions and their proper functioning within a democracy.

Chief Justice Emeritus Joseph Said Pullicino expressed his agreement with the approach that was advocated by the Northern Ireland Ombudsman. He explained that the main thrust of his Office in Malta is not to have its decisions enforced at all costs by the public administration but to ensure that in the case of decisions that for some reason or other are not acted upon, there will be an airing of all the relevant circumstances so that the country's political authorities can reach a final decision that will do justice to all the parties involved.

The Ombudsman insisted that once after a proper and fair investigation and after a full airing it is recognized that the Ombudsman's conclusions are valid and that an injustice has taken place that has harmed the interests of a citizen, it is politician's duty to turn the clock back and to rectify the injustice in the most appropriate manner. The Ombudsman commented that although highly desirable, the shoots of a direct line of communication between Parliament and his Office had so far failed to sprout.

Ms Anne Seex, UK Local Government Ombudsman[4] spoke from the perspective of an Ombudsman who does not have access to Parliament or to a dedicated parliamentary committee and who, up till only a short while ago, was not even obliged to submit an annual report to Parliament.

4 There are currently two Local Government Ombudsmen in England and each of them deals with complaints from different parts of the country. The other Local Government Ombudsman is Ms Jane Martin who was unable to travel to Malta for the PSO meeting.

She observed that nature abhors a vacuum and that it was largely due to this lack of direct accountability from the Local Government Ombudsman to Parliament that critics of her institution made use of the media including the internet to attack her office. This criticism is not only detrimental to the ombudsman institution but is also detrimental to the confidence of people who need the services of an Ombudsman. She lamented that this lack of a route of accountability meant that there was no direct means for the people's elected representatives in Parliament to debate with the Local Government Ombudsmen about the quality of their work and to take up on behalf of disaffected citizens the issues that have a negative impact on their daily lives.

The **Speaker, Dr Michael Frendo** noted that although only very few of the Ombudsman's reports were not put into effect, this is irrelevant since it was the concept regarding the enforcement and application of the Ombudsman's suggestions that mattered most. In this context the Speaker referred to the Ombudsman's suggestion that his reports should be ventilated among a dedicated parliamentary committee but advised caution in the sense that from his point of view while he fully agreed on the need to discuss these reports in a committee such as the House Business Committee, he would rather favour an approach whereby this Committee would not necessarily need at the end of its meeting to draw any conclusions or to arrive at a resolution on the issues under consideration. According to the Speaker, knowing that they are expected merely to establish facts and to explain their decisions would enable participants in this discussion – and particularly those representing the public administration – to cast aside a defensive mentality that could otherwise cloud their whole attitude to the discussion and possibly make it easier to chart the way forward.

Mr David Agius MP, Government Whip explained that in his view the country has an adequate scrutiny infrastructure and that there are enough checks and balances so that any allegation of maladministration can be properly investigated and, if sustained, put right. He stressed that it is in the interest of governments to implement the proposals that are submitted by Ombudsmen in their reports on administrative shortcomings since in this way the public administration will improve and provide better quality service to citizens. It is also in the interest of governments to heed the work of Ombudsmen and to strengthen the scrutiny institutions in their country since if they fail to do so they are bound to be the ones to suffer in the long run.

There was at this stage consensus among several speakers that the Ombudsman is an Officer of Parliament and is only responsible to the Speaker while his role cannot be equated with that of a pressure group or of a political party. Political leaders ought to make maximum use of their right to resort to the Ombudsman and use his services constructively so as to hold public officers to account. In turn citizens can hold their political leaders to account not for the actions and the conduct of these officials but for the way in which they dealt with the Ombudsman's pronouncements of administrative wrongdoing and how they acted in order to remedy any sustained misdeeds.

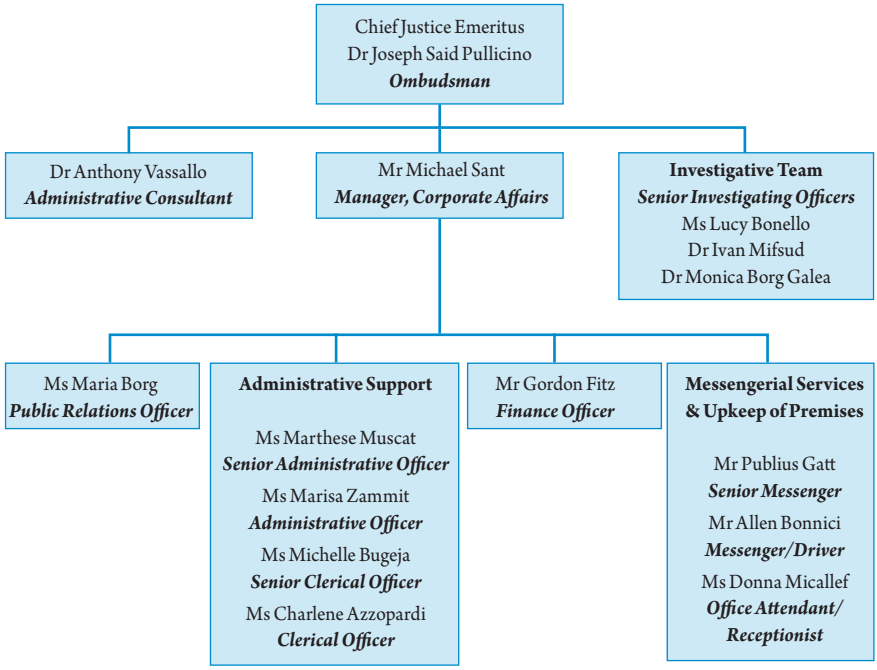
In this connection it is also advisable for a country's political masters not only to show respect for the work of the Ombudsman but also to resort to the service provided by the ombudsman institution since this can have a liberating effect on their own decisions and conduct vis-à-vis administrative issues and decisions and their consequence upon citizens.

In conclusion it was agreed that work still needs to be done in Malta so that Parliament and the Office of the Ombudsman will be associated with each other and also draw strength from each other. It was also agreed that it is important to ensure that in future it will be possible to find more space and time in the agenda of the Maltese Parliament so that the Ombudsman can contribute towards a better understanding of the right to good administration by citizens and an all-round improvement in quality service by the Maltese public administration.

Appendix D

Office of the Ombudsman

Staff organisation chart (as on 31 December 2011)



Appendix E

Office of the Ombudsman: Report and financial statements for the year ended 31 December 2011

Statement of responsibilities of the Office of the Ombudsman

The function of the Office of the Ombudsman is to investigate any action taken in the exercise of administrative functions by or on behalf of the Government or other authority, body or person to whom the Ombudsman Act, 1995 applies. The Ombudsman may conduct any such investigation on his initiative or on the written complaint of any person having an interest and who claims to have been aggrieved.

During the year of review the Office of the Ombudsman continued to provide investigative and administrative support services to the Mepa Auditor against payment of a fixed annual sum as agreed with Mepa in 2008. Similar services were provided to the University Ombudsman however related expenditure was refunded by the Ministry of Education which retains the Government funds voted for the University Ombudsman.

The Office hosted a major international conference in May 2011 and a smaller conference in June 2011. The former was the annual conference of the Association of Mediterranean Ombudsmen (AOM) and the costs of this conference were shared between France, Morocco, Spain and Malta. The smaller conference was for the Public Sector Ombudsmen (PSO) of the British and Irish Ombudsman Association (BIOA) who meet regularly to discuss issues of interest and invite the Ombudsman of Gibraltar and of Malta to attend. Whilst participants covered their travel and accommodation costs, other expenses for this mini-conference were covered by the Office of the Ombudsman.

The Office of the Ombudsman is responsible for ensuring that:

- proper accounting records are kept of all transactions entered into by the Office, and of its assets and liabilities;
- adequate controls and procedures are in place for safeguarding the assets of the Office, and the prevention and detection of fraud and other irregularities.

The Office is responsible to prepare accounts for each financial year which give a true and fair view of the state of affairs as at the end of the financial year and of the income and expenditure for that period.

In preparing the accounts, the Office is responsible to ensure that:

- appropriate accounting policies are selected and applied consistently;
- any judgments and estimates made are reasonable and prudent;
- International Financial Reporting Standards are followed;
- the financial statements are prepared on the going concern basis unless this is considered inappropriate.

Gordon Fitz
Finance Officer

Michael Sant
Manager
Corporate Affairs

Statement of comprehensive income

	Notes	2011 €	2011 €	2010 €
Income				
Government grant		**499,988**		373,000
Mepa Auditor grant	2	**23,293**		23,293
University Ombudsman services	2	**7,161**		5,564
Non-operating income	3	**518**		652
AOM conference grants	5	**49,000**		-
			579,960	402,509
Expenditure				
Personal emoluments	4	**(397,712)**		(397,477)
Mepa Auditor expenses		**(157)**		(783)
Administrative and other expenses (Schedule 1)		**(100,406)**		(100,014)
Conference expenses	5	**(67,999)**		-
			(566,274)	(498,274)
Surplus/(loss) for the year			**13,686**	(95,765)
Total comprehensive income/ (loss) for the year			**13,686**	(95,765)

Statement of financial position

	Notes	2011 €	2011 €	2010 €
ASSETS				
Non-current assets				
Property, plant and equipment			**71,057**	62,505
Current assets				
Receivables	6	**19,985**		34,375
Cash and cash equivalents	7	**106,630**		87,847
		126,615		122,222
Total assets			**197,672**	184,727
EQUITY AND LIABILITIES				
Accumulated surplus			**188,012**	174,326
Payables	8		**(9,660)**	(10,401)
Total equity and liabilities			**197,672**	184,727

The financial statements were approved by the Office of the Ombudsman on 16 February 2012 and were signed on its behalf by:

Gordon Fitz
Finance Officer

Michael Sant
Manager
Corporate Affairs

Statement of changes in equity

	Accumulated fund total €
At 1 January 2010	270,091
Statement of comprehensive income	
Loss for the year	(95,765)
At 31 December 2010	174,326
Statement of comprehensive income	
Surplus for the year	13,686
At 31 December 2011	**188,012**

Statement of cash flows

	Notes	2011 €	2010 €
Cash flows from operating activities			
Surplus/(loss) for the year		**13,686**	(95,765)
Adjustments for:			
Depreciation		**17,775**	13,076
Gain on disposal of tangible fixed assets		**-**	245
Interest receivable		**(518)**	(652)
		30,943	(83,096)
Decrease in receivables		**14,390**	1,859
(Decrease) in payables		**(741)**	(4,041)
Net cash from (used in) operating activities		**44,592**	(85,278)
Cash flow from investing activities			
Payments to acquire tangible fixed assets		**(26,327)**	(11,154)
Interest received		**518**	652
Net cash used in investing activities		**(25,809)**	(10,502)
Net increase/(decrease) in cash and cash equivalents		**18,783**	(95,780)
Cash and cash equivalents at beginning of year		**87,847**	183,627
Cash and cash equivalents at end of year	7	**106,630**	87,847

Notes to the financial statements

1 Legal status

In 1995 the Maltese Parliament enacted the Ombudsman Act and established the organization and functions of the Office of the Ombudsman. The main objective of the Office of the Ombudsman is to investigate complaints by the public against any action taken in the exercise of administrative functions by or on behalf of the Government or other authority, body or person to whom the Ombudsman Act applies. The Office of the Ombudsman is situated at 11, St Paul Street, Valletta.

These financial statements were approved for issue by the Finance Officer and Manager, Corporate Affairs on the 16th February 2012.

2 Summary of significant accounting policies

The principal accounting policies applied in the preparation of these financial statements are set out below. These policies have been consistently applied to all the years presented, unless otherwise stated.

Basis of preparation

The financial statements have been prepared in accordance with International Financial Reporting Standards (IFRS) and their interpretations adopted by the International Accounting Standards Board (IASB). The financial statements have been prepared under the historical cost convention.

The preparation of financial statements in conformity with IFRS requires the use of certain critical accounting estimates. Estimates and judgments are continually evaluated and based on historic experience and other factors including expectations for future events that are believed to be reasonable under the circumstances.

In the opinion of the Finance Officer and the Manager, Corporate Affairs the accounting estimates and judgments made in the course of preparing these financial statements are not difficult, subject or complex to a degree which would warrant their description as critical in terms of requirements of IAS 1.

The principal accounting policies are set out below.

Materiality and aggregation

Similar transactions, but which are material in nature are separately disclosed. On the other hand, items of dissimilar nature of function are only aggregated and included under the same heading, when these are immaterial.

Functional and presentation currency

Items included in the Financial Statements are measured in euros (€), i.e. the currency used in the primary economic environment in which the Office of the Ombudsman operates.

New and revised standards

During the year under review the Office of the Ombudsman has adopted a number of standards and interpretations issued by the IASB and the International Financial Reporting Interpretations Committee and endorsed by the European Union. The Office of the Ombudsman is of the opinion that the adoption of these standards and interpretations did not have a material impact on the financial statements.

There have been no instances of early adoption of standards and interpretations ahead of their effective date. At the date of statement of financial position, certain new standards and interpretations were in issue and endorsed by the European Union, but not yet effective for the current financial year. The Office of the Ombudsman anticipates that the initial application of the new standards and interpretation on 1 January 2012 will not have a material impact on the financial statements.

Property, plant and equipment (PPE)

Property, plant and equipment are stated at historical cost less accumulated depreciation and impairment losses. The cost of an item of property, plant and equipment is recognized as an asset if it is probable that future economic benefits associated with the item will flow to the group and the cost of the item can be measured reliably.

Subsequent costs are included in the asset's carrying amount or recognized as a separate asset, as appropriate, only when it is probable that future economic benefits associated with the item will flow to the group and the cost of the item can be measured reliably. The carrying amount of the replaced part is de-recognized. All other repairs and maintenance are charged to the income statement during the financial period in which they are incurred.

Depreciation commences when the depreciable amounts are available for use and is charged to the statement of comprehensive income so as to write off the cost, less any estimated residual value, over their estimated lives, using the straight-line method, on the following bases:

	%
Property improvements	7
Office equipment	20
Computer equipment	25
Computer software	25
Furniture and fittings	10
Motor vehicles	20
Air conditioners	17

An asset's carrying amount is written down immediately to its recoverable amount if the asset's carrying amount is greater than its estimated recoverable amount. The carrying amount of an item of PPE is de-recognized on disposal or when no future economic benefits are expected from its use or disposal. The gain or loss arising from derecognition of an item of PPE are included in the profit and loss account when the item is de-recognized.

Receivables

Receivables are stated at their net realizable values after writing off any known bad debts and providing for any debts considered doubtful.

Cash and cash equivalents

Cash and cash equivalents are carried in the Statement of Financial Position at face value. For the purposes of the cash flow statement, cash and cash equivalents comprise cash in hand and deposits held at call with banks.

Payables

Payables are carried at cost which is the fair value of the consideration to be paid in the future for goods and services received, whether or not billed to the Office.

Revenue recognition

Revenue from government grants is recognised at fair value upon receipt. Other income consists of bank interest receivable, payment by Mepa for investigative and administrative services provided by the Office of the Ombudsman. Similar services are being provided to the University Ombudsman; however, all expenditure made is charged to the Ministry of Education. At the end of the year, however, the remaining funds were transferred to the Office of the Ombudsman by the Education Department as part-payment for administrative services provided to the University Ombudsman.

France, Morocco and Spain forked out €49,000 between them as their share for the expenses of the AOM conference held in Malta on 30-31 May 2011.

		2011 **€**	2010 €
3	**Non-operating income**		
	Bank interest receivable	**518**	652
4i	**Personal emoluments**		
	Wages and salaries	**379,622**	378,814
	Social security costs	**18,090**	18,663
		397,712	397,477

4ii	**Average number of employees**	**15**	15

	2011	2010
	€	€
5 Conference expenditure		
Association of Mediterranean Ombudsmen	**65,227**	-
British and Irish Ombudsman Association	**2,772**	-
	67,999	-
6 Receivables		
Bank interest receivable	**68**	98
Trade receivables	**15,508**	13,743
Prepayments	**4,409**	20,534
	19,985	34,375

7 Cash and cash equivalents

Cash and cash equivalents consist of cash in hand and balances in bank. Cash and cash equivalents included in the cash flow statement comprise the following balance sheet amounts:

	2011	2010
	€	€
Cash at bank	**106,249**	87,587
Cash in hand	**381**	260
	106,630	87,847

		2011 €	2010 €
8	**Payables**		
	VAT payable	**3,385**	2,096
	Accruals	**6,275**	8,305
		9,660	10,401

Financial assets include receivables and cash held at bank and in hand. Financial liabilities include payables. As at 31 December 2011 the Office had no unrecognised financial liabilities.

9 Fair values

At 31 December 2011 the fair values of assets and liabilities were not materially different from their carrying amounts.

Schedule 1

Administrative and other expenses

	2011 €	2010 €
Utilities	**12,966**	13,502
Materials and supplies	**4,990**	4,722
Repair and upkeep expenses	**2,179**	4,226
Rent	**2,166**	2,166
International membership	**1,370**	1,370
Office services	**6,513**	6,225
Transport costs	**9,132**	7,771
Travelling costs	**5,278**	4,927
Information services	**10,057**	12,210
Contractual services	**25,263**	26,972
Professional services	**1,559**	(422)
Training expenses	**620**	1,899
Hospitality	**362**	837
Incidental expenses	**17**	117
Bank charges	**159**	171
Depreciation	**17,775**	13,076
Disposals	**-**	245
	100,406	100,014

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Auditor General

Our Ref: NAO 56/2010
Your Ref:

7th August 2012

The Ombudsman
Office of the Ombudsman

Report of the Auditor General

To the Office of the Ombudsman

Report on the financial statements

We have audited the accompanying financial statements of the Office of the Ombudsman set out on pages 6 to 17, which comprise the statement of financial position as at 31 December 2011, and the statement of comprehensive income, statement of changes in equity and statement of cash flows for the year then ended, and a summary of significant accounting policies and other explanatory information.

The Office of the Ombudsman's responsibility for the financial statements

The Office of the Ombudsman is responsible for the preparation of financial statements that give a true and fair view in accordance with International Financial Reporting Standards as adopted by the European Union, and for such internal control as the Office of the Ombudsman determines is necessary to enable the preparation of financial statements that are free from material misstatement, whether due to fraud or error.

Auditors' responsibility

Our responsibility is to express an opinion on these financial statements based on our audit. We conducted our audit in accordance with International Standards on Auditing. Those standards require that we comply with ethical requirements and plan and perform the audit to obtain reasonable assurance whether the financial statements are free of material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on our judgement, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, we consider internal control relevant to the preparation of financial statements of the Office that give a true and fair view in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the internal control of the Office. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the Office of the Ombudsman, as well as evaluating the overall presentation of the financial statements. We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion

In our opinion, the financial statements give a true and fair view of the financial position of the Office of the Ombudsman as at 31 December 2011, and of its financial performance and cash flows for the year then ended in accordance with International Financial Reporting Standards as adopted by the European Union, and comply with the Office of the Ombudsman Act, 1995.

Auditor General
7th August 2012

Office of the Ombudsman 11 St Paul Str Valletta VLT1210 Malta