



OMBUDSMAN

On the strengthening of the Ombudsman Institution

A proposal by
The Office of the Parliamentary Ombudsman

January 2014



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Foreword

This document has been prepared following a request by the Honourable Louis Grech, Deputy Prime Minister and Minister for European Affairs and Implementation of the Electoral Manifesto, for submissions by this Office on how the institution of the Parliamentary Ombudsman in Malta can be strengthened.



This request is made in the context of a consultation exercise intended to give substance to the electoral promise in the Labour Party's manifesto that in Chapter 17 para 14 of the Section entitled "*GVERN B'BIBIEN MIFTUHA GHALIK (Open Government)*" states "*Insaħħu l-Uffiċċju tal-Ombudsman b'aktar riżorsi u għodda biex intejbu l-operat ta' din l-istituzzjoni importanti*" (We shall strengthen the Office of the Ombudsman with more resources and tools to improve the working of this important institution).

Care has been taken to avoid theoretical argumentation or complex legal submissions in support of the proposals advanced by this Office to strengthen the Ombudsman Institution. I have purposely limited this document to the basic essentials of the measures I believe should be taken for a correct evolution of the institution in a modern, democratic society. Each proposal is followed by a specific recommendation on what steps should be taken to bring the project to fruition. Additional information on the principles that motivate my vision for the future development of the Ombudsman Institution as an effective instrument to audit the acts of the public administration in the exercise of its function as a defender of citizens' rights, can be drawn from a number of appendices to this document. These reproduce, for what they are worth, my thoughts over the years on this important topic and the measures I believe should be taken.

During my tenure of office, some of these measures have been adopted and implemented by the previous administration and legislature. Foremost among them is the recognition of the Ombudsman as a constitutional authority and the 2010 amendments to the Ombudsman Act empowering the Ombudsman to appoint specialised Commissioners for Administrative Investigations and to designate them as Officers of Parliament. These and other notable improvements that undoubtedly strengthen the Ombudsman Institution were implemented following long and fruitful consultations and eventually a debate in Parliament that led to the unanimous approval of the constitutional and legislative amendments. They need only to be further developed and strengthened.

It is my conviction that the principles on which the proposals made in this document are based should attract wide consensus. The recommendations made are obviously not cast in stone. They should be considered as an element for a fruitful debate to trace the way forward for the strengthening of an institution which has always been regarded by all shades of public opinion as a major player in the network of checks and balances essential for the correct, transparent and accountable management of public affairs in a modern democracy to which citizens are justly entitled.

The fact that the Government has deemed it fit to ask the Ombudsman for his views on how his Office should be strengthened is in itself a positive indication that the Administration is aware of the aspirations of citizens and that every effort would be made to realise them.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a smaller 'P' and a few trailing strokes.

**Chief Justice Emeritus
Joseph Said Pullicino
Parliamentary Ombudsman**

Introduction

Introduction

Dual function of the Ombudsman

The starting point for any decision on how to render the Office of the Ombudsman more meaningful for citizens has to be a correct appreciation of the dual function that the Ombudsman has as an effective defender of citizens' rights.

Primary function – Defender of Rights

Undoubtedly the primary function remains that of providing persons who feel that they have been wronged by an act of the public administration with an authoritative institution that can investigate their complaint and recommend appropriate redress. Essentially, the core function of the Ombudsman is to promote transparency, fairness, equity and administrative justice in the operations of the Maltese public administration that fall under his jurisdiction. He seeks to restore dignity and justice to individuals with a sustained grievance against a public institution.

At that primary level the Ombudsman attempts to empower the citizen to react against injustice, acts of maladministration and improper discrimination, encouraging him to stand up for his rights. He enhances the individual's ability to access information on processes that affect his interests and consequently to demand that decisions taken are based on the principles of fairness, transparency and equity. In this respect the legislative framework, modelled on that governing the New Zealand institution and further improved by the 2010 amendments to the Ombudsman Act, has proved to be progressive and forward looking. It allows for further improvement to meet new situations and challenges in a society that is continuously changing and developing.

Complaint management techniques and investigative procedures modelled by the Office within the parameters of the wide powers given to it by the Ombudsman Act 1995 are known to have been generally successful and have now withstood the test of time. No major legislative initiatives are required in this respect, though there might be need for some fine tuning.

Own Initiative Investigations

An important aspect of the primary function of the Ombudsman is his power to make own initiative investigations. It is important to stress that when

the legislator chose to entrust the Ombudsman with the power to initiate investigations into areas of maladministration that he felt merited his attention, he was in effect raising the status of the Office to that of an auditor of the administrative actions of the public administration.

The Ombudsman does not need to have a complaint to carry out an own initiative investigation, though often this is inspired by a grievance against which individuals seek redress. Essentially, when conducting own initiative investigations the Ombudsman is acting as a watchdog over the action of government departments, ministries and other public authorities and statutory bodies and partnerships or other bodies in which the Government has a controlling interest, or that fall within the jurisdiction of his Office. In this regard, the Ombudsman is expected by law to be proactive and to act as a defender of citizens' rights in the widest sense of the term.

The Maltese legislator has been forward looking and far sighted in this respect. Only a few European Ombudsman institutions are given the right to conduct own initiative investigations. This right has been put to good use by the Maltese Ombudsman and now by the Commissioners. Many of their own initiative investigations have been well received and have had a positive impact on specific areas of the administration that required immediate attention and corrective measures. The recognition of the status of the Ombudsman as a national auditor of the administrative actions of the public administration should therefore be a pivotal issue in any exercise to identify measures to strengthen the Institution.

The Ombudsman lacks Executive Powers

In the exercise of his primary function as defender of the people the Ombudsman in Malta, like many other Ombudsmen elsewhere, lacks executive powers. He can recommend a wide range of flexible remedies including financial compensation when appropriate, but unlike a Court of Law, his recommendations are not binding and can be rejected by the public authorities. The Ombudsman's ability to secure results therefore depends upon the quality of the arguments he makes, the respect he commands in the country and the moral authority inherent in his Office. I strongly believe that there should be no change in this approach and that the fundamental distinction between the Ombudsman as a mediator between the citizen and the public administration and the Courts of Law that deliver binding judgements, should be retained.

The Ombudsman does not determine rights and obligations. The investigation he conducts is not adversarial in character and the procedure he adopts, while

respecting the rules of due process, cannot be considered to fully comply with all the norms regulating a fair hearing before a Tribunal or a Court of Law. Essentially the Ombudsman's opinions, while based on the application of legal norms, are weighted with principles of justice and equity. There is however scope to consider ways and means how the final opinions and the recommendations of the Ombudsman that have not been accepted by the public authorities, could be rendered more effective. This by ensuring that the complainant is given full satisfaction through a transparent and accountable process, that the public authority was justified in refusing to implement the Ombudsman's recommendation.

Majority of recommendations implemented

It has to be stated that the vast majority of the recommendations of the Parliamentary Ombudsman are implemented within a relatively short time by the authorities. However, there will always be a small number of cases where the administration fails to implement the recommendation of the Ombudsman notwithstanding his opinion that the grievance is justified. The Ombudsman considers that when a confirmed grievance is not redressed the authority of the Ombudsman is undermined. Such a negative outcome inevitably lowers the expectations of citizens on the power and ability of the Ombudsman to resolve instances of injustice by the public administration. It is therefore opportune to address this issue and specific proposals will be made in this respect.

Secondary function - Catalyst for improvement of public administration

A secondary but certainly not less important function of the Ombudsman, that is implied but not expressly spelt out in the Ombudsman Act and that has been actively pursued and developed by the current Parliamentary Ombudsman, is the potential of the Office to act as a catalyst for the improvement of the public administration. This especially so where systemic failures of policies and procedures, aggravating wide sectors of the population are identified, it has already been stated that the Office of the Parliamentary Ombudsman does not project itself as an adversary of the public administration. It does not follow a policy of confrontation. The Ombudsman considers himself to be a defender of the citizen but also an *amicus* of the public administration.

In promoting these initiatives, the Ombudsman has generally found collaboration from ministries, government departments, public authorities and corporations. He has on several occasions successfully conducted initiatives that

led to the setting up of internal complaint mechanisms, consumer protection bodies, transparent and fair promotion processes and similar exercises. There have on occasion been cases where the public authority itself has sought the advice of the Parliamentary Ombudsman, who then offered his services to help in determining correct, just and transparent procedures that would go a long way to satisfying the aspirations of aggrieved citizens.

Positive and Proactive collaboration

This positive and proactive collaboration between the Ombudsman and the public administration needs to be highlighted, recognised and strengthened. Public authorities should be encouraged to react affirmatively to proposals meant to make their administration more transparent and accountable. The Office of the Ombudsman should progress into a useful tool to design effective procedures of redress that could satisfy the grievances of citizens that are not satisfied with the service they receive and that would favour out of court settlement.

Conclusion

The proposals that the Ombudsman is submitting as the basis for discussion on the strengthening of his Office are meant to provide a wider and sturdier constitutional and legal base for the Office that would recognise its standing as a Parliamentary Institution charged with the audit of the administrative actions of Government and that would allow it to exercise its dual functions effectively. They will also seek to implement a plan of action for the expansion of its services to the citizen, based on the convergence of specialised sectoral scrutiny mechanisms, operating autonomously but under the guidance of the Parliamentary Ombudsman as one unified service.

Of Constitutional Amendments

Proposal Number 1

A. The fundamental right to good administration

The pivotal node that should be at the centre of any major reform to strengthen the Office of the Ombudsman should be the recognition by the State that the individual enjoys a fundamental right to good administration. The radical change in mentality in favour of ensuring a transparent and accountable public administration that would treat the citizen justly, fairly and without improper discrimination was undoubtedly the result not only of the country's total exposure to modern concepts of good administration, but also of Malta's decision to attain full membership in the European Union and consequently to adopt and maintain the basic values that constitute the essence of good governance.

These basic values are incorporated in the European Code of Good Administrative Behaviour that translates in a tangible and comprehensive manner the right to good administration, acknowledged and defined in the Charter of Fundamental Rights of the European Union¹ to which Malta is a signatory. That Charter was incorporated by the Union in the Treaty of Lisbon on 1 December 2009. A Treaty to which Malta subscribed and that in the words of the Union's President Barroso *"puts citizens at the centre of the European project"*. This Article in the Charter², that of course regulates the relationship between Member States and their citizens, and the institutions of the European Union, expressly lays down that *"every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union"*.

Elements of the right

In sub-article 2 of Article 41, the Charter specifies what the right to good administration includes; namely:

1. the right of every person to be heard before any individual measure which will affect him or her adversely is taken;

1. Article 41 of the Charter of Fundamental Rights of the European Union.

2. *"...I am pleased to note that the Code has been taken on board by a number of Member States and candidate countries.....I hope that the Code will continue to serve as a useful working tool for public administration and as a reference point for citizens all over Europe."* The European Code of Good Administrative Behaviour, foreword by P. Nikiforos Diamandouros, European Ombudsman (2003 – 2013), 5 January 2005.

2. the right of every person to have access to his or her file while respecting the legitimate interests of confidentiality and of professional and business secrecy; and
3. the obligation of the administration to give reasons for its decisions.

These are essentially the constitutive elements of good administrative behaviour that the Ombudsman seeks to identify in the exercise of his functions when investigating complaints by individuals seeking redress. The principles of good governance that constitute the right to good administration are not laid down in the Charter of Fundamental Rights of the European Union as a *desideratum*. They are laid down as a right that can be exercised by citizens who are entitled to it. A right that can be invoked before the Union's judicial and quasi-judicial institutions.

Right should be enshrined in Constitution

I strongly believe that the time has come for the individual's right to good public administration to be enshrined in a revised Constitution for Malta. A Constitution that should be designed to serve the people, should have as its central focal point the recognition of the right of every individual to be fairly and correctly treated by those who have been entrusted by him to administer public affairs.

Incorporating the right to good administration as a basic principle in the Constitution means that the individual is given an effective legal tool to exercise that right by keeping the public authority accountable for its actions through judicial and other processes. Moreover, the formal recognition of that right in the Constitution will not only strengthen the right of citizens to a just and transparent administration; it would also motivate and justify the decision of the House of Representatives to entrench the Office of the Ombudsman in the Constitution as a guardian of that right. It should also be clear that, recognising the people's right to a good public administration is a necessary corollary of the principle that the Constitution should be an instrument to serve the people and to ensure good governance.

Principle of State Care and Liability

It should also be clear and acceptable to all that a modern and progressive Constitution, tailored to suit and serve the people, should expressly recognise the principle of the State's liability for the actions of its officers and the right

of the individual to seek redress against the State for damage suffered. A right which encapsulates the principal function of its Parliamentary Ombudsman as a defender of the people. At this stage, it is pertinent to point out that sub-article 3 of Article 41 of the Charter of the European Union declares that *“every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties in accordance with general principles common to the law of the Member States”*.

This is a principle that is today enshrined in many European and other Constitutions. It is a fundamental principle that in my view should find its place in a revised Constitution of Malta. Its inclusion in the founding document of the Republic would highlight the commitment of the State towards a transparent and accountable public administration. It would further promote and enhance positive steps taken in this direction set out in the Public Administration Act. A law that perhaps for the first time, grants rights to the individual on an administrative level to ensure that the public sector is transparent, accountable and professional. The Act in fact imposes a duty on public servants to treat persons to whom they are obliged to provide a service fairly, justly, equitably and without improper discrimination. It is within this context that the Parliamentary Ombudsman needs to exercise his functions.

Recommendation

It is recommended that the Constitution should recognise the right to a good public administration as a fundamental right and should also expressly recognise the principle of the State's liability for the actions of its officers and the right of the individual to seek redress against the State for damages suffered.

Proposal Number 2

B. The strengthening of the Constitutional Status of the Parliamentary Ombudsman

The Constitutional recognition of the basic right of the individual to a good administration would in fact justify and give substance to the constitutional amendment unanimously approved by the House of Representatives on 24 July 2007 providing that *"...there shall be a Commissioner for Administrative Investigations to be called the Ombudsman who shall have the function to investigate actions taken by or on behalf of the Government or by such other authority, body or person as may be provided by law (including an authority, body or office established by this Constitution) being actions taken in the exercise of their administrative functions"*³.

Sub-article 2 of Article 64A further states that *"...the manner of appointment, term of office, and the manner of removal or suspension from Office of the Ombudsman together with any other matter ancillary or consequential thereto or considered necessary or expedient for the carrying out of the function referred to in sub-article 1 shall be provided for by an act of Parliament"*. That Act is of course the Ombudsman Act.⁴

Limited constitutional protection

This Constitutional amendment is entrenched and requires a qualified majority of two thirds of the Members of the House of Representatives to be changed. It is however, clear that this constitutional protection does not extend to the Ombudsman Act that is an ordinary law that can be changed by a simple majority, even though it does include provisions that adequately protect the independence of the Office of the Ombudsman. In fact the Act requires a qualified majority of two thirds of the House of Representatives to amend certain key provisions.

Univocal political statement

Any meaningful exercise to strengthen the Ombudsman Institution should have as its starting point a univocal political statement expressed by the people through their Constitution, that they intend the Auditor General and the Ombudsman, as Officers of Parliament answerable to their representatives,

3. Article 64 A(1) of the Constitution.

4. Act XXI of 1995 as amended.

to be their watchdog and defender to ensure a clean and transparent administration by the Executive.

The Constitution therefore, should recognise these two offices as authorities charged with the audit of the public administration with the express function to ensure that the Executive, in a wide sense including its authorities and entities, are accountable to Parliament and is seen to be so. The constitutional provisions governing these two authorities should expressly state that they are accountable to Parliament. They should essentially be seen as a vital tool in the democratic system of checks and balances by which Parliament can verify and control the actions of the Executive.

Ombudsman and Auditor General on equal footing

The constitutional provisions governing the two institutions should be on dual, parallel but not necessarily converging tracks. Both authorities should be on an equal footing – the Auditor General charged with the scrutiny of the fiscal performance of the public administration, and the Ombudsman charged with investigating its administrative actions, inactions, decisions and processes. Taking the existing constitutional provisions governing both institutions as the starting point for this exercise, one can identify the following essential elements that are required to guarantee their proper constitutional status to function as independent and autonomous authorities:

- Method of appointment
- Term of Office
- Security of tenure
- Funding of the Office
- Conditions of service

It is noted that while all these essential elements are provided for in the Constitution as regards the Auditor General, in the case of the Ombudsman they are only provided for in the Ombudsman Act. At present, while the Ombudsman Institution is entrenched in the Constitution, the Ombudsman himself does not enjoy constitutional protection, even though, it must be said that the Act itself is fully compliant with the Paris Principles⁵ and adequately provides for the essential elements mentioned above.

It is the opinion of the Ombudsman however, that these discrepancies should be removed to ensure full protection of the Ombudsman in the Constitution, even though it must be emphasised that there has never been any problem

5. Vide Annex VIII on page 102

with any administration in this respect. The streamlining of the constitutional recognition and the protection of these two Officers of Parliament is essential to underline the principle that they have to be allowed to exercise their responsibilities in full freedom and that they should be accountable only to Parliament without any allegiance either to Government or the Opposition.

Single term of Office

Furthermore, one should consider whether it is advisable to convert the term of Office of both officers to a single term. The Auditor General and the Ombudsman both hold office for five years from the date of their appointment and are eligible for reappointment for one further period of five years. Experience has however shown that there is often an interval between the lapse of the first term and their reappointment, for reasons unrelated to the Office or its incumbent. A hiatus that is undesirable and that can give rise to untoward political manoeuvring during the renewal period. In an effort to ensure more transparency, many countries have opted for a single longer term of appointment of between seven or nine years. This would not only avoid any risk of undue influence but would afford the holder of such a high office adequate time to execute his vision and policies. The same should apply to the term of Office of Commissioners appointed in terms of the 2010 amendments.

Separate Title in Constitution

It is suggested that in the redrafting of a new Constitution, the provisions regulating these two authorities should be grouped together and placed in a separate title immediately after those regulating Parliament. The Constitution should recognise their status as authorities, answerable to Parliament and entrusted by it to verify that the actions of the Executive conform to legislation enacted by it and that they satisfy the right to good administration.

Ensuring continuity in Office

Another issue worth considering refers to the appointment of the Ombudsman. As the law stands today, it does not adequately provide for the time when the post remains vacant. This could happen for a number of reasons – the post could become vacant because of death, resignation or inability to perform one's duties during the running of the term of Office. Sub article 2 of Section 5 provides that *“unless his office sooner become vacant, a person appointed as*

an Ombudsman shall hold office until his successor is appointed.”

There have been cases where months passed before agreement was reached between the political forces on the appointment of a new Ombudsman. It is clearly not right that this post remains vacant for a long time, thus depriving citizens of their right to resort to the Institution while the vacancy is held in abeyance. There is no statutory provision providing for a temporary appointment to this sensitive position in most of these instances.

It is not proposed to interfere in the method of appointment laid down in the Ombudsman Act which has proved to be very satisfactory and has withstood the test of time. This method of appointment should indeed be provided for in the Constitution.

Mediatory role for President

Consideration could also be given to the possibility of the President assuming an active, mediatory role in the appointment of the Ombudsman, and perhaps other key positions when the Prime Minister and the Leader of the Opposition fail to agree on a person that could command the required two thirds majority of the Members of the House of Representatives. If this happens, it might be advisable if the President be empowered in his own deliberate judgement, to submit to the House of Representatives for its consideration a list of three persons who, in his opinion could competently fill the post.

In such circumstances, it would be fair to assume that it would be easier for the House to identify one of these persons who could gain the approval of the necessary qualified majority.

The Ombudsman is of the opinion that such appointments should remain in the first place a prerogative of the Prime Minister and Leader of the Opposition and that the President should only retain a subsidiary role in case they fail to agree within a definite time frame established by law.

Deputy Ombudsman

Provision should be made either in the Constitution or in the Ombudsman Act for the appointment of a Deputy Ombudsman to stand in for the Parliamentary Ombudsman when necessary. As the law stands today, it provides for the appointment of a Temporary Ombudsman by the President whenever the need arises. Experience has shown this procedure to be cumbersome and time

consuming.

It is suggested that the law should provide that there should be a Deputy Ombudsman who would have such functions as the Ombudsman would from time to time, delegate to him and who shall perform the functions of the Ombudsman whenever the Office of the Ombudsman is temporarily vacant and until a new Ombudsman is appointed. The Deputy Ombudsman would also exercise his functions whenever the Ombudsman is absent from Malta, or on vacation, or is for any reason unable to perform the functions of his Office. One of the Commissioners, appointed in the Office of the Ombudsman, could be delegated by the President, after consultation with the Ombudsman when possible, to act as Deputy Ombudsman.

This suggestion is on the same lines that the Constitution provides for the appointment of a Deputy Auditor General. A simpler mechanism is being suggested because the organisational setup of the Office after the 2010 amendments would not require additional safeguards for the Deputy Ombudsman who would in any case, enjoy the status of a Commissioner and the adequate guarantees that this Office enjoys.

Financial sustainability

The Paris Principles require that the State has to ensure that the Ombudsman has sufficient human, material and financial resources to discharge his functions independently and efficiently. There is no specific reference to funding of the Ombudsman Institution in the Constitution. It only provides that ancillary or consequential matters to the appointment of the Ombudsman that were considered necessary or expedient for the carrying out of his functions, shall be provided for by an Act of Parliament. A provision that substantially reflects the article in the Constitution for the funding of the National Audit Office.

The procedures for the funding of his Office in the Ombudsman Act are considered by the Ombudsman to be satisfactory and have withstood the test of time. There is only one reservation that appears to be shared by the Auditor General. It is the Ombudsman's conviction that once Parliament approves the annual Ombudsplan, that determines the budget for his Office for the following year, and once that decision is approved by Parliament in the annual Budget, the amount voted should be put at the disposal of the Ombudsman. It should be in no way curtailed, as of right, by a subsequent directive from the Executive.

There have been instances where the Ministry of Finance approached this matter as if the Ombudsman's Office was just another government department,

authority or institution. This is not the case. The Ombudsman has put it on record⁶ that, while he feels it is his duty, as part of the public administration in a wide sense, to follow government policies including, fiscal measures that do not unduly hamper the proper functioning of his Office, that decision rests with him. It is his conviction that the Executive cannot unilaterally, alter or reduce the vote approved by Parliament to be put at his disposal in the annual Budget.

A different reading of the powers of the Executive in this regard would not only disturb the relationship that there should be between the Parliamentary Ombudsman and Parliament, it would also be in conflict with the legal protection that both the Ombudsman⁷ and the Auditor General⁸ have that, in the exercise of their functions, they should not be subject to the authority or control of any person.

Recommendation

It is recommended that the Constitutional protection already enjoyed by the Auditor General should be extended to the Ombudsman. The provisions regulating both authorities should be complementary and afford the basic guarantees required as explained above to ensure that these Officers of Parliament can exercise their functions freely and without undue influence in institutions that are truly independent and autonomous. The proposals might also require consequential amendments to the Ombudsman Act of 1995.

6. Vide Annex VI - Letter by the Parliamentary Ombudsman to mister Alfred Camilleri permanent Secretary Ministry of Finance, the Economy and Investment - 12th January 2012 on page 98.

7. Article 108 of the Constitution of Malta provides that “(1) There shall be an Auditor General whose office shall be a public office who shall have the functions as provided in the following provisions of this article. (2) The Auditor General shall be an officer of the House of Representatives and shall be appointed by the President acting in accordance with a resolution of the House of Representatives supported by the votes of not less than two-thirds of all the members in the House.”

8. Article 64A of the Constitution of Malta provides that “(1) There shall be a Commissioner for Administrative Investigations to be called the Ombudsman who shall have the function to investigate actions taken by or on behalf of the Government, or by such other authority, body or person as may be provided by law (including an authority, body or office established by this Constitution), being actions taken in the exercise of their administrative functions.”

Of the Stengthening of the Institutional Framework

Of the strengthening of the Institutional Framework

In recent years the Parliamentary Ombudsman has been focusing the country's attention on the need to further strengthen the institutional framework of his Office for the protection and promotion of citizens' rights, in the context of a wider Ombudsman jurisdiction. It is his view that there is room for improving the Ombudsman service in areas that are felt to warrant deeper scrutiny and oversight as a means to enable citizens to assert their rights even more forcefully.

There has undoubtedly been a significant change in Government policy in the conduct of public affairs that favours a clear distinction between the role of the Government as regulator and its role as a direct provider of a range of essential services. The Government is in many cases, shedding its former role as a direct provider of services, allocating these responsibilities to separate administrative and operational structures. It is retaining the role of a watchdog to supervise the quality and standards of these services.

The increased complexity of the social and economic activities generated by the public administration often require the setting up of *ad hoc* institutions to ensure that the right of citizens to a fair and transparent provision of services is guaranteed. The setting up of these institutions, that in most cases do not enjoy the status, independence or investigative capacity of the Ombudsman which included authorities like the Audit Officer at the Malta Environment and Planning Authority and the University Ombudsman, was seen not to be providing an effective and adequate means of redress to which aggrieved persons were entitled. Complaints against these authorities could be lodged with the Parliamentary Ombudsman. However, it was becoming increasingly evident that the Office of the Ombudsman, even though well equipped to carry out investigations, was lacking the necessary expertise to effectively carry out its functions in these areas with authority and competence.

Proposal Number 3

For these reasons the Ombudsman proposed to the outgoing administration that his Institution should be orientated towards specialisation and strengthened with the launching of a process aimed at convergence between the Office of the Parliamentary Ombudsman and various sectoral, scrutiny mechanisms set up under various laws in recent years. That proposal led to the 2010 amendments to the Ombudsman Act that provide for the appointment of Commissioners for Administrative Investigations in specialised areas of the public administration. A process that, while guaranteeing the full autonomy of these Commissioners in the exercise of their respective powers and functions in the investigation of complaints falling within their technical competence, would for all other purposes integrate them within the existing structures of the Office of the Parliamentary Ombudsman. This meant that the application of the investigative processes and procedures, as well as any legal provisions that regulate the work of the Ombudsman would apply to them. This ensures a more homogeneous structure that favours a unified scrutiny mechanism.

The 2010 amendments to the Ombudsman Act provide the legislative framework for an improved Ombudsman service, aimed to set up a strong and effective point of reference for those seeking redress for injustice suffered as a result of maladministration. The amendments are intended to strengthen the institutional framework of the Office by providing, as far as possible, a one stop shop for aggrieved citizens to seek redress for complaints covering the widest possible spectrum of the actions of the public administration and public authorities that fall within the Ombudsman's jurisdiction.

The amendments are specifically intended to enhance the role of the Ombudsman as a defender of citizens' rights. They are enabling provisions that allow a wide margin of flexibility to be exercised by the Ombudsman with the approval of the Prime Minister. The exercise was intended to enable the Ombudsman to meet the challenges of establishing a comprehensive and effective means of control and audit of the acts of the public administration. Initially three vital areas of development that required to be upgraded were targeted. It was abundantly clear that the Ombudsman's attention had to be focused on these areas since administrative decisions were becoming more complex and were increasingly affecting citizens' rights.

2010 amendments - a first step

The previous administration understood that the 2010 amendments should, as a first step, be put into effect through the appointment of a Commissioner for Health, a Commissioner for Education and a Commissioner for Environment and Planning. A decision that proved to be very positive and rewarding. The Office of the Audit Officer at MEPA and the Office of the University Ombudsman were abolished and substituted by Commissioners to cover these areas, while a new Commissioner for Health was appointed.

This experiment, that has been fully operational for the last eighteen months, is proving to be very successful and is serving its purpose well. The Office has gained expertise in areas which are today very specialised. The Commissioners work in an integrated system of investigation and processing of final opinions. There is constant consultation between them and the Parliamentary Ombudsman on the method of investigation, the conduct of procedures, the interpretation of legal provisions applicable to the merits of complaints and the rules of due process. They are ably supported by the investigative and administrative staff of the Office and benefit from other support services the Office can offer. Undoubtedly they are providing, together with the Ombudsman, a better service to the citizen. The Office can deliver opinions in these areas that are not only well motivated but also authoritative, given by Commissioners who are highly qualified in their specialisation. All this has been achieved with a marginal rise in the recurrent expenditure of the Office, except of course for the honoraria due to the Commissioners.

Scope for further specialisation

The Ombudsman is of the opinion that this successful development should be extended to other important areas of the public administration, where the demand warrants it. A clear distinction must be maintained between the need for specialisation within the Ombudsman Institution, meant to essentially upgrade and enhance the services delivered by the Ombudsman in the exercise of his functions, and the possible convergence with his Office of other autonomous institutions that to some extent partake of the Ombudsman's functions to investigate the actions of public authorities.

At this point it is only the first issue of further specialisation that is being considered. The extension of this successful exercise to improve the Ombudsman's service would only involve the Office of the Parliamentary Ombudsman. It needs solely to be considered and provided for within the parameters of the Ombudsman Act and in the contest of the appointment of

new Commissioners in terms of the 2010 amendments. In the second instance, any proposed convergence of other existing authorities or institutions with the Office of the Ombudsman must take into account the fact that convergence has to ensure that both the Parliamentary Ombudsman and the ‘converging institution’ are to retain their autonomy in the exercise of their proper functions.

Careful study needed

As things stand today, the Ombudsman is of the opinion that before other Commissioners are appointed to inject further specialisation in the investigations of complaints lodged with his Office, a careful study needs to be made to ensure that such an appointment would be justified by the nature of the subject matter, the degree of expertise it requires and whether the number of complaints would provide a sufficient workload to warrant the appointment of a Commissioner, who would enjoy the status of a Magistrate.

A number of areas that could qualify for the appointment of a Commissioner have been identified. The following are three examples:

A. Commissioner for Persons Deprived of their Liberty

Following consultations with the Ombudsman in 2012, the then Ministry of Home Affairs, made formal proposals to address three pressing needs:

- 1) the provision of an independent ongoing source of investigation and additional redress for prisoners;
- 2) the closer oversight of prison facilities and other institutions of detention; and
- 3) the setting up of an appropriate institutional framework to enable Malta to fully comply with obligations arising from its subscription to the OPCAT⁹.

The Ombudsman’s jurisdiction today extends to the investigation of complaints regarding civil prisons, detention centres, mental institutions and other facilities housing persons deprived of their liberty. It has to be admitted that complaints to the Ombudsman regarding these institutions are few and far between. The Office is not as yet, considered to be an accessible focal point in these areas to seek redress against maladministration. It has not as yet established a presence in them and no major initiative to reach out to the residents in

9. Memo from the Permanent Secretary, Ministry of Home Affairs to the Ombudsman dated 11 October 2012 are reproduced at Annex VII.

these institutions has been made. It is felt that a physical, proactive presence is required to instil in inmates the sense of security and reassurance required to encourage them to put forward their grievances for investigation.

Appointing the right person as Commissioner with a hands-on approach to resolve problems and to oversee the administration of these institutions would undoubtedly be of great benefit both to the inmates of these facilities as well as to their administrators. The Memo quoted above put forward other valid reasons in support of the appointment of a Commissioner in this field and specifically recommended that his Office be set up within the framework of the expanded Ombudsman service in terms of the 2010 amendments to the Ombudsman Act.

Decision delayed

The Ombudsman actively considered this proposal but delayed taking a decision since he thought it advisable to give some time to the new integrated system to function and to prove its worth. He was also concerned that the number of cases that could be generated in this specialised area might not be adequate to justify the appointment of a full time Commissioner, even though he was quite aware that once a good service is provided the demand would definitely grow. This has been amply proved in the case of the new Commissioners, especially the Commissioner for Health. Another reason for delaying his decision was the unstable political situation that led to a General Election some months later.

The Ombudsman is of the opinion that this proposal should be reactivated and reconsidered. The concerns about the potential caseload could be addressed by extending the functions of the new Commissioner to cover complaints from uniformed and non-uniformed personnel in the country's security services including the Armed Forces, the Police and Civil Protection. Complaints from these areas, within the limited parameters of the Ombudsman Act, already fall within the jurisdiction of the Ombudsman. It is appreciated that their investigation often requires a degree of specialised expertise that a Commissioner familiar with the administration of disciplined forces would provide.

B. Commissioner for Local Councils

A good percentage of the complaints lodged with the Ombudsman concern the administration of local councils that today exercise a vital function in the

management of the affairs of civil society at ground level that mostly affects the citizen. The responsibilities of local councils extend to a wide variety of services that is bound to increase. They have been functioning for the last twenty years and inevitably the need has been felt to introduce structures to ensure good management, efficiency and accountability and to give citizens effective means to seek redress against maladministration. The Ombudsman has been very active in this field and has also provided useful advice on the improvement of practices and procedures of local council administration. He has finalised opinions on the role of the Executive Secretaries as an essential point of reference between the Council and the central Government to ensure the correct observance of rules and regulations.

At a national conference organised by the Nationalist Party on local councils on 23 November 2013, it was proposed that an ombudsman or Commissioner for Local Councils be appointed within the Office of the Parliamentary Ombudsman. The Parliamentary Secretary for Local Councils stated that the proposal would be favourably considered. It is proposed that this suggestion be further studied to establish whether the appointment of a Commissioner in this field is a viable and sustainable proposition. Undoubtedly, the administration of Local Councils is a wide and specialised area that could benefit from the attentive scrutiny of a Commissioner exclusively focused on the impact of decisions taken by the councils.

C. Commissioner for Consumers' Rights

Another area that could merit specialised attention is that of consumer rights. It has already been noted that in recent years Government has been gradually shedding its role as a service provider and is assuming that of regulator. Services which up to some time ago were considered to be essential, have either been completely privatised or are being provided by authorities or entities enjoying a degree of autonomy, but in which the Government has a controlling interest. In all cases there is however still the need to ensure that consumers are adequately protected to guarantee that services are being efficiently and justly provided according to the rules of good administrative behaviour.

It is the opinion of the Ombudsman that it is not enough for service providers to have in place internal or other complaint mechanisms to which consumers may revert if they are unsatisfied with the service given. They need to be able to have recourse to an autonomous and authoritative institution like the Ombudsman who could objectively investigate complaints and recommend redress.

The appointment of a Commissioner for the protection of consumers might therefore be advisable, especially if the jurisdiction of the Ombudsman was to be extended to include complaints against bodies in the private sector that are providing a service that the law considers to be essential. If a study of this proposal shows that the setting up of a Commissioner for Consumer Rights is viable and advisable one could consider that this Office could be joined to that of the Commissioner for Local Councils thus ensuring that one Commissioner would have an adequate caseload to justify the cost of an additional Commissioner.

Recommendation

It is recommended that the Government carefully evaluates any request by the Ombudsman to further the process of specialisation in his Office by the appointment of other Commissioners under the 2010 amendments of the Ombudsman Act, if the service so requires. The Office of a Commissioner is set up by the Ombudsman with the concurrence and approval of the Prime Minister.

Proposal Number 4

There has been in recent years a mushrooming of a considerable number of autonomous or semi-autonomous institutions set up by law to oversee specific areas of social, economic or other activities that Parliament considered needed regulation in the interest of citizens and society generally. These authorities and institutions often essentially have within their specialised functions a remit to investigate complaints of acts of maladministration in matters falling under their jurisdiction. They can make recommendations on how a proved injustice can be redressed and in some cases, can also initiate executive action for this purpose. In most cases their jurisdiction extends also to the private sector.

There is no uniform standard legislative pattern governing these institutions. Each one of them is regulated by its own founding law, tailored to its needs. It is a fact that most of these authorities and institutions do not completely conform to the Paris Principles. Authorities like the Commissioner for Children, the National Commission for Persons with Disability, the Commissioner for Mental Health and others are doing sterling work in their respective fields, but they cannot be said to afford the citizen with the same level of protection that he enjoys when having recourse to the Parliamentary Ombudsman.

A number of these authorities have voiced concerns that they do not enjoy that degree of independence and autonomy from the Executive to allow them to exercise their functions with the required freedom and serenity. On the other hand, it is the opinion of the Ombudsman that the size and limited resources of the country can ill-afford so many independent authorities often exercising similar or analogous functions. It is his considered opinion that a study should be carried out to determine whether some of these authorities could usefully be converged to some extent with his Office. This would mean a sharing of human and material resources, of investigative and administrative services and a valuable exchange of expertise in the conduct of investigations and the determination of complaints. Convergence does not mean fusion.

The proliferation of various often hybrid institutions having the function of auditing the management of specific areas of the public administration, operating under different statutes and in many cases dependent on the same authorities that fall under their jurisdiction, has been perceived by many countries as a weakening factor in a national ombudsman service. The Ombudsman feels that there was a lack of rational planning in the haphazard way in which these authorities were being set up and a consequent waste of

human resources, inefficiencies in their institutional setup and the expertise required to properly carry out their functions.

It was for this reason that the Ombudsman in 2007, called for the consideration of a process of convergence of national administrative review mechanisms set up by law to investigate specific sectors of public administration. A similar situation was being faced at the time in other European jurisdictions and many countries have taken and are still taking steps in the direction of a unified ombudsman service. Every country is choosing the model that it deems appropriate to achieve a measure of unified service according to its needs¹⁰.

Malta's Ombudsman has contributed to the ongoing debate on this issue in the European fora. He believes that Malta too should choose the model best suited for its purposes. He is of the opinion that convergence should be approached cautiously and introduced gradually and only when the process would clearly benefit both the authority to be converged and the Ombudsman Institution itself. The exercise, while ensuring that designated existing complaint handling services would be brought closer to the Office of the Parliamentary Ombudsman by means of direct access to its administrative and investigative services, would also promote a streamlined and coherent process in terms of investigative techniques, the application of complaint evaluation methodologies and provision of remedy in sustained cases.

It is proposed that the 'converged' authority, while being bound to conduct its investigations like other Commissioners according to the provisions of the Ombudsman Act, would retain its identity and autonomy in the exercise of its functions as set out in its founding legislation, that shall remain operative for all other intents and purposes. Such a system would have the advantage of getting the converged authority into the mainstream of the national ombudsman service, while retaining the necessary flexibility and expertise to carry out the specialised functions it has been set up to perform.

In the opinion of the Ombudsman, the converged authority would still retain its identity and exercise the functions proper to it under the provisions of its founding law. The converged authority, through its Commissioner would continue to determine complaints that fall within its jurisdiction in full freedom and autonomy. Such a process of convergence would go a long way to develop a single port of call for Ombudsman activity in the country.

It is not intended in any way to create a monolithic, all-embracing Ombudsman service to audit all aspects of the public administration. The setting up of an all-powerful institution would be counterproductive and not conducive to a

10. Examples of the various models are given in Appendix V at page 92.

proper, well-balanced development of democratic institutions. The proposal is however, meant to encourage a review of existing institutions, having functions akin to that of the Ombudsman, even if exercised within the parameters of a limited jurisdiction. This to determine whether they could operate within the existing structures of the Office of the Parliamentary Ombudsman, thus improving their status, making them more cost-effective, strengthening their human resources and consequently, providing a more efficient and authoritative service to the citizen.

Recommendation

It is recommended that the Government should carry out a study to establish whether authorities and institutions set up by law that have functions akin to those of the Parliamentary Ombudsman could usefully be converged with his Office within the parameters considered above.

Of making full use of existing functions

Proposal Number 5

Finally the best way to strengthen the institutional framework of the Office of the Ombudsman lies undoubtedly in utilising to the full the functions for which it was set up as a national authority vested with the duty to investigate the administrative actions of the Executive and public authorities. The services that the Office of the Ombudsman can provide for the benefit of society within the existing institutional framework, do not seem to be in some respects, fully utilised.

Some of the provisions of the Ombudsman Act confer on the Ombudsman investigative powers that have never been utilised and are for all intents and purposes a dead letter. It is widely known that the Ombudsman generally investigates any action taken by or on behalf of the Government or other authority, body or person that fall within his jurisdiction, being actions taken in the exercise of their administrative functions. Such investigations may be conducted on the written complaint of any person having an interest, who claims to have been aggrieved. The Ombudsman can also conduct any such investigation on his own initiative. He can also investigate a complaint made by the representative of any person who feels aggrieved by an administrative act of a public authority. There have been cases where a Member of Parliament asked the Ombudsman to investigate a complaint of one of his constituents. Surprisingly, these are however extremely rare cases.

The Maltese legislator was very forward looking when deciding to grant the individual the right to directly petition the Ombudsman to defend him against acts of maladministration, injustice, improper discrimination and abuse of power by the public authority. Giving the aggrieved individual the right of direct access to the Ombudsman, without the need of passing through an intermediary like his Member of Parliament, gives complainant optimum protection and makes the Maltese law an extremely progressive one. Indeed, many European countries do not have the right of individual petition. In the UK a complaint can only be made by a constituent through his MP. This is considered by many to be inadequate and a debate is underway to determine whether the system should be altered to allow the right of direct access to the Parliamentary Ombudsman.

Few are aware that according to Article 13 of the Ombudsman Act, the Ombudsman can be required by any Committee of the House of Representatives or by the Prime Minister, to investigate any matter they refer to him. Indeed Sub-article 4 of that Article declares that “any Committee of the House of

Representatives may at any time refer to the Ombudsman any petition that is before that Committee for consideration or any matter to which the petition relates". In any such case the Ombudsman is bound to investigate the matter referred to him so far as it is within his jurisdiction and subject to any special directions given to him by the Committee. It is interesting to point out that the referral has to be made by the Committee and not by any member of the Committee. The reference can only be made in respect of any petition that is before the Committee for consideration, or of any other matter that relates to such a petition. The power of the Committee is therefore circumscribed by the existence of a petition that has been submitted to it. This Sub-article is of special relevance today since Parliament is considering whether to set up a Committee to receive petitions from individuals who feel aggrieved by the actions of Members of the House.

Sub-article 6 of Article 13 provides that: "The Prime Minister may at any time refer to the Ombudsman for investigation and report any matter other than a matter which is subject to judicial proceedings, which the Prime Minister considered should be investigated by the Ombudsman". It is pointed out that in such cases the Prime Minister is free to refer any matter to the Ombudsman for investigation. There is no need that such matter refers to a complaint. The only limitation that the Prime Minister has is that the matter should not be subject to judicial proceedings and the general limitation that the Ombudsman cannot conduct an investigation in respect of actions and matters described in the Second Schedule to the Ombudsman Act that specifies the matters that are not subject to investigation by the Ombudsman.

As far as can be ascertained, no matter has been referred for investigation to the Ombudsman, in terms of these sub-articles either by any Committee of the House or by the Prime Minister the Office was set up in 1995. There is only one notable exception that could be linked to Sub-article 6, even though no direct reference was made to it when the mandate was conferred on the Ombudsman. This refers to the request made by the Prime Minister to the Ombudsman, the Auditor General and the Principal Electoral Officer in April 2013 to recommend a remuneration mechanism and levels of Holders of Political Office. A report, finalised on the 31st of December 2013, was presented to the Prime Minister.

It is interesting to note that referrals by the Prime Minister and Parliament to the Auditor General to investigate matters that were deemed to fall within his competence, have been regularly made and have been on the increase in recent years. It is clear that the Office of the Auditor General is rightly

perceived to be the competent, independent, constitutional authority, that can conduct an objective investigation on matters that require an in-depth inquiry to establish the facts on alleged administrative misbehavior and malpractice, and to recommend what action should be taken. This is undoubtedly a positive development. The referrals enhance the status of the Office of the Auditor General and in the process strengthens the institution. There is no reason why the services of the Ombudsman should not be likewise utilised.

Recommendation

The powers vested in the Prime Minister and the Committees of the House of Representatives to utilise the services of the Ombudsman within the terms of Article 13 of the Ombudsman Act, should, where appropriate, be exercised. Any investigation carried out by the Ombudsman, now a constitutional authority, would have the obvious advantage of the hallmark of autonomy and independence, detaching it completely from partisan or political influence. Such referrals would also fit in with the proposed institutional upgrade of the Office of the Ombudsman as an authority at the service of an autonomous Parliament and accountable to it.

On the widening of the Ombudsman's remit

On the widening of the Ombudsman's remit

An issue that requires to be addressed is whether there is a need for a revision of the Ombudsman's remit to extend his jurisdiction to areas which do not as yet fall under his purview or which have ceased to be so following developments in certain areas of social and economic activities. The widening of the Ombudsman's remit can be viewed from three different aspects:

- a) Extending his functions to protect citizens receiving an essential service from a private stakeholder previously administered by Government;
- b) Bestowing on the Institution a specific and formal mandate to investigate complaints on alleged violations of fundamental human rights; and
- c) Extending the Ombudsman's functions to other areas not hitherto subject to his jurisdiction.

Proposal Number 6

A. Essential service now provided by a private service provider

Erosion of protection through privatisation

This Office has on several occasions in the last years drawn the public's attention to the fact that as a direct result of the privatisation of the provision of essential services formerly provided by the Government or its agencies, the citizen's protection against maladministration in these sectors has been greatly reduced. The process of privatisation as an effective tool to optimize the efficiency of a service and ensure its sustainability gained momentum following accession to the European Union that requires adherence to common economic policies. These policies tend to require Government to act as a regulator of economic activity rather than as a service provider. As a result of the implementation of these policies, various sectors of economic activity that provide a service previously given by the Government or its agencies and authorities, have been privatised and thus now fall outside the jurisdiction of the Ombudsman.

Extent of privatisation

These areas that for several years, fell under direct Government control and management because they were considered to be essential services include among others the banking sector, the provision of postal services and telecommunications, the management of the international airport, and public transport. For example, with the taking over by Government of the company until recently managing the public transport system, that sector has now fallen within the jurisdiction of the Ombudsman. This sector will again fall out of his jurisdiction once the plans for the privatisation of the system materialise.

There are indications that other vital areas of economic activity might be privatised in the near future and such measures would further erode and limit the extent of the Ombudsman's remit. Privatisation naturally had a negative effect on the number of complaints processed by this Office. This is not in itself worrying. Indeed, if privatisation results as it should, in the provision of a more efficient and cost effective service to the consumer, then it is most welcome.

What is however worrying is the loss by consumers of the protection they

previously had through the Ombudsman Institution to ensure that the service given to them was administered in a just and equitable manner.

It is true that these private service providers as a rule have internal complaints mechanisms and that ultimately consumers could also have recourse to *ad hoc* tribunals set up by law. However, there is no doubt that once the essential service falls out of the jurisdiction of the Ombudsman, consumers will be losing the right to have their complaint investigated by an independent authority that could recommend adequate out of court redress for damage suffered through acts of maladministration. The question is whether the law should provide that the Ombudsman should retain an oversight of the provision of a service that is of strong public interest where the legislator considers that the service, given to the consumer by a private service provider is essential in character.

Strong public service obligation

It is the opinion of this Office that economic activities that are now provided by the private sector but that invariably still encompass a strong public service obligation, should fall under the scrutiny of an independent overseer to ensure that the consumer is being well provided with services that the legislator considers to be essential for society. It is noted that the suggestion by the Ombudsman to extend his jurisdiction to cover the provision of essential services by the private sector has of late become a favourite topic for discussion in seminars held for European Ombudsmen. The concerns raised are very similar to those expressed by the Parliamentary Ombudsman and the solutions proposed are basically on the same lines¹¹.

Limited Ombudsman's jurisdiction

It must be stressed that the proposed extension of the Ombudsman's jurisdiction to the private service provider is essentially meant to be limited to the provision of the service itself and to the way the consumer is affected by its quality and efficiency. The Ombudsman would have no jurisdiction to interfere in, and even less investigate, the management and internal affairs of the entity which provides the service. This has to remain free to act as a commercial entity beyond government control.

11. This issue was discussed at some length in the Ombudsman's Annual Report of 2010, an extract of which is being reproduced in Annex III page 75 for easy reference.

Constitutional amendment allows this development

It is interesting to note, that this proposal appears to have been favourably considered as a potential avenue of development of the Ombudsman's jurisdiction when the Constitution was amended in 2010 to enshrine the Office of the Ombudsman as a constitutional authority. Indeed sub-article 1 of Article 64A provides that the Ombudsman shall, apart from having the function to investigate the actions of Government and entities over which it has an effective control, also have the function to investigate actions taken "*by such other authority, **body or person** as may be provided by law, being actions taken in the exercise of their administrative functions*".

The Constitution extends the Ombudsman's jurisdiction to exercise his functions in respect of any body or person so long as that is "*provided for by law empowering him so to do*". A person that can be physical or moral. The Constitutional parameters of the Ombudsman's jurisdiction are therefore very wide. If the Government decides to implement this proposal, it would only require an amendment to the Ombudsman Act or provisions in other laws, to identify which body or person providing a service considered to be essential should be subject to the Ombudsman's jurisdiction. Such amendment should also determine the extent of his jurisdiction and the modalities of its exercise.

Recommendation

It is recommended that if the Government favours this proposal, an in-depth study of its implication should be carried out before the necessary amendments to the Ombudsman Act and/or consequential legislation in other statutes are made to implement it.

Proposal Number 7

B. Bestowing on the Ombudsman a specific and formal mandate to investigate allegations of violations of Fundamental Human Rights

For years the Office of the Ombudsman has been actively engaged in promoting the need to set up in Malta a National Human Rights Institution (NHRI). In October 2013, following a suggestion by the Deputy Prime Minister during the debate on the Ombudsplan for that year, the Ombudsman published a document formally proposing the setting up of an NHRI in Malta. He recommended that his Office was ideally suited to act as an umbrella organisation to monitor the level of observance of human rights in Malta, to investigate allegations of their violation and to advise the competent authorities on their promotion.

In conclusion, the Ombudsman stated that there are various models of National Human Rights Institutions in Europe and elsewhere. It is the Government's prerogative to choose the model best suited to Malta's needs. In making its choice Government should endeavour not only to provide the individual with optimum protection for the enjoyment of his fundamental human rights, and this without unduly burdening the country with unnecessary additional expense. Also and more importantly, Government should ensure that the model chosen would merit and receive the maximum level of UN accreditation – an A status with the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)¹².

The Ombudsman received no official reaction to that document, but it has recently been made known that the Government could be opting for another solution. The Ombudsman welcomes the designation of any organisation as an NHRI, so long as it is endowed with the necessary qualities and independence to perform the task. His Office will fully cooperate with it, when and if, asked to do so.

Fundamental Rights are everybody's concern

This notwithstanding and irrespective of this development, the Ombudsman still feels that it is proper for his Office to be given a specific human rights mandate.

12. Refer to the proposal by the Office of the Parliamentary Ombudsman "*The setting up of a National Human Rights Institution*" submitted to the Office of the Prime Minister and published in October 2013. The document can be accessed on www.ombudsman.org.mt

It is not uncommon that complaints filed against Government and entities falling under his jurisdiction allege violations of fundamental human rights or their threat. The Ombudsman has conducted own initiative investigations on actions taken by public authorities that appear to infringe on fundamental human rights or that appear to constitute a threat against them. There have been instances where he actually identified an infringement of these rights and successfully recommended measures to redress the situation. The Ombudsman will continue to exercise his functions in this regard irrespective of whether he is designated an NHRI or not. Every institutional authority in the country has the duty to be concerned with the promotion and protection of fundamental human rights. The notion that the protection of these rights should be the monopoly of any particular institution or authority is incorrect.

In this respect, it is noted that the Ombudsman regularly receives requests to report on the observance of human rights in Malta from the Commissioner for Human Rights of the European Union and of the Council of Europe and their UN counterpart. They all recognise his Office as an authoritative and objective source of information, useful in the drafting of their reports. In their discussions with the Ombudsman, they always insist that his Office should be given a clear mandate for the investigation of complaints involving human rights, even though this is not, in the opinion of the Ombudsman, a *sine qua non* requisite for him to do so, since his present remit is wide enough to include this function.

Recommendation

It is recommended that the Ombudsman Act be amended to include a formal and specific fundamental human rights mandate within the Ombudsman's functions.

Proposal Number 8

C. To extend the Ombudsman's functions to other areas identified in the Government Electoral Manifesto not hitherto subject to his jurisdiction

It has been suggested that the functions of the Ombudsman could be extended to cover areas not hitherto subject to his jurisdiction that would impinge on activities carried out in the private sector. The question that arises is whether the citizen should, in certain instances, be given direct access to the Ombudsman for protection against maladministration in the provision of such service. This question has to be kept distinct from the other issues discussed earlier, including those regarding specialisation within the Office of the Parliamentary Ombudsman and the convergence with the office of other existing authorities that audit the administrative acts of Government and other public entities that provide the public with an essential service.

This proposal should only be considered as a measure to additionally protect consumers against malpractice in the provision of a service and the quality of the goods provided. It should not in any way be viewed as a means to interfere in the affairs or business of the service provider. The Ombudsman's investigation should essentially lead to a recommendation to the appropriate Government authority and/or to the private service provider to take remedial action to give redress to the complainant, if his complaint results to be justified.

Government's commitment

The Electoral Manifesto that the Government is committed to implement, considers the appointment of a number of new ombudsmen or commissioners covering various social activities that have a strong private sector component. These include proposals to have an Ombudsman for Financial Services, a Commissioner for the Protection of Animals and a Commissioner for Journalistic Ethics. Others proposed the appointment of other commissioners, like a Commissioner for Consumer Rights. There are obviously advantages in having such institutions incorporated in the Office of the Parliamentary Ombudsman, since this could provide them with the expertise and support services, both investigative and administrative, necessary to carry out their functions.

The Parliamentary Ombudsman is often voicing his opinion that one should limit as much as possible the setting up of new national authorities to serve as ombudsmen or commissioners with very limited jurisdictions. He is of the opinion that the size of the country does not warrant such a set up. In

a number of cases they would be called upon to investigate a small number of complaints that would not warrant the expense involved in setting up and running these authorities. These commissioners could be incorporated within the structure of the Office of the Parliamentary Ombudsman on the lines of the Commissioners appointed under the 2010 amendments.

Move possible

The Ombudsman believes that such a move might be possible in some instances within the new flexible framework acquired by his Office after the 2010 amendments and this at a modest additional increase in its recurrent expenditure. However, the legal implications involved in the setting up of each particular ombudsman or commissioner under this heading, need to be carefully studied, since it is not possible to adopt a one cap fits all model. The essentially '*private*' nature of the activity subjected to the remit of these commissioners and the nature of their proposed functions have to be fully analysed and appreciated before any action is taken. It is advisable to undertake a study to ensure that the legislation subjecting these bodies or institutions to autonomous commissioners under the 2010 amendments, not only integrates well with that regulating the Office of the Parliamentary Ombudsman, but would also adequately safeguard the interests of consumers and provide them with appropriate, adequate redress for their proved grievances.

Recommendation

If the Administration is of the opinion that the Office of the Parliamentary Ombudsman should be involved in the implementation of some or all of these electoral proposals, it is recommended that:-

- a) the Ombudsman Act be further amended to provide that the functions of the Parliamentary Ombudsman would extend to the actions of private entities or bodies as determined by law;
- b) a study is carried out to establish which ombudsmen or commissioners, identified in the Electoral Manifesto and others, could be integrated as Commissioners in the Office of the Parliamentary Ombudsman; and
- c) these commissioners would be appointed as Commissioners in the Office of the Parliamentary Ombudsman in terms of the 2010 amendments to the Ombudsman Act and would be bound to exercise their functions according to the provisions of that Act. It is not excluded that one or

more of these Commissioners might, because of the particular nature of the actions they are charged with investigating, be empowered to give executive force to their final opinions. These are matters to be regulated by the particular law setting up their office.

If this proposal is accepted provision has to be made in the Ombudsman Act, for the extension of the jurisdiction of the Parliamentary Ombudsman to regulate the actions of the private entities that would come under his purview. The law should also regulate the functions and powers of the Commissioners appointed to oversee the service provided by these private entities.

Of rendering more effective the Ombudsman's recommendations

Proposal Number 9

A. The empowerment of recommendations

The Parliamentary Ombudsman in Malta like many other Ombudsmen elsewhere lacks executive powers. His recommendations need to be well founded in law but they are principally motivated by principles of justice and equity. The Ombudsman Act does not make any limitation on the means of redress that the Ombudsman can recommend to rectify damage resulting from acts of maladministration or improper discrimination.

He can recommend a wide range of flexible remedies including financial compensation. He can also recommend payment for moral damages, though this has rarely been resorted to since experience has shown that to date, the public administration has been reluctant to accept such recommendations. An attitude that needs to be revisited because the principle of the State's liability for damages caused by its officers should extend to the *restitutio in integrum* which means that the person who suffers the injustice has to be put in the same position that he or she was before the act of maladministration took place. Complainant has the right to be compensated not only for his actual loss, but also for pain and suffering.

Ombudsman's recommendations should remain non-binding

Unlike Court judgements the Ombudsman's recommendations are non-binding and can be rejected by the public authorities. Consequently, his ability to secure results depends exclusively upon the quality of his arguments, the respect the Institution enjoys and the moral authority exercised by his Office. The Ombudsman does not believe that this inherent quality of persuasion rather than coercion in the exercise of his functions should change. Making his recommendations enforceable would essentially convert the Ombudsman to a court of law. This would radically change the nature of the Institution, that is basically structured on the trust which the public administrator and the citizen should equally have in the Ombudsman's ability to make a fair and objective assessment of the facts that result from his investigation.

Making the Ombudsman's recommendations enforceable would result, in a radical shift of their motivation, that would have to be based essentially on the interpretation of laws and the determination of rights and obligations, rather than on justice and equity. Such a change would require a totally different approach in the method of investigation of complaints, that would have to

fully respect the fundamental rules of a fair hearing applicable to judicial proceedings according to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Moreover, making the Ombudsman's recommendations enforceable would negatively affect his role as a mediator between the public administration and the citizen and considerably reduce the effectiveness of his Office as a valid instrument to help improve the public administration.

Most recommendations accepted

It is a fact that the great majority of the recommendations of the Maltese Parliamentary Ombudsman are implemented within a relatively short time by the authorities. This is to the credit of successive administrations that have, as a rule, promoted a culture that the Ombudsman's reports are to be considered authoritative opinions to be respected and his recommendations implemented whenever possible. There have been and will always be a small number of cases where the administration fails to implement the recommendations of the Ombudsman, notwithstanding his decision that the grievance is justified. In the opinion of the current Parliamentary Ombudsman where a citizen's confirmed grievance is not redressed this *"is considered to undermine the integrity of the Ombudsman system and to lower the expectations of citizens in the power and ability of the Ombudsman to resolve instances of injustice by the public administration"*.¹³

Measures need to be taken

It is to counter and remedy such situations that measures need to be taken to further strengthen the functions and powers of the Ombudsman to render his Office more effective as a defender of citizens. The Ombudsman firmly believes that a clear distinction should be made between the conclusion reached by the Ombudsman following his investigation, in which he declares that the complaint against the public administration is justified and that an act of maladministration has caused prejudice that needs to be remedied, and his recommendation on how that proved grievance should be redressed.

The Ombudsman strongly feels that, once the Constitution recognises him as the authority entrusted with the investigation of the acts of the public administration and tasks him with the duty to declare whether the public

13. Annual Report 2010, page 24.

administration is at fault, his final conclusion on the merits of the complaint investigated should, as a rule, be respected and accepted by the public administration. It is only exceptionally that his final opinion that there has been an act of maladministration that caused an injustice to the complainant should be questioned or put in doubt. In such cases, the administration should be required to clearly declare the grounds for its non-acceptance of the Ombudsman's declaration and procedures need to be put in place to provide for these objections to be verified and finally determined by a higher authority, namely Parliament.

Unforeseen administrative consequences

The Ombudsman understands that the adequate means of redress recommended by him could raise administrative issues that might not have been foreseen and that require to be further clarified through discussion and possibly negotiation. In this respect the Ombudsman would act as a mediator to help the parties arrive at an amicable settlement. It is noted that when the public administration either decides not to accept the Ombudsman's final opinion, or is not in a position to implement the recommendation, this is in most cases because:

- a) the Administration is unable to implement the recommendation due to Constitutional impediment that vests jurisdiction in other authorities; or
- b) fear of creating a precedent; or
- c) the financial implications of his recommendation to remedy the proved injustice in the complaint and other similar cases, would be unsustainable; or
- d) it disagrees with the Ombudsman's interpretation of rules and regulations, defining the extent of its discretion and the way this has been exercised; or
- e) the public administration disagrees with the Ombudsman's interpretation of a binding legislative instrument.

In these cases where the Ombudsman fails to convince that his final opinion should be accepted, the matter should not be allowed to rest there. The public administration's refusal to accept the Ombudsman's final opinion should not be the last word. Ways and means need to be devised to satisfy the aggrieved citizen, fortified by the Ombudsman's decision, that the complaint was justified, that every effort has been made and every avenue has been explored to grant adequate redress for the injustice that has been proved he or she suffered.

Creating a precedent

More often than not the public administration expresses concern that it would be creating a precedent if the Ombudsman's recommendation was accepted. One should however note the fact that the Parliamentary Ombudsman is perfectly entitled, within his remit, to recommend that any practice on which the decision, recommendation, act or omission was based and which caused the injustice, should be altered. Similarly, he can recommend that any law on which a decision, recommendation, act or omission was based and that gave rise to the maladministration, injustice or improper discrimination should be reconsidered. Fear of creating a precedent can never justify the negation of justice caused by an act of maladministration. Rather, the public administration should seek to identify the cause of the injustice and provide a remedy to the aggrieved person and others in the same situation.

Several countries with similar Ombudsman institutions facing the same predicament have opted for different solutions to give more effectiveness to the Ombudsman's final opinions and recommendations. A sample of these different procedures are listed in the annexed document at page 89 (Annex VI). The Parliamentary Ombudsman feels that a number of solutions suitable for Malta's scenario can be suggested and are being recommended.

Recommendation

The Ombudsman as an Officer of Parliament

It is intended to strengthen the relationship between the Ombudsman as an Officer of Parliament and the House of Representatives. As the law stands today *"If within a reasonable time after that the report is made no action is taken which seems to the Ombudsman to be adequate and appropriate, the Ombudsman, in his discretion may send a copy of the report and recommendations to the Prime Minister, and may thereafter make such report to the House of Representatives on the matter as he thinks fit".*¹⁴

The purpose of this provision is to focus the spotlight of publicity on instances of non-compliance on the part of the public authorities. It is intended to draw the attention of the public to problems of citizens that have not been adequately and correctly addressed by the public administration. In this regard a former Ombudsman observes that *"there is little doubt that the right of an Ombudsman to submit special reports to his legislature constitutes a powerful instrument. Even if this is never used by the Ombudsman, the*

14. Sub-article 4 of Article 22 of the Ombudsman Act.

potential of its use may be employed as a successful strategy to win compliance with recommendations. When it is used, it focusses a lot of public attention on a single unresolved justice dispute. It may generate a lot of questions and pressures from legislators, the media and the public and the government, first to respond and second to comply or explain its non-compliance”¹⁵.

Negative experience

Experience during the last years has however shown that in Malta this procedure has had very limited success, if any. Whenever a report by the Ombudsman was sent to the House, there has been no substantial reaction both in the House and outside, even though as a rule the subject matter of the complaint was of interest to the public in general. It is because of this negative response that the Ombudsman has in recent years been suggesting that the Speaker should refer reports sent by him to the appropriate Standing Committee of the House. It is therefore recommended that such reference by the Speaker should be statutorily provided for in the Standing Orders of the House.

Public Opinion - ultimate sanction

It should be the House of Representatives that should finally determine whether the opinion of the Ombudsman, who is one of its Officers, and the recommendations made by him to rectify an administrative injustice, merit to be further discussed, and whether they were correct and should be sustained. If the Committee of the House decides to discuss the merits further, it could call on the Ombudsman and the public authority involved in the complaint to appear before it to explain their respective positions. Such a procedure would ensure that it would be the House of Representatives that would be the final arbiter on the report filed by the Ombudsman and on whether his recommendations should be accepted. Its decision would be subject to the scrutiny of public opinion as this is politically the ultimate forum in which the conduct of the public administration is judged.

Such a procedure, if correctly followed, would respect the constitutional hierarchy and strengthen the relationship between the Ombudsman as a constitutional authority and an autonomous Parliament to which it is accountable. It would also give the aggrieved citizen the optimum satisfaction that his complaint was considered in the highest political forum. A decision

15. G E Caiden 'The challenge of change' the Fourth National Conference Papers Canberra Commonwealth Ombudsman 1989.

need not necessarily be taken by the Committee of the House. On the other hand, if a political decision is eventually taken, this need not necessarily be along party lines insofar as the issue under consideration would as a rule be essentially one of justice and equity.

Proposal Number 10

B. Referral to a Court or Tribunal

In many cases where disagreement between the public administration and the Ombudsman on the implementation of the recommendation made in the final opinion persists, there are often differences on the interpretation of rules and regulations governing administrative discretion or of an applicable, binding legislative instrument. It is not uncommon for the administration's viewpoint to be supported by advice given to the Government by the Attorney General.

The Parliamentary Ombudsman concedes that his interpretation of binding legal provisions need not necessarily be correct and that the final word should rest with a judicial authority. In these cases however, it does not appear to be just and proper that, when the difference in the interpretation of a binding provision is the primary reason for the refusal of the public administration to accept the Ombudsman's opinion, the interpretation given by the public administration should prevail without any further enquiry. It is therefore being proposed that in such cases the conflict should be resolved by an authoritative judicial pronouncement and that any final decision on the complaint should be suspended pending such procedures.

Recommendation

It is therefore recommended that the Ombudsman Act should provide for such referral to a judicial authority, preferably to the Administrative Review Tribunal. Referral should be made within a short term established by law to run from the date of the Ombudsman's Final Opinion. The referral should be made by the complainant and the law should provide for court fees and dues to be waived. The Tribunal should be bound to determine solely the issue of the interpretation of the legal provision, applicable to the facts of the complaint, leaving the ultimate decision on its merits to be decided in accordance with the Tribunal's ruling. Such a judicial decision should be taken within a definite, short term prescribed by law.

Proposal Number 11

C. Developing a synergy between the Ombudsman and the Courts

There are three issues that could be addressed to develop a synergy between the Ombudsman and the Courts in the citizen's interest.

Final Opinion as *prima facie* evidence

i) It has been noted already that the Ombudsman Institution is not a court of law and does not have a judicial or quasi-judicial function. It does however perform the service of a mediator and while it does not determine and define rights and obligations, the Ombudsman's report delivers an authoritative opinion on whether complainant suffered an injustice as a result of an act of maladministration. The facts of the complaint could be such as to entitle complainant to seek judicial redress for his grievance. However, the Ombudsman is rightly precluded from investigating a complaint if its merits are being contested before a court of law. The only exception being that provided for by sub-article 5 of Article 13 which provides that *"...an investigation may be proceeded with in respect of problems of general interest contained in the complaint"*.

On the other hand, it is often the case that when the Ombudsman's final opinion and recommendation are not accepted and implemented by the public administration, the dissatisfied complainant attempts to seek redress through judicial action. While the Ombudsman reiterates that it is not advisable that his final opinion should be enforceable in a court of law, it might be considered opportune to give weight to his decision in court proceedings determining the same merits between the complainant and the public administration.

In such cases, one could consider that the final opinion and the recommendations of the Ombudsman could be produced as evidence by either party in the suit. The court would be empowered to give that opinion the weight it considers is due to it in its deliberations, on the same lines as it considers the opinion of expert witnesses. The facts as reported in the opinion could be taken as *prima facie* evidence but the parties or the court itself would have the right to produce further evidence to supplement, support or contradict them. As a rule most of the facts and documentation on which the Ombudsman bases his opinion can be produced in court upon the request of the court or the parties. This would ensure transparency and openness in the process.

Such a procedure might, at the very least, help the contending parties to identify those facts relevant to the merits of the case on which there is agreement.

This would limit the area of conflict between them. A procedure that would contribute towards a speedier and more efficient judicial process.

The Ombudsman should continue not to be a compellable witness in court proceedings. The confidentiality of the investigation conducted by him, expressly decreed by the Ombudsman Act, should be respected. This is so because, he often acts as a mediator between the public administration and the citizen. This confidentiality is one of the basic constituents in the Ombudsman's investigative procedures, laid down by law to generate the required trust in the complainant and the public administration alike, essential to allow the Ombudsman to properly exercise his functions. The Ombudsman or members of his staff should not therefore be called upon to give evidence in any court or in any proceedings of a judicial nature, in respect of anything that comes to their knowledge in the exercise of their functions under that Act¹⁶.

The Ombudsman believes that introducing such a procedure would not only give added value to his Final Opinions and give it weight in the eyes of the aggrieved complainant, it would also facilitate a speedier resolution of court proceedings between the citizen and the public administration. It would also give the Court the advantage of a qualified, objective and authoritative opinion on the merits of the case before it. The Ombudsman understands that this proposal requires further study to ensure that the clear distinction between the Ombudsman Institution and the Courts is maintained and that his final opinion could only be admissible in Court:

- a) if it can help the proceedings; and
- b) that all Courts follow the same procedure, when a party to a suit requests to submit the Ombudsman's Final Opinion for the Court's consideration¹⁷.

Complaint to interrupt the extinctive prescription of the action

ii) Another matter that requires attention is the running of the term of the extinctive prescription of the action that a citizen can institute against the public administration, once he has filed a complaint with the Ombudsman on the same merits. This is especially relevant in those cases where, the prescriptive term is short and in those instances where it is not possible for the Ombudsman to conclude his investigation in a short time thus forcing complainant to institute an action to safeguard his rights. This would result not only in stultifying the process before the Ombudsman, but also in the filing of

16. Sub-article 2 of Article 25 of the Ombudsman Act.

17. Vide exchange of correspondence on this issue with Associate Professor Kevin Aquilina, Head of Department of Public Law and Dean of the Faculty of Laws, Annex IX on page 111.

judicial proceedings that could have been avoided. It has been the practice for these last years for the Ombudsman to inform complainants of the danger that their rights might be prejudiced, if the statutory term for the extinguishment of their right of action is allowed to lapse, and that they should take the necessary precautions to safeguard their interests.

It is suggested that the formal filing of a complaint with the Ombudsman against the Government or any institution or authority that falls under his jurisdiction, should be considered to be an act that interrupts the running of the prescriptive period for the extinguishment of any right of action that complainant could exercise on the same merits. The prescriptive period would then commence to run again on the date when the Ombudsman delivers his final opinion and definitely closes the case.

Liquidation of damages

iii) The Ombudsman can in his recommendation recommend the payment of compensation for actual damages suffered by complainants. It has been stated that it is very unusual for the Ombudsman to recommend the payment for moral damages for pain and suffering. Ideally compensation should aim at attaining a *restitutio in integrum* with the aggrieved person being put in the same position he would have been had the aggravation not taken place. When that is not possible, complainant should be entitled to damages. The Ombudsman has very rarely recommended payments for moral damages because of the reluctance of the public administration to assume liability for any amount that was not quantifiable as actual damages suffered. Even in such cases, disagreement regarding the actual amount due and whether interests or other dues are payable are not uncommon.

It is worth considering therefore whether Malta should follow the model found in other countries such as Northern Ireland, where in certain instances both the citizen and the public administration are given the right to take judicial steps for the liquidation of compensation, in cases where the Ombudsman recommends that such payment is due to complainant as an adequate means of redress for the injustice suffered. The Courts' intervention would be sought solely on the issue of the liquidation of damages. It is also recommended that in these cases the Court would be authorised to liquidate moral damages, including those for pain and suffering, that could have been caused by the administration's failure to observe the basic rules of good administration as spelt out in the Ombudsman's final opinion, the Public Administration Act, the European Code for Good Administrative Behaviour and other codes.

It should only be possible to have recourse to the Court, that could be the Administrative Review Tribunal, in those cases where:

- a) the public authority agrees with the findings of the Ombudsman in his final opinion that a complaint is justified but fails to agree with his recommendation for redress;
- b) the public authority fails to accept the amount recommended by the Ombudsman;
- c) the public administration and the complainant fail to agree on the amount due; and/or
- d) the Ombudsman is of the opinion that the amount offered by the public administration, following his recommendation, was still unacceptable as adequate redress.

Common Fund

The issue also arises whether a common fund should be established to provide for payment to a citizen, who could be entitled to compensation for damages both *ex lege* as well as on an *ex gratia* basis following a recommendation by the Ombudsman. Trusts or funds for similar purposes have been set up from time to time under *ad hoc* legislation to cover payment of damages that arose under other situations, for example in the case of payment of compensation to victims of public violence. Reference is made to the Criminal and Injuries Compensation Scheme Regulations, Subsidiary Legislation 9.12, Legal Notice 186 of 2012 as amended by act XVIII of 2013.

Recommendation

It is recommended that, in the first and third instances, appropriate amendments are made to the Code of Organisation and Civil Procedure and, in the second instance, to the Civil Code to adequately provide for the above proposals, if they are accepted.

Tail end

The proposals made in this document are by no means exhaustive. Nor are they intended to determine the only way forward to strengthen the Office of the Ombudsman.

Finally it is up to Government and Parliament to decide how best to utilise the services of the Office of the Ombudsman in the interest of citizens and the defence of their rights.

This publication has to be considered as a document for public consultation and it is hoped that the political fora, the private sector and civil society will react to the proposals put forward and to how the recommendations made could be implemented.

What is of utmost importance, however, is the urgent need for political consensus on the recognition of the Constitutional right of the individual to good administration as a basic right, on the principle that the Executive is accountable to Parliament and that the Ombudsman, the Auditor General and indeed other institutions, have an essential role to play to ensure this accountability and the right to a transparent, just and effective public administration. It will finally be up to Parliament to determine how that role is best performed.

Annexes

Annex

This section reproduces extracts from the Annual Reports and other documents published by the Parliamentary Ombudsman.

They are meant to trace the policies that the Ombudsman has constantly advocated since 1995 and the manner these policies have developed.

They provided additional information on the proposals made and how they can be implemented. References to these appendixes are made in the main text.

Further background material, annual reports, and other documents can be accessed on www.ombudsman.org.mt

Annex I

1. Of Constitutional Amendments

A. The Fundamental Right of good public administration

Annual Report 2006

Proposal by the Ombudsman to recognize the right to good administration in the Constitution

The Ombudsman suggested that the Bill put forward by the Government could be further enhanced if the proposal to entrench the Office would be preceded by another clause that would recognize the right of every individual to good administration. This right is acknowledged and defined in the Charter of Fundamental Rights of the European Union (Article 41) to which Malta is a signatory.

The Office of the Ombudsman has consistently given wide coverage to various practical aspects of citizens' right to good administrative practice in its work and has promoted this new administrative culture widely in the Maltese public sector.

Not only is regular reference made in the institution's work to the implications especially of Article 41 of the Charter of Fundamental Rights of the European Union but, whenever considered relevant, the Ombudsman's evaluation of individual complaints is guided by these principles and his findings, opinions and recommendations are based on the practical implications that these principles give rise to.

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

Article 41 - Right to good administration

1. *Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.*
2. *This right includes:*
 - *The right of every person to be heard, before any individual measure which could affect him or her adversely is taken;*

- *The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
 - *The obligation of the administration to give reasons for its decisions.*
3. *Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*
 4. *Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.*

Article 43 - Ombudsman

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

In his communication of 27 December 2006 to the Speaker the Ombudsman expressed the view that formal recognition of the right to good administration in the Constitution of Malta would not only strengthen the right of citizens to a just and transparent administration but would also motivate and justify the decision of the House of Representatives to entrench the ombudsman institution as a guardian of this right. In this connection the Ombudsman recommended that recognition by the State of the individual's right to good administration could feature in Chapter II Declaration of Principles of the Constitution of Malta. This would mean that as such the principle would not be enforceable in any court of law but would nevertheless be fundamental to the governance of the country and it shall also be the duty of the Government to apply it when making laws.

By the end of 2006 there were indications that the process to incorporate the Office of the Ombudsman in the Constitution of Malta had gathered sufficient momentum so that the existence of the institution would be guaranteed and enshrined in the country's supreme document of fundamental laws and principles.

Annual Report 2007

The right to good administration

Although favourable views were expressed regarding this proposal (the right to good administration) during the debate in the House of Representatives on the entrenchment of the ombudsman institution in the Constitution, at the same time doubts were raised that its proposed status and lack of enforceability were likely to undermine its positive effects. To some extent, however, refuge on this issue was sought from the fact that Part II of the Administrative Justice Act (Act V of 2007) lists various principles of good administrative behaviour that are to be respected and applied by administrative tribunals established under this Act while the Bill entitled Public Administration Act, 2008 affirms the values of public administration and provides for the application of these values throughout the public sector with a view to service delivery that is courteous, expeditious and impartial for an effective and efficient implementation of the policies of the government of the day.

Annual Report 2009

The right to good administration

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

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

associate good administration with service provision that places citizens first and that manifests itself by actions and decisions that are respectful and courteous; that are responsive and sensitive to the needs of citizens; that are timely, reasonable and equitable; and that acknowledge and make amends for any service deficiency.

B. The strengthening of the Constitutional status of the Parliamentary Ombudsman

A Constitution to serve the people – 2013

Speech by the Parliamentary Ombudsman at the Third President's Forum – April 2013

I strongly believe however that the fundamental right of the individual to a good public administration should be enshrined in the Constitution.

Reassessment of Administrative controls

Although the Constitution does not recognise the right to a good administration as a fundamental right, it does provide, as stated, a number of authorities and commissions with the function to regulate, verify and control specific areas of the public administration.

I think that there is scope to reassess these authorities and commissions in a holistic manner from the perspective of the rights of the people to be well administered, emphasising the protection that the individual should have against public maladministration, improper discrimination, abuse of power and violations or threats to their fundamental freedoms. I believe that this reassessment should be made in the context of creating a strong bond between Parliament and these constitutional bodies that are essentially intended to scrutinise the actions of the Executive.

The Constitution already provides that these bodies do not form part of the Executive. They generally conform with the Paris Principles regarding their administrative and financial autonomy. They are not accountable to any ministry and they are bound to report to the House of Representatives. The Auditor General, the Ombudsman and Commissioners appointed under the Ombudsman Act, are considered to be Officers of Parliament. However, apart from having the right to submit reports to Parliament, which are rarely followed up, the link with the House of Representatives is very tenuous indeed. Certainly, the individual cannot really feel that he has access in the present setup to have his grievances brought to the attention of Parliament to seek redress against injustice, maladministration and abuse of power.

Structural review

I believe there is need for a structural review of these provisions of the Constitution. It is suggested that a new chapter be included after the one dealing with “*Parliament*” to provide for the “*Scrutiny of Executive Actions*”. This Chapter would deal primarily with the financial audit carried out by the Auditor General and the administrative audit entrusted to the Parliamentary Ombudsman. Both authorities would retain their autonomy and continue to exercise their functions under separate laws as hitherto. However the Constitutional provisions entrenching them should be streamlined, harmonised and improved.

Points to ponder

Both the Auditor General and the Ombudsman should enjoy the same constitutional protection. This is not the case to date. While the Office of the Ombudsman has been entrenched, the Ombudsman himself does not enjoy constitutional protection. The constitutional provisions regulating the method of appointment and removal of the Auditor General, his term of office and guarantees of security of tenure have not been constitutionally extended to the Ombudsman. Similarly, provisions in the Constitution regulating the funding of the Auditor General’s office and establishing his conditions of service, equiparating them to those of a Judge of the Superior Courts, have not been extended to the Ombudsman though they are secured by ordinary law in the Ombudsman Act.

These discrepancies should be removed to ensure full protection of the Ombudsman, even though it has to be stated that there has never been any problem with any administration in this respect. The streamlining of this constitutional recognition and the protection of these and other officers of Parliament is necessary to emphasize the principle that they have to be allowed to exercise their functions in full freedom and that they should be accountable only to an autonomous Parliament, without any allegiance either to Government or Opposition.

Both the Auditor General and the Ombudsman hold office for a period of five years from the date of their appointment and are eligible for reappointment for one further period of five years. Experience has shown that there is very often a hiatus between the lapse of the first term and reappointment for reasons unrelated to the Office or its incumbent. In an effort to ensure more transparency, many countries have opted for a system of a one, long term period of between seven or nine years. This would not only avoid any risk of undue influence but also would allow the incumbent adequate time to execute his vision and policies for the high office he occupies.

Annex II

2. Of the Strengthening of the Institutional Framework

Of Convergence

Annual Report 2006

The strengthening of the institutional framework for the protection and promotion of citizen rights within a wider ombudsman jurisdiction

Another issue that merits consideration concerns the further strengthening of the country's institutional framework for the protection and promotion of citizen rights, possibly in the context of a wider ombudsman jurisdiction, with a view to further improving practice in areas that are felt to warrant deeper scrutiny and oversight as a means of enabling citizens to assert their rights even more forcefully. At this stage these areas concern in particular the healthcare sector, the education sector and freedom of information.

Mainly under the impact of Malta's membership of the European Union, the public service reform programme in recent years promoted policies aimed at maintaining a clear distinction between the role of the Government as regulator and as the direct provider of a range of services to citizens particularly in welfare.

In the last years a significant policy change gained momentum and there was a far reaching shift as the government's former dual role as a direct provider of services and as a watchdog to supervise the quality and standards of these services moved apart. There now exists wider recognition of the fact that the provision and delivery of services under statutory powers need to be kept apart in the first place from the overview and scrutiny function by the allocation of these responsibilities to separate administrative and operational structures.

In addition to this development, it is felt that the stage has now been reached for the Office of the Ombudsman to serve as a strong catalyst so that other *ad hoc* institutions, duly set up by law and similarly founded on independence and integrity, can further promote transparency and combat maladministration in its various forms by responding to individual situations that are considered to prejudice citizen rights in the context of a broader national institutional framework that is supportive of the right to good administration. It is therefore proposed that while maintaining full autonomy in the conduct of their

activities and operations including the submission of recommendations to the appropriate authorities regarding amendments to administrative practice and regulations as well as on the award of suitable remedies, at the same time there will be a tighter fit between these oversight institutions and the Office of the Ombudsman.

Under these arrangements, institutions that work in favour of citizen rights in specific areas of administrative action falling under their scrutiny will benefit from administrative and logistic support that will be made directly available to them by the Office of the Ombudsman including access to adequate funding, premises, staff and common services to enable them to implement their mandate in a more effective manner. This process of rationalisation and convergence will in turn require the Office of the Ombudsman to be provided with appropriate additional human, administrative and financial resources and will also contribute towards an improved public perception of the autonomous nature of these institutions since oversight bodies should no longer continue to be dependent on those who fall under their scrutiny to source their requirements.

This closer administrative convergence with the existing structures and resources of the Office of the Ombudsman will also need to be rooted in a more substantive form of cooperation that will be inspired primarily by the national commitment in favour of the right of citizens to good public administration. Collaboration at this level should contribute towards the strengthening of the investigative capability of these institutions by means of technical advice and support that may be offered, whenever required, by the Office of the Ombudsman and provide at a subsequent stage uniformity in the way in which procedures regarding investigations are carried out as well as convergence regarding the interpretation and application of the principles of good administration that inspire the work of these institutions.

Annual Report 2008

Laying the foundations for a unified ombudsman service

The spark that provided the initial impetus to the initiative that was launched by the Ombudsman to promote the unification of the ombudsman service in the country is widely known.

Early in 2007 the first Commissioner for Children publicly voiced her concern at the inadequacy of the resources that were put at her disposal and at her perceived lack of independence when she was dependent for her own resource provision on the same public authorities that she was entrusted to scrutinize.

This was followed by a similar lament some time later by the Audit Officer of the Malta Environment and Planning Authority (Mepa) who too complained publicly that he was finding it difficult to check allegations of service failure and to probe actions and decisions by Mepa that raised discontent among citizens when the issue of his reappointment after the expiry of his first term of office was unduly protracted and the investigative resources at his disposal were no longer made available by the Authority itself for reasons that he did not share.

It was evident that the thread that linked the fate of these officeholders was the inability of two *ad hoc* review mechanisms of government action to assert their autonomy and independence from the institutions that were subject to their scrutiny. This prompted the Ombudsman in an open letter to the Prime Minister and to the Leader of the Opposition on 19 July 2007 to attribute this impasse to disregard of the principles that are affirmed in Resolution 48/134 *National institutions for the promotion and protection of human rights* approved in the 85th plenary meeting on 20 December 1993 by the General Assembly of the United Nations (the Paris Principles) and in particular in the section entitled *Composition and guarantees of independence and pluralism*.

The Ombudsman recommended that key to a solution to this problem lay in the setting up of a unified public sector ombudsman structure under the overall direction of his Office that would remove these review mechanisms with specific functions in designated administrative areas from the clutches, real or perceived, of the institutions and authorities that they are required to investigate. This move would allow them to operate in fuller control of their actions and enable them to exercise their powers and functions autonomously and independently and work in consultation and collaboration with the Parliamentary Ombudsman insofar as investigative practice and procedures and principles for complaint handling and for the award of remedy are concerned...

This process to reform and consolidate the Maltese ombudsman system was guided by the recognition that the relative proliferation of different Ombudspersons in various areas of public administration, each with their own separate jurisdictions, complaint handling systems and methods for the evaluation, adjudication and resolution of grievances, even though well intentioned, could possibly lead to uncertainty about the respective roles and remits of each officeholder and give rise to confusion as to where complaints should be addressed in the first place...

By latching on to the Parliamentary Ombudsman this additional role of overseer of citizens' rights in other specific administrative jurisdictions, his Office would provide a higher value added service to citizens and further enhance its credibility status. This role gains added significance with the establishment

of the Office of the Parliamentary Ombudsman as a constitutional authority with the main function to investigate administrative actions taken by or in the name of the government or by any authority or body set up by law and the residual function to scrutinize administrative action falling under the specific competence of other institutions that were also set up by virtue of special *ad hoc* legislation.

The basis of draft legislation for the proposed unified ombudsman service

Together with this groundwork to lay the foundations for a more integrated ombudsman service, during 2008 the Office of the Ombudsman concluded its work on the preparation of a draft legislative framework as a basis for discussion containing amendments that are considered necessary to its founding legislation to guide the development of the proposed new ombudsman service in the country...

On the occasion of the opening of the Eleventh Parliament on 10 May 2008 the President of the Republic stated in his address that in the context of the government's commitment to principles of good governance, the Government was proposing to enact legislation *"for the empowerment of the Ombudsman in coordinating all administrative complaints in the public service as a whole."* This statement was consistent with the indication that was given by the Government to the Ombudsman in July 2007 that it was in principle in favour of strengthening and streamlining the various structures set up by law in recent years to scrutinize and audit decisions and actions in specific areas of public administration by means of a unified ombudsman service.

Annual Report 2009

Developments during 2009 in the unification of the ombudsman service

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

This is not to say that there should be a plethora of ombudsman jurisdictions with the type of institutions found in the UK such as, for instance, the Energy Ombudsman, the Legal Services Ombudsman, the Office for Legal Complaints, the Pensions Ombudsman, the Property Ombudsman, the Removals Industry Ombudsman Scheme, the Surveyors Ombudsman Service, the Waterways Ombudsman or the Furniture Ombudsman. While holding the view that citizen rights in various fields would be better served by existing structures in favour of consumer protection or by internal standards bodies, this Office would again like to advocate an awareness of the need to ensure that with regard to undertakings entrusted with the operation of a service of an essential public nature or interest or having the character of a revenue producing monopoly, the Parliamentary Ombudsman should be allowed adequate flexibility of operation so as to involve himself with due discretion and within the limits of well-defined powers, functions and responsibilities to ascertain that the best interests of citizens are at all times respected.

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

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

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).

The process to develop a unified ombudsman structure: progress during 2010

It will be recalled that in its second interim report dated 14 December 2009 the Select Committee of the House of Representatives had, among other issues, referred at some length to an improved system and to new legislative provisions regarding the scrutiny and the audit of administrative action in the public service as well as in the public sector. By and large this work by the Select Committee was based on and reflected the proposals that had been submitted by this Office.

This proposed strengthening of the Maltese ombudsman institution envisaged the launching of a process aimed at convergence between the Office of the Parliamentary Ombudsman and the various sectoral scrutiny mechanisms that were set up under various laws in recent years.

This Office holds the view that the various decisive moves that were made during 2010 in favour of a unified scrutiny mechanism following a relatively long period of deliberation and discussion should be considered as the first rather than the last step in this process for the convergence of institutions for the protection and enhancement of citizen rights *vis-à-vis* the public administration. Indeed it is known that other administrative scrutiny bodies overseas are moving in the same direction – and a case in point is the French ombudsman institution – and this may be taken as confirmation and as a

positive indication that the path that is being followed in the country should be further pursued.¹⁸

At this stage the Office of the Ombudsman firmly believes that that this overall process should be viewed in its longer-term perspective and that the momentum that was gained by this process during 2010 should continue to inspire the longer-term vision of the institution and its development in the years ahead. This will entail the further widening and consolidation of the ongoing exercise so that other scrutiny bodies that have been established particularly in recent years and that are actively engaged in efforts to sustain and uphold citizen rights in specific sectors of the public administration will be brought under one roof.

The proposed unified structure for administrative review

Members of the House were largely in favour of the proposed unified structure for administrative review that would do away with the hitherto fragmented system and agreed that under these arrangements Commissioners for Administrative Investigations would have adequate tools and resources at their disposal to enable them to function in an efficient manner.

Members also shared the view that the weight and autonomy of Commissioners would be strengthened by the provision in the Bill regarding their full immunity from any disciplinary, administrative or civil action for any act arising from the execution of their official duties.

The House acknowledged that the autonomy of the new national ombudsman structure being proposed would greatly benefit from the fact that the provisions of the founding legislation of the Office of the Ombudsman that are applicable to the Ombudsman in the exercise of his functions under this Act shall also apply to Commissioners. This would in turn enable investigative procedures to be homogenous and uniform and Commissioners shall have full access to all available information relating to their investigations on complaints that fall under their specific domain.

18. In this connection it is also interesting to note that similar developments have recently taken place in Hungary where the convergence of a number of institutions with the Office of the Parliamentary Commissioner for Human Rights, including the Commissioner for Children, required an amendment to the Constitution. This reform was proposed by the Hungarian Ombudsman, also in the light of discussions and advice given by his Maltese counterpart.

Select Committee of the House of Representatives – Interim Report 2 (2009)

The Strengthening of the Ombudsman Institution

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

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

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

- In addition to what is already provided under the Ombudsman Act, the Ombudsman should also be given a clear mandate with a jurisdiction to investigate:
 1. every agency set up under the Public Administration Act (chapter 497);
 2. every foundation set up by the Government, by a statutory body, or by an organization or other body in which any one of the said bodies or any combination thereof has a controlling interest or over which it has effective control; and
 3. every chairperson and member of a board, committee, commission

or some other decision-making body, whether set up by law or by means of administrative action, which can take decisions that effect any member of the public.

- There should be one structure to investigate allegations of maladministration in specific sectors of public administration that will be regulated by means of a legislative framework under the Ombudsman Act.
- For this purpose there should be *ad hoc* Ombudsmen, to be designated Commissioners for Administrative Investigations, in specialised sectors as may be established by the Prime Minister in consultation with the Parliamentary Ombudsman. Similar to the Ombudsman, these Commissioners would also be Officers of Parliament and would fall under the ultimate control of the House of Representatives and would report to the House through the Parliamentary Ombudsman.

Annual Report 2010

On the inclusion of new scrutiny bodies in the proposed unified ombudsman structure

During the discussion it emerged that the Select Committee of the House had agreed during its meetings that at least at this stage the Office of the Commissioner for Children with its limited investigative role and the Police Board set up under the Police Act should not be included in the new unified ombudsman structure.

On the selection of new areas for scrutiny, however, the two sides in the House were in agreement on the appointment of a Commissioner for Health particularly at a time of sustained development in the country's national health system and in efforts to promote the accessibility, quality and sustainability of public health services and resources. Both sides agreed that the appointment of a Commissioner for Health would give a strong boost to the promotion of patients' rights in health service provision by the national health authorities in state hospitals, health centres, pharmacies, day centres and residential homes for elderly persons as well as in the case of other health providers where the service is paid for out of public funds.

Proposal for the convergence of sectoral scrutiny mechanisms

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 be 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."*

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 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.

ANNEX III

3. On the widening of the Ombudsman's remit

A. Essential service now provided by the private sector

Annual Report 2010

The widening of the Ombudsman's jurisdiction

Section 12 of the Ombudsman Act, 1995 lays down that this Act applies to the Government including any government department or other authority of the Government, any Minister or Parliamentary Secretary, any public officer and any member or servant of a public authority; to any statutory body and any partnership or other body in which the Government has a controlling interest or over which it has effective control including any director, member, manager or other officer of such body or partnership or of its controlling body; and to local councils including Mayors, Councillors and members of staff of all local councils.

The amendments to the Ombudsman Act envisaged the widening of the Ombudsman's jurisdiction to *"any agency established as provided by article 36 of the Public Administration Act"*; *"any foundation established by the Government or by any statutory body and any partnership or other body referred to in article 12(b)"* (of the Ombudsman Act); and *"chairmen and members of boards, committees, commissions and any other decision making bodies, whether established by law or by an administrative act, which can take decisions affecting any member of the public..."*

This aspect of the widening of the Ombudsman's jurisdiction was generally welcomed by the House and rests on the belief that whenever citizens' lives and destinies can be affected by any measure that may be taken by any new government agency that may be set up in future by or under any law or by order of the Prime Minister in the *Gazette* and which makes use of public funds, any such authority is duly subject to scrutiny by the Parliamentary Ombudsman. Some Members, however, expressed their concern at the fact that in their view this widening was not enough.

The Ombudsman's oversight of service provision that is of strong public interest

This Office has on several occasions in the last few years expressed its views on this subject and has put forward proposals so that activities that are now provided by the private sector but that invariably still comprehend a strong public service obligation should fall under the scrutiny of an independent overseer. This authority will be fully entitled to investigate levels of service provision to citizens and to inquire into complaints on quality standards with a view to ensuring that these obligations are respected and that citizens' interests are placed foremost.

To date, however, this proposal remains largely on the shelf although the 2010 amendments to the ombudsman legislation left the door ajar and served to register the first inroad into areas that were hitherto out of bounds for the Maltese ombudsman institution. The fact that the amended legislation allows scope for review by Commissioners for Administrative Investigations in the context of public-private partnerships in the field of higher education and in the provision of healthcare services is considered by this Office as marking a step in the right direction.

Although confined to the scrutiny of the behaviour of government departments and public authorities and bodies, as is widely known the Ombudsman's mandate was largely influenced in recent years by the release of several areas from the public domain. The management and control of these areas has been handed to private organizations despite the fact that these activities retain a strong dimension of public service interest and have a longstanding tradition of service to citizens.

This shift in service delivery and in the status of these service providers which took the form both of the sale of public assets and the contracting out of selected services provided by the state, was meant to achieve an improvement in the delivery of these services coupled with the release of government resources towards more essential areas and activities in the wake of economic liberalization and reform programmes. It was also accompanied in turn by the escape of these sectors and their migration away from the Ombudsman's purview.

Proposed functions for Commissioners for Administrative Investigations

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.

The defence of rights and good practices in private management of public services – The role of the Ombudsman - 2011

Seminar organised by IOI-Europe and chaired by the Catalan Ombudsman jointly with Cercle d'Economia – Barcelona, Spain - 2011

The evolution of our society has led to an enhancement of the rights of consumers and users, especially those referred to the management of services considered to be basic or essential for people's daily life. An important part of these basic or essential services has evolved from its primary configuration as public services reserved for public administration to its current set up, in which are rendered by private companies under the regulation of free market. The liberalization of the management of activities considered to be essential can not diminish the rights or guaranties of consumers.

This process of liberalization and privatization of public services and activities means that the Administration is not the only entity to have public service duties, as certain economic private sectors have also these duties because of the activity they carry out.

In this framework, the activities in private sectors that entail public service duties shall be monitored directly by the ombudsman, although it should be considered if the tools thought to oversee public administration could be used to monitor the private sector, in which the use of the same tools could entail interferences in the exercise of certain fundamental rights.

B. Bestowing on the Ombudsman a specific and formal Human Rights mandate to investigate allegations of the non-observance of these fundamental rights

Annual Report 2006

The further strengthening of the Ombudsman's involvement in human rights

The Office of the Ombudsman is aware of other international initiatives aimed at widening the institution's involvement in, and concern with, human rights issues.

However, although generally supportive of attempts to enhance civil liberties and basic rights, any such involvement will need to take due regard of the Maltese context and in particular the legal limitation in the Ombudsman's competence to the review and investigation of actions taken by or on behalf of the Government or any public body or authority *"in the exercise of their administrative function."* At the same time mindful that no formal human rights institution exists in Malta, any dimension that will fasten an explicit human rights mandate to the institution and widen the Ombudsman's brief to a more substantive concern with human rights will not only provide greater value added to the institution's work but also serve to put into practice the principle of subsidiarity.

The Ombudsman Act does not explicitly define human rights as one of the criteria to guide the Ombudsman's investigation of complaints although human rights issues now feature as a crucial central plank in the Ombudsman's scrutiny and are used regularly to evaluate complaints. These issues have become increasingly important in recent years in the light of the recognition of the right to good administration as a fundamental right in the European Charter of Fundamental Human Rights.

Although various mechanisms have mushroomed worldwide in recent years to review complaints against public sector organizations, it is parliamentary Ombudsmen who supervise government action who conduct investigations on issues that often involve and relate to human rights.

Despite efforts to reduce the size and strength of the Maltese public sector, state bureaucracy inevitably continues to touch upon various aspects of the daily life of citizens. In the face of this situation the Maltese ombudsman institution remains committed to stamp out administrative action that gives rise to the violation of the human rights of citizens in the context of its mandate. The

Office of the Ombudsman, therefore, addresses any alleged violation of human rights in areas that fall under state responsibility. In this way it further increases the aspirations of citizens to democracy, the rule of law, observance of human rights and good governance as befits a modern democracy.

Reference was made earlier to the letter sent by the Ombudsman to the Speaker of the House of Representatives on 27 December 2006 in connection with the entrenchment of the Office of the Ombudsman in the Constitution of Malta. The Ombudsman drew the attention of the Speaker to the fact that both the Commissioner for Human Rights of the Council of Europe and the European Union are actively promoting the notion that national and regional Ombudspersons should take on a positive human rights dimension. This proposal also envisages the setting up of a network of Ombudsmen to assist the Commissioner in his work and that for this purpose it should be mandatory for Ombudsmen to have an explicit human rights mandate.

The Ombudsman therefore urged the House of Representatives to take due account of these developments and ensure that his constitutional function would not only allow him to promote the observance of fundamental human rights but also to assume an explicit mandate in this respect, if and when so required.

Annual Report 2007

The Ombudsman's role in the protection of human rights

Another proposal by the Office of the Ombudsman that failed to find favour was the inclusion of a reference in the constitutional amendment that the Ombudsman could take on a role in the promotion of human rights. This dimension is fast becoming an increasingly important feature of the Ombudsman's investigation of administrative actions even in a country such as Malta which consistently receives creditable ratings in international scoreboards regarding respect and observance for human rights.

It was therefore somewhat disappointing that the advice by the Office to the House of Representatives to take account of these developments and to ensure that its new constitutional status would enable it to promote the observance of fundamental human rights as well as to assume an explicit mandate in this field was turned down.....

Even at this stage, however, it should be pointed out that the functions of the Ombudsman as laid down in the Ombudsman Act, 1995 and in the Constitution

are sufficiently wide so as to permit his Office to engage itself unrestrictedly, as indeed it is already doing, in the field of human rights. The Office not only conducts its investigations of admissible complaints from a human rights perspective whenever circumstances associated with such grievances warrant this approach but also draws the attention of the authorities concerned to any actual or potential violations of these rights. It puts forward proposals and recommendations for the award of appropriate redress not only with regard to instances under investigation but also with a view to a wider audience and a more general applicability and relevance...

Although the Ombudsman's founding legislation coupled with recent amendments to the Constitution to enshrine the Office of the Ombudsman do not bestow upon the institution a specific and formal mandate to steer investigations on the basis of rules that are grounded on the observance of human rights, it is clear, however, that the work of the Ombudsman is already guided largely by this vision.

Annual Report 2009

The Ombudsman as a protector of human rights

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

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

Annual Report 2011

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.

In its *Annual Report 2010* this Office gave ample coverage to this proposal 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 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

A Constitution to serve the people – 2013

Speech by the Parliamentary Ombudsman at the Third President's Forum – April 2013

Points to ponder

I have been pushing forward a proposal for the setting up of such an Institution as a tangible confirmation of the national commitment in favour of and respect for the observance of human rights and fundamental freedoms.

Under this proposal the Maltese human rights institution would be entrusted with the responsibility to ensure the effective implementation of the national human rights standards in the country and also with the task to develop and promote public awareness of these rights and freedoms. The Office would

serve as a catalyst for other authorities, institutions and NGOs with a human rights content in their functions. The setting up of a Commission for Human Rights would be an added safeguard for the civil, political, economic, social and cultural rights of citizens in the country.

ANNEX IV

Of rendering more effective the Ombudsman's recommendations

The Empowerment of recommendations

Annual Report 2008

On recommendations in sustained grievances that are not observed by public authorities

Despite efforts in recent years by this Office to find a solution to this problem, no effective means have been found as yet to bring recommendations that have not been accepted by the administration to the attention of the House for its consideration. This has taken place even though the Ombudsman Act, 1995 already provides that an identified injustice or an instance of maladministration which ultimately require a political decision as to whether the issue at stake should be rectified and in what manner, can be brought to the notice of the House of Representatives by the Ombudsman.

Subsequent to the appointment of the current Ombudsman, however, this Office expressed the view that it feels that this system is not appropriate given the local parliamentary environment and that the House of Representatives might not have adequate resources to monitor these cases in an effective manner. This Office also feels that scrutiny by the House of Representatives of these cases should not be done on a voluntary basis.

The Office of the Ombudsman feels that the updating of the legislation covering its functions, duties and responsibilities that is being proposed in connection with the widening of its original mandate should serve as an opportunity to introduce legislative amendments regulating the conduct of the House in similar cases on the lines mentioned above.

Annual Report 2009

On sustained cases that remain unresolved: a further attempt

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

recommendations in sustained cases.

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

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

This Office accepts that in cases of sustained maladministration its recommendations should have no executive force and should not be binding on the Government and that this should remain so. At the same time this Office appreciates that in some instances the Government may have its own rightful reasons that constrain it from implementing the Ombudsman's findings in his Final Opinion. It is nonetheless frustrating for the Ombudsman and his staff to find that in sustained cases that remain unresolved and where complainants fail to secure redress, there is so far no direct intervention by the House of Representatives that can at least serve to bring matters to a head.

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

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

Annual Report 2010

On complaints that are deemed justified by the Ombudsman but remain without appropriate remedy

Most Members of the House were in agreement that the Parliamentary Ombudsman should not be awarded any executive power since this would run counter to the very nature of the ombudsman institution as a force for good that rests its case on the Ombudsman's moral authority and integrity, his independence and autonomy of the public authorities that fall under his mandate and his sustained search for accountability and transparency based on the principles of equity and legality. There were, however, other Members who were of the opinion that the Ombudsman's recommendations on justified cases should at all times be accepted and implemented and that he should be given the necessary tools to enforce his proposals for remedial action.

At the same time it was recognized that despite the Government's interest to ensure that the conduct of the public administration serves society and follows the values of democratic governance, the Government should still retain the right not to accept any recommendations that may be put forward by the Parliamentary Ombudsman in sustained grievances. It was also felt that it would also be useful if on regular occasions the House Business Committee would discuss complaints that fall in this category and consider the reasons why the remedial action being proposed in these grievances remains unattended...

Subsequent to the approval by Parliament of the new ombudsman legislation, the Office of the Ombudsman immediately took the necessary action to draw the attention of the Government to the steps that needed to be followed under the programme for the convergence of sectoral administrative scrutiny offices within the wider canvas of the new structure embedded in the amended ombudsman legislation.

Annual Report 2011

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

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.

The relationship between the Ombudsman and Parliament – 2011

Round Table debate between the Public Sector Ombudsman (PSO), Group of the British and Irish Ombudsman Association (BIAO) chaired by the then Speaker of the House of Representatives, Dr. Michael Frendo – The Palace, Valletta – June, 2011

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 Ombudsman¹⁹ 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.²⁰ 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.

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

19. 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.

20. 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).

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. 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 then 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 Ombudsmen²¹ and on the role of Ombudsmen in the landscape for administrative justice as a whole.

21. This report was published on 14 July 2011.

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 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.

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, the then 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.

A Constitution to serve the people – 2013

Speech by the Parliamentary Ombudsman at the Third President's Forum – April 2013

Points to ponder

A need is felt for both these authorities to be given the means not only to communicate to the House of Representatives the results of their investigations on instances they perceive to constitute maladministration but also to ensure that proper procedures are in place to have them debated by the appropriate Committee of the House to which they relate, other than the Public Accounts Committee in the case of the National Audit Office. In this way Government's actions would be subjected to the scrutiny of public opinion. The reports and findings of these parliamentary officers would become more effective even though not enforceable. What is necessary from a constitutional point of view is to establish, materially and tangibly, the link and synergy between Parliament and its officers.

ANNEX V

The situation regarding enforcement in some countries

Enforcement

The Ombudsman in Malta, like other Ombudsmen elsewhere, lacks executive powers. He can recommend a wide range of flexible remedies, including financial compensation, but unlike a court of law his recommendations are not binding and can be rejected by the public authorities. The Ombudsman's ability to secure results therefore depends upon the quality of the arguments he makes, the respect towards his Office and the moral authority inherent in the Office.

The vast majority of the recommendations of the Maltese Parliamentary Ombudsman are implemented within a relatively short time by the authorities²², however there are still a small number of cases where the administration fails to implement the recommendations of the Ombudsman, notwithstanding his decision that the grievance is justified. In the opinion of the current Parliamentary Ombudsman when a citizen's confirmed grievance is not redressed this *"...is considered to undermine the integrity of the ombudsman system and to lower the expectations of citizens in the power and ability of the Ombudsman to resolve instances of injustice by the public administration"*²³

The situation regarding enforcement in some countries

In the **United Kingdom** there are a number of Ombudsmen dealing with various sectors of government activity and set up under different statutes. The **Parliamentary Commissioner for Administration or Parliamentary Ombudsman** investigates complaints from members of the public about government departments. These complaints are however lodged through Members of Parliament. The Ombudsman has wide powers to obtain evidence from government departments and make recommendations about the cases lodged, just like the Maltese Parliamentary Ombudsman and appears before the House of Commons Select Committee on the Parliamentary Commissioner. The Parliamentary Commissioner Act provides that where the Parliamentary Commissioner for Administration and the Health Service Commissioner of England is of the opinion that an injustice has been caused to the person

22. Between 1995 and 2010 only 18 recommendations of the Ombudsman were not implemented by the Maltese Public Authorities - Information tabled in the House of Representatives of Malta on 28 March 2011 by the Hon. Dr Michael Frendo, Speaker of the House.

23. Annual Report 2010 page 24.

aggrieved in consequence of maladministration, and that this injustice has not been or will not be remedied, he/she may lay a special report about the unremedied case in front of this Committee and the Committee will examine the report. This provision is also found in **France**.

The effect of this provision is to focus the spotlight of publicity on instances of non-compliance on the part of the public authorities. In this regard, a former Ombudsman observes –

“There is little doubt that the right of an Ombudsman to submit special reports to his legislature constitutes a powerful instrument. Even if it is never used by the Ombudsman the potential of its use may be employed as a successful strategy to win compliance with recommendations. When it is used, it focuses a lot of public attention on a single unresolved justice dispute. It may generate a lot of questions and pressures from legislators, the media and the public on the government, first to respond and second to comply or explain its non-compliance.”²⁴

On the other hand, the final decisions of the **UK Financial Ombudsman Service** become binding on both the consumer and the business when the decision is in favour of the consumer and the consumer accepts the decision before the deadline indicated by the Ombudsman. In this case, companies are required to comply with the determination of the Ombudsman in the shortest time possible but where this is not done, the decision of the Ombudsman can be enforced in court without having to argue the merits of the case again.

In **Denmark** when the recommendations of the Parliamentary Ombudsman are not implemented, he has the power to recommend that the complainant be granted free legal aid for legal action to be brought against the authority in a court of law²⁵. Between 1997 and 2010 the Danish Parliamentary Ombudsman recommended that free legal aid be granted on ten different occasions²⁶.

In **Northern Ireland**, where complainant is not provided with redress following the Regional Ombudsman’s decision that there is an act of maladministration, the Ombudsman’s report provides the material upon which the complainant can go to court and request the court to make an enforceable award against the authority. The **Irish Pensions Ombudsman’s decision** can be enforced by the Courts in terms of Section 141 of the Pensions Act 1990 (as amended).

24. G. E. Caiden, ‘The Challenge of Change’ in the Fourth International Conference: Papers (Canberra: Commonwealth Ombudsman, 1989).

25. Section 23 of Act No 473 of 12 June 1996, the Ombudsman Act.

26. The Institution of the Ombudsman in Malta: The issue of non-compliance - Mr J Chetcuti (Dissertation for the attainment of the Diploma in Public Administration 2012).

The Circuit Court may make an order directing that the party implement the terms of the Determination, if a party to a complaint or dispute fails to comply with the Determination of the Pensions Ombudsman. Such an order may be applied for by the other party (usually complainant) or by the Pensions Ombudsman *“if he is of the opinion that it is appropriate to do so, having regard to the circumstances”*. In view of the wording of the law, and since the complaint is personal to the individual, the Pensions Ombudsman generally only seeks enforcement himself where the case involves special or unusual circumstances for him to become involved in the enforcement process. Once such an order is made by the court, a party continuing to refuse to implement a Determination will be subject to court jurisdiction and may stand in contempt.

In **Sweden** the Ombudsman’s opinion is also not legally binding. However, where the Parliamentary Ombudsman finds that an official has acted incorrectly, he has the right to initiate disciplinary procedures against the official for misdemeanors. This is resorted to on very few occasions and the most frequent outcome of the Ombudsman’s investigation is a critical advisory comment or some form of recommendation. The most extreme recourse allows an Ombudsman to act as a special prosecutor and bring charges against the official for malfeasance or some other irregularity - this very rarely happens, but the mere awareness of this possibility means a great deal for the Ombudsman’s authority.

In **Pakistan**, once the Ombudsman finalises the investigations and makes his recommendations, the government entity, agency or department are required to inform the Ombudsman about the action taken on the recommendations or the reasons for not complying with the same within a specified time. If the reasons advanced appear to be frivolous or without force, the Ombudsman may reject the same and call on the entity to implement the findings and recommendations. If on the other hand, the Ombudsman finds the reasons advanced tenable, having the likely effect of modifying or withdrawing the findings, the complainant is issued a notice for hearing. An appropriate order is issued after this hearing. The law provides for further provisions which help in the implementation of the recommendations, namely:

- i) Article 3(3) of the President’s Order No 1 of 1983 which provides that *“all executive authorities throughout Pakistan shall act in aid of the Mohasib (Ombudsman)”*. Thus the authorities are obliged to implement the recommendations;
- ii) the power of committal for contempt as vesting in the Supreme Court has been conferred on the Ombudsman by Article 16 of the President’s Order No 1 of 1983; and

- iii) if the recommendations are not implemented, the Ombudsman has been conferred by the power to initiate 'defiance of recommendations' proceedings, and may, after the hearing, report on the matter to the President of Pakistan. The matter will be recorded as an adverse entry in the official's character roll²⁷.

27. Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States (The Caribbean Experience) published by the Commonwealth Secretariat.

Annex VI

Letter by the Parliamentary Ombudsman to Mr Alfred Camilleri, Permanent Secretary, Ministry of Finance, the Economy and Investment – 12th January 2012



Ombudsman

OMB/3/1/P13

12 January 2012

Mr Alfred Camilleri
The Permanent Secretary
Ministry of Finance, the Economy and Investment
30 Maison Demandols
South Street
Valletta
VLT 2000

Dear Mr Camilleri

I thank you for your e-mail of 9 January 2012 and attached statement. I have taken note of their contents.

As we have already pointed you will appreciate that the finances required for this Office as approved by the House of Representatives following consideration of the Ombudsplan submitted to it *"shall be a charge on the consolidated fund without any further appropriation other than this Act"* (Section 10(4) of Act XXI of 1995). Any reduction of the approved amount for 2012 financial year can therefore only be made through parliamentary resolution.

However, as a constitutional authority this Office is conscious of its institutional relationship with the central Government and perceives itself as an extension of the national government in a wide sense, entrusted with the function to oversee administrative practices.

This Office therefore, considers it its duty to cooperate with your Ministry to ensure that the set targets are met since it is satisfied that the measures proposed are in the public interest. At the same time I trust that despite the proposed reduction my Office will still be in a position during 2012 to implement the proposed development of the institution that was approved by Parliament in 2010.

Yours sincerely

J Said Pullicino
Ombudsman

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Annex VII

Memo by Mr. Mario Debattista, Permanent Secretary, Ministry for Home Affairs to the Parliamentary Ombudsman – 11th October 2012

DATE: 11 October 2012
TO: Ombudsman
FROM: Permanent Secretary, Ministry for Home Affairs
RE: APPOINTMENT OF COMMISSIONER FOR PERSONS DEPRIVED OF THEIR LIBERTY

Objective

This memo makes proposals that seek to address three pressing needs: (i) the provision of an independent, ongoing source of investigation and additional redress for prisoners; (ii) the closer oversight of prison facilities and other institutions of detention; and (iii) the setting up of an appropriate institutional framework to enable Malta to fully comply with obligations arising from its subscription to the OPCAT.

Current State of Play at the Prisons

Generally speaking, the main European Penal Institutions are “supervised” through the creation and appointment of a “Prison Board of Visitors”. Malta is no exception and has been adopting this system since its time under the British administration.

The Prisons Act (Cap 260) at Art. 8 establishes the Board of Visitors of the Prisons. Its duties and functions derive from Prisons Regulations, 1995 (S.L. 260.03) para 104, as follows:

“104. The Board shall have the following functions:

- (a) to satisfy itself as to the treatment of prisoners, the state of prison premises and the administration of the prison;*
- (b) monitor the administration of the prison disciplinary system and inform the Minister of its findings; this includes the authority to attend disciplinary hearings of prisoners;*
- (c) to advise the Minister on any matter relating to the care and rehabilitation of prisoners, as well as to the organisation and improvement of the prison and the prison service, which the Minister may refer to it or any ancillary matter on which the Board deems it opportune to tender its advice to the Minister;*
- (d) to advise the Minister on matters relating to work and activity to be performed by prisoners;*
- (e) to inquire into and report upon any matter which it deems proper, or the Minister requests it, to enquire into;*
- (f) to act as the person responsible for a National Preventive Mechanism for the prevention of torture, as provided for in the Optional Protocol to the United Nations Convention against Torture; and*
- (g) to perform such other functions as are assigned to it under these regulations.”*

The composition of the Prison Board of Visitors comprises eight professionals who are committed in full-time engagements elsewhere. It follows therefore that, while, the remit assigned to the board is very broad, the input that the respective members can give to the board is limited. Within these constraints the board has evolved into a first point of reference for prisoners with respect to their complaints regarding day to day issues within prison. It also fulfils the role of advisor to the Minister, in drawing up at least an annual report which makes recommendations for improvements.

The circumstances do not allow for the in-depth investigation of every complaint, and neither is there room for an independent course of investigation with recourse to redress in the eventuality that an individual's human rights are considered to have been breached.

The recently-adopted role of the Prison Board of Visitors as the National Preventive Mechanism in respect of the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is mainly being fulfilled with regard to attendance at international meetings. The reporting element that is expected of it under OPCAT has not been fulfilled and is difficult to implement within the current set-up. We shall dwell upon this in more detail further down in this memo.

It is in the light of the current set up and constraints that it is considered opportune to establish a specific focus on correctional services within the Office of the Ombudsman as the office for the safeguarding of human rights.

There is no intention to abolish the present Board of Visitors system as it is considered that a body or a multi-disciplinary team should still be available to the prisoners and the Director, Correctional Services. This team should still be there to hear complaints and act as a liaison between the inmates, staff and the Director. This Board shall remain answerable to the Minister responsible for the Prisons.

Commissioner for Persons Deprived of their Liberty

It is considered necessary to appoint a Commissioner for Persons Deprived of their Liberty having responsibility for the Prisons and all other places which house persons deprived of their liberty. This office would complement the activities of the Prison Board apart from addressing shortcomings currently being experienced in relation to Malta's obligations under OPCAT. The advantages such a set-up would bring to the prisons' scenario in particular are numerous, foremost among them the fact that the Office of the Commissioner would carry out its function of oversight on a full time basis.

The Office of the Commissioner would fall under the aegis of the Ombudsman reflecting the current structure and procedures already established within the Office of the Ombudsman. Such arrangement would make for an independent body which would scrutinise more closely and on a full time basis the situation in Prison.

Our Obligations under OPCAT

Malta has been a signatory since the 24th September 2003 to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the United Nations Convention against Torture. This has been in force since 22 June 2006. OPCAT was a further step in the direction of having places where people are being deprived of their liberty open to outside scrutiny by independent international and national preventive bodies. On the international front, the United Nations Subcommittee on Prevention of Torture (SPT) is the applicable body. At a national level, this function is exercised by National Preventive Mechanisms (NPMs) which signatory states are required to set up, in terms of the Protocol, with a view to monitoring all Persons Deprived of their Liberty regularly, and to making recommendations and observations to prevent torture and other cruel, inhuman or degrading treatment or punishment.

OPCAT sets out basic requirements for the establishment of NPMs by a State Party. Foremost among these is that they must be independent of Government, including functional independence in the sense that they must not be under the authority or influence of any government ministry or institution. Moreover, as already stated, they are expected to report to the SPT apart from having an obligation to publish and disseminate NPM annual reports.

The Ministry for Home Affairs appointed the Prison Board of Visitors by means of paragraph 104 (f) of Prison Regulations, 1995, as the National Preventive Mechanism for Correctional Facilities. The Board of Visitors for Detained Persons was in turn nominated as National Preventive Mechanism with regard to persons being detained as irregular immigrants by virtue of Section 3 (f) of Legal Notice 266 of 2007, under the Immigration Act (Cap 217). These two Boards report directly to the Minister for Home Affairs and thus far have never reported to SPT even though there have been instances where they were prompted to do so by the latter.

Clearly, both the Prison Board of Visitors as well as the Board of Visitors for Detained Persons are not sufficiently well equipped to fulfil their obligations in respect of the OPCAT. They lack the capacity, resources and full autonomy from government institutions that are pre-requisites under OPCAT standards. Moreover, it is pertinent to point out that Malta is not covering all places of "detention" such as police lock-ups and mental health and social care institutions including homes for the elderly.

It is felt, therefore, that the setting up of a Commissioner for Persons Deprived of their Liberty within the Office of the Ombudsman would enable us to better fulfil our obligations under OPCAT in that the Commissioner would be designated as the contact person in respect of Malta's OPCAT obligations and the Office of the Ombudsman would be nominated as Malta's National Preventive Mechanism Body.

Conclusion and Recommendation

In light of the foregoing it is considered necessary that Malta establishes an independent body which could concurrently oversee the administration of prisons and the well-being of the prisoners, as well as fulfilling Malta's obligations in relation to the OPCAT.

The Office of the Ombudsman may therefore wish to consider the appointment of a Commissioner for Persons Deprived of their Liberty. The officer would also serve as Malta's contact person for OPCAT and consequently, the Office of the Ombudsman would be nominated as National Preventive Mechanism in respect of all the obligations which arise from OPCAT.



Mario DeBattista
Permanent Secretary

Annex VIII

Paris Principles

Paris Principles

A/RES/48/134
85th plenary meeting
20 December 1993

National institutions for the promotion and protection of human rights

The General Assembly,

Recalling the relevant resolutions concerning national institutions for the protection and promotion of human rights, notably its resolutions 41/129 of 4 December 1986 and 46/124 of 17 December 1991 and Commission on Human Rights resolutions 1987/40 of 10 March 1987, 1988/72 of 10 March 1988, 1989/52 of 7 March 1989, 1990/73 of 7 March 1990, 1991/27 of 5 March 1991 and 1992/54 of 3 March 1992, and taking note of Commission resolution 1993/55 of 9 March 1993,

Emphasizing the importance of the Universal Declaration of Human Rights, the International Covenants on Human Rights and other international instruments for promoting respect for and observance of human rights and fundamental freedoms,

Affirming that priority should be accorded to the development of appropriate arrangements at the national level to ensure the effective implementation of international human rights standards,

Convinced of the significant role that institutions at the national level can play in promoting and protecting human rights and fundamental freedoms and in developing and enhancing public awareness of those rights and freedoms,

Recognizing that the United Nations can play a catalytic role in assisting the development of national institutions by acting as a clearing-house for the exchange of information and experience,

Mindful in this regard of the guidelines on the structure and functioning of national and local institutions for the promotion and protection of human rights endorsed by the General Assembly in its resolution 33/46 of 14 December 1978,

Welcoming the growing interest shown worldwide in the creation and strengthening of national institutions, expressed during the Regional Meeting for Africa of the World Conference on Human Rights, held at Tunis from 2 to 6 November 1992, the Regional Meeting for Latin America and the Caribbean, held at San Jose from 18 to 22 January 1993, the Regional Meeting for Asia, held at Bangkok from 29 March to 2 April 1993, the Commonwealth Workshop on National Human Rights Institutions, held at Ottawa from 30 September to 2 October 1992 and the Workshop for the Asia and Pacific Region on Human Rights Issues, held at Jakarta from 26 to 28 January 1993, and manifested in the decisions announced recently by several Member States to establish national institutions for the promotion and protection of human rights,

Bearing in mind the Vienna Declaration and Programme of Action, in which the World Conference on Human Rights reaffirmed the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information and in education in human rights,

Noting the diverse approaches adopted throughout the world for the promotion and protection of human rights at the national level, emphasizing the universality, indivisibility and interdependence of all human rights, and emphasizing and recognizing the value of such approaches to promoting universal respect for and observance of human rights and fundamental freedoms,

1. Takes note with satisfaction of the updated report of the Secretary-General, prepared in accordance with General Assembly resolution 46/124 of 17 December 1991;
2. Reaffirms the importance of developing, in accordance with national legislation, effective national institutions for the promotion and

protection of human rights and of ensuring the pluralism of their membership and their independence;

3. Encourages Member States to establish or, where they already exist, to strengthen national institutions for the promotion and protection of human rights and to incorporate those elements in national development plans;
4. Encourages national institutions for the promotion and protection of human rights established by Member States to prevent and combat all violations of human rights as enumerated in the Vienna Declaration and Programme of Action and relevant international instruments;
5. Requests the Centre for Human Rights of the Secretariat to continue its efforts to enhance cooperation between the United Nations and national institutions, particularly in the field of advisory services and technical assistance and of information and education, including within the framework of the World Public Information Campaign for Human Rights;
6. Also requests the Centre for Human Rights to establish, upon the request of States concerned, United Nations centres for human rights documentation and training and to do so on the basis of established procedures for the use of available resources within the United Nations Voluntary Fund or Advisory Services and Technical Assistance in the Field of Human Rights;
7. Requests the Secretary-General to respond favourably to requests from Member States for assistance in the establishment and strengthening of national institutions for the promotion and protection of human rights as part of the programme of advisory services and technical cooperation in the field of human rights, as well as national centres for human rights documentation and training;
8. Encourages all Member States to take appropriate steps to promote the exchange of information and experience concerning the establishment and effective operation of such national institutions;

9. Affirms the role of national institutions as agencies for the dissemination of human rights materials and for other public information activities, prepared or organized under the auspices of the United Nations;
10. Welcomes the organization under the auspices of the Centre for Human Rights of a follow-up meeting at Tunis in December 1993 with a view, in particular, to examining ways and means of promoting technical assistance for the cooperation and strengthening of national institutions and to continuing to examine all issues relating to the question of national institutions;
11. Welcomes also the Principles relating to the status of national institutions, annexed to the present resolution;
12. Encourages the establishment and strengthening of national institutions having regard to those principles and recognizing that it is the right of each State to choose the framework that is best suited to its particular needs at the national level;
13. Requests the Secretary-General to report to the General Assembly at its fiftieth session on the implementation of the present resolution.

Principles Relating to the Status of National Institutions

Competence and Responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, inter alia, have the following responsibilities:
 - (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
 - (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

- (ii) Any situation of violation of human rights which it decides to take up;
- (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
- (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;
- (b) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
- (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;
- (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;
- (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;
- (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

- (g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

4. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:
 - (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
 - (b) Trends in philosophical or religious thought;
 - (c) Universities and qualified experts;
 - (d) Parliament;
 - (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).
5. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it 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.

6. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;
- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);
- (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and

protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-judicial competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
- (d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

Annex IX

The following is an exchange of correspondence between the Ombudsman and Associate Professor Kevin Aquilina, Head of Department of Public Law and Dean of the Faculty of Laws, on the proposal that the Final Opinion of the Ombudsman could constitute a prima facie evidence in a Court of Law, Proposal No. 11, at Page 51. The published proposal takes into account Prof. Aquilina's comments.

Email from Prof. Kevin Aquilina, 4th February 2014

Dear Ombudsman,

I have read the report on the strengthening of your office which is very well written and coherently argued.

I have very few feedback to give as per below:

Pages 51-52: Final Opinion as prima facie evidence: I am not sure whether I agree with this proposal more so in the light of the fact that the courts have to accept the final opinion without being in any way able to scrutinise that opinion in the sense that the courts will not have access to the documents which the Ombudsman used to arrive at that opinion and the court is not in a position to subpoena the Ombudsman or any relevant member of his staff to enlighten the court as to the facts, motivations and other considerations which have been considered at arriving at such a final opinion. Indeed, there is no transparency and openness once the court does not have access to the Ombudsman's file and documents contained in that file. I would prefer to keep both procedures separate. The proposal has throughout consistently distinguished the role of the Ombudsman from that of the courts and I would prefer to retain such distinction throughout the document. Indeed, the court would be at a loss to have to accept the Ombudsman's final opinion with no access to the documentation which lead to that opinion and to the case officers who can clarify better why the final opinion what framed in that way. In an adversarial system, as is ours, one cannot accept in judicial proceedings some form of proof without being in a position to contest it in open court once one only gets the final opinion and not the accompanying documents upon which it is based. It is like the Court of Appeal having a copy of the judgment of the inferior court but no access to the record of proceedings of the inferior courts.

Reply from the Parliamentary Ombudsman, 11th February 2014

Dear Kevin,

Thank you for examining my script and for your personal comments.

Re your remarks on pages 51/52 – they are very much to the point and made me think twice on this proposal. However I decided not to delete the section but to water it down and present it as an issue to be studied further. The position today is that Courts are reacting differently to requests to produce the Ombudsman's final opinion during proceedings. Some allow it, others do not. Others just allow the parties to do so if they agree. Strictly speaking opinions are not admissible as evidence unless they are of Court appointed or ex parte experts. I never intended that the Court would have to accept the Ombudsman's opinion. Transparency and openness are however assured once the Court and the parties can have access from outside sources to the evidence made available to the Ombudsman during his investigations.

I do appreciate the difficulty of a Court adopting an opinion if its author cannot be examined to verify its validity. That is why I opined that the Court would be free to give the Ombudsman's opinion the weight it considers it deserves. At this point, my only concern is whether the Ombudsman's report could facilitate and expedite Court proceedings or contribute towards an amicable resolution of the case.

Reply from Prof Kevin Aquilina, 11th February 2014

Dear Ombudsman,

Thank you for the clarification below.

I do understand your point.

Let us see what reaction will the document elicit on this and other points.

Best regards,

Kevin

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