Reflections on the White Paper
Towards the Establishment of the Human Rights and Equality Commission

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List of Abbreviations

NHRI - National Human Rights Institution

HREC - Human Rights and Equality Commission

NGO - Non-governmental organisation

NCPE - National Commission for the Promotion of Equality

KNPD - National Commission for Persons with Disability

EU - European Union

ICC - International Coordinating Committee on National Institutions for the Promotion and Protection of Human Rights

UN - United Nations

EHRC - Equality Human Rights Commission
Foreword
Foreword

by Prof Kevin Aquilina, Dean, Faculty of Laws, University of Malta.

On 10 December 2014 – International Human Rights Day – the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, published a White Paper entitled Towards The Establishment Of The Human Rights And Equality Commission. It invited comments from members of the public and other interested bodies upon the interesting recommendations contained therein. The Parliamentary Ombudsman is, in this present publication, expressing his positive reception of the White Paper’s suggestions whilst setting out concrete proposals intended to develop further the rationale of the White Paper thereby ensuring that when the legislation which will follow therefrom ends out to be suitable to, and compliant with, the administrative environment in Malta so that the White Paper’s objectives are fully achieved, are well planned out, institutionally coherent and implemented successfully. The Parliamentary Ombudsman also partakes of the national human rights institution in Malta and thus has a major role to play in ensuring the proper establishment of the Human Rights and Equality Commission.

After having been requested by the Parliamentary Ombudsman to write a Foreword to this publication, I read and pondered upon the main thrust of both the White Paper and the Ombudsman’s reflections thereupon. I must unhesitatingly confess that I am in agreement with both documents which, in my view, very much complement each other. The Ombudsman’s Reflections give flesh to the White Paper’s spirit. Needless to say, the White Paper sets out the principles which the Government wants to achieve in the realm of human rights and equality law; the Ombudsman’s Reflections chart out the ways and means how these principles can be concretised in practice in Malta having due regard to extant entities which carry out duties in the realm of Human Rights law and Equality Law. That is why I consider the White Paper and the Reflections to be complementary to each other.

The Ministry for Social Dialogue, Consumer Affairs and Civil Liberties has to be lauded for the well-deserved initiative it is taking in order to update Malta’s human rights and equality laws to current international and European standards. Currently there exist gaps in the legal framework and lack of coherence in the standards adopted by the concerned institutions. I consider this Government-led initiative to be an excellent step in the right direction and an inevitable consequence of the reform of the Ombudsman institution which was carried out by Parliament in 2010.

The first phase in this reform exercise of the national human rights institution in Malta saw sectoral ombudsmen being re-organised and grouped together
within the Office of the Parliamentary Ombudsman under one law without, in turn, losing their respective autonomy. In terms of the 2010 amendments to the Ombudsman Act it became possible to establish Commissioners for Administrative Investigations within the Parliamentary Ombudsman institution. Indeed, under subsidiary legislation made under those amendments – the Commissioners for Administrative Investigations (Functions) Rules, 2012 (Subsidiary Legislation 385.01) – three Commissioners for Administrative Investigations were established and appointed namely, the Commissioner for Education, the Commissioner for Environment and Planning, and the Commissioner for Health. These amendments are flexible enough to allow the establishment in the future of other Commissioners for Administrative Investigations. Overall, the 2010 reform has been successful, worked out well and all Commissioners are functioning autonomously and in a co-ordinated fashion within this restructured Ombudsman institution.

The second phase in the reform of the national human rights institution in Malta focuses on two aspects: equality and non-discrimination, on the one hand, and human rights, on the other. As was the situation with the Ombudsman institution prior to the 2010 amendments to the Ombudsman Act, in so far as equality and non-discrimination are concerned, there exist today state entities which are very sectoral in nature – focusing on gender and race discrimination, disability rights and children’s rights – which do not address equality and non-discrimination in its multiplicity and within one national institution.

First and foremost, it is of paramount importance that these three sectoral entities are all brought within the fold of one institution – the proposed Human Rights and Equality Commission. Secondly, their remit ought to be extended in the new legislation to cover all forms of discrimination rather than allowing such an extension to take place sporadically and in a piecemeal fashion as has been unfortunately the practice in the past. This is, in fact, what the White Paper is correctly proposing to achieve. Thirdly, the new legislation needs to clarify that it is without prejudice to, and is saving the powers of, extant constitutional and other legally established authorities which implement human rights law such as the Broadcasting Authority with regard to freedom of expression, the Commission for the Administration of Justice with regard to the judicial system and the Electoral Commission with regard to the right to vote. Naturally there are other administrative authorities which, in one way or another, administer human rights law and their powers have to be reconfirmed as well. Fourth, the new legislation should retain intact the powers ascribed by law to judicial and quasi-judicial bodies entrusted to provide remedies in the case of breaches of human rights law such as the Civil Court, First Hall, the Constitutional Court, the Court of Appeal and the Administrative Review Tribunal, just to cite a few examples.
In my view, the Human Rights and Equality Commission should, in so far as equality and non-discrimination are concerned, have three Commissioners: a Commissioner for Equality; a Commissioner for Persons with Disability, and a Commissioner for Children. In this way, it will encompass extant entities which already satisfactorily perform duties in the realm of equality and non-discrimination. As to the other limb of the Human Rights and Equality Commission, the Data Protection and Freedom of Information Commissioner could well be absorbed within the new Commission as, after all, such Officer is also dealing with personal data and access to information which both fall under its Human Rights mandate. This change will ensure that all Commissioners (Equality Commissioner, Persons with Disability Commissioner, Children’s Commissioner and Data Protection and Information Commissioner) are upgraded and brought in line with the Paris/Belgrade Principles set out in the annexes to the White Paper. It further ensures that all these Commissioners – as part of the Human Rights and Equality Commission – retain their autonomy whilst co-operating and working in tandem. In this sense, the Human Rights and Equality Commission would be considering human rights and equality matters from a holistic perspective and in a comprehensive manner.

Further, it is imperative that all the entities within the Ombudsmen institution, all the entities within the Human Rights and Equality Commission and other relevant stakeholders are represented in the Human Rights and Equality Commission’s Board of Governors so that they can better co-ordinate their functions. The Human Rights and Equality Commission should be chaired by the Equality Commissioner and should be governed by a Board of Governors comprising the Equality Commissioner, as chairperson, and, as members, the Persons with Disability Commissioner, the Children’s Commissioner and the Data Protection and Information Commissioner; the Ombudsman and the Commissioners for Administrative Investigations for Education, Environment and Planning, and Health; a representative of the Commission for the Administration of Justice; and representatives of other stakeholders such as the University of Malta and non-governmental human rights organisations, whether purely locally established or forming part of a branch of an international or European human rights non-governmental organisation. In this way, the new Commission will not overlap with extant structures but contribute to complement and co-ordinate their work better.

The adoption by Parliament of these measures through legislative means will conclude the second phase in the implementation of the review of the national human rights institution in Malta. Once these materialise Malta can start reaping their benefits to the advantage of its population.

I conclude by thanking both the Minister for Social Dialogue, Consumer Affairs
and Civil Liberties for having taken this initiative to publish such a seminal document and the Parliamentary Ombudsman for having produced a set of exhaustive and well thought out reflections on the White Paper under review which clearly and convincingly set out the administrative and legal structures aimed at paving the way to reach the goals admirably set out in the Ministry’s White Paper.

Professor Kevin Aquilina
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Msida, 5th July 2015
Introduction
Introduction

The starting point of this document must necessarily be the tail end of the publication issued by the Parliamentary Ombudsman in October 2013 on the setting up of a National Human Rights Institution in Malta. It was then 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 to the enjoyment of his fundamental human rights, and this without unduly burdening the country with unnecessary additional expense, but also and more importantly, it should ensure that the model chosen will merit and receive the highest level of accreditation - an A status with the ICC. As a member of the European Union that should pride itself on the level of respect of fundamental rights and their observance, Malta deserves nothing less”.

The White Paper issued by the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties takes the process towards the formation of a Human Rights and Equality Commission a step further. The White Paper sets out the broad outlines of the legal framework that the government intends to set up to address identified gaps in protections and freedoms enjoyed by individuals in Malta under established international human rights standards.

The government avowedly intends to ensure that Malta has an internationally accredited Human Rights and Equality Commission, that meets the obligations both of human rights standards laid out in the Paris and Belgrade Principles as well as subsequent documents and EU Equality legislation.

The objectives set out in the White Paper are undoubtedly laudable and fully meet the high expectations and stringent institutional parameters considered by the Ombudsman to ensure international accreditation. It remains to be seen how these objectives will be realised in practice through the legal instruments setting up the proposed framework and whether these instruments would adequately guarantee the desired protection and promotion of human rights in an institutional set up that fully respects the Paris and Belgrade principles.

In his previous contribution on the setting up of an NHRI, the Ombudsman had concluded that “Rather than setting up a new authority that the country can ill-afford, the Ombudsman has repeatedly recommended that his Office could provide the structure for the NHRI that would, under his chairmanship,
act as an umbrella institution. It is proposed that the institution would be an autonomous body made up of the Ombudsman and the various Commissioners and Chairmen of national authorities and institutions that have a strong human rights content in their functions, together with a number of representatives of non-governmental organisations (NGOs) dedicated to human rights protection. The institution would function independently and autonomously, benefitting from the authoritative experience and expertise of its members in their respective fields of operation.”

The White Paper proposes a model that is different from that suggested by the Ombudsman. It seems to concur with the Ombudsman that there is no room to set up a completely new authority to act as an NHRI. It does not however agree that the functions of the NHRI should be exercised by a multi-institutional commission chaired by the Ombudsman and serviced by his Office.

It opts for the setting up of a Human Rights and Equality Commission that essentially takes over the functions of the National Commission for the Promotion of Equality (NCPE). It expands its remit to cover human rights in a wider sense. The proposal to have fundamental human rights overseen by an umbrella organisation in which major stakeholders involved in their protection and promotion are represented, does not seem to have been favourably considered in this White Paper. Though the model chosen and recommended is different from that suggested by the Ombudsman, this does not mean that it cannot be an efficient and effective instrument to achieve its stated objectives.

The White Paper provides important information on the extent of the Commission’s remit and how it is meant to operate. That information, even if somewhat lacking in detail, gives a clear indication of how the government intends to legislate to provide the legal structures necessary for the Commission to exercise its functions, within a framework that enjoys full autonomy from the Executive and financial independence.

In the chapters that follow, this document will attempt to ascertain whether the proposed legislation will be fully compliant with the Paris and Belgrade Principles. It will also analyse the institutional set up in the context of the historical development of the constitutional and legal fundamental human rights scenario in Malta and the need for further promotion and protection.

There is general consensus in principle on the way forward. However, care should be taken to ensure that existing structures are not weakened or demotivated. The Ombudsman will also give his opinion in this respect. The Government has now declared its chosen model. This document is meant to be a further contribution in the process to ensure that the model chosen will be
the best suited for Malta’s needs and such as to attain the highest international accreditation. It should therefore be regarded as a follow up of the original opinion published in October 2013, by the Ombudsman and should be read in conjunction and regarded as complimentary to it.
Chapter 1

The Legacy of Human Rights Protection in Malta
The Legacy of Human Rights Protection in Malta

A brief historical note

It is not widely acknowledged that a most important positive effect of Malta’s long and chequered colonial history was the inevitable exposure of its indigenous population to the more progressive social and political thinking that moulded the formation of European States throughout the centuries. The gradual, growing awareness of the intrinsic value of every human being and of the basic principles of natural law that govern human relations, greatly affected the development of both the continental and the common law legal systems that have substantially influenced Maltese jurisprudence, and served as guiding models in the drafting of the country’s legislation.

Undoubtedly, Malta’s constitutional provisions on fundamental, human and civil rights feed on the deeply rooted and continuous aspirations of western civilisation inspired by Greek and Roman humanism, fostered by the Judaic Christian message and invigorated by the right philosophy of enlightenment which teaches that fundamental human rights and freedoms are not derived from the political and legal order but are rather antecedent to it.

The first, tangible, Maltese manifestation of their belief in the universality of human rights can be linked historically to the 1776 Declaration of Independence of the United States of America that states that: “All men are created equal; they are endowed by their Creator with certain unalienable rights. Among these are life, liberty and the pursuit of happiness”. Those principles are reflected in the Declaration of the French Constituent Assembly that, on 26 August 1789 declared “that people are born and die with equal rights” and qualified these rights as “natural and imprescriptible”.

It is not widely known that these important declarations of principles, enunciating the universality of fundamental human rights that embody the creed on which modern democracies have been built, were enshrined in the first ever declaration of human rights that the Maltese incorporated in a petition submitted to the King of the United Kingdom on the 15th June 1802.

This historic document, drafted after the Maltese had successfully ended the French occupation with the help of the British, was drawn up a mere twelve years after the Declaration of the French Constituent Assembly. Clearly those progressive, liberal and revolutionary concepts that were spreading like wildfire among European thinkers and philosophers deeply influenced Malta’s small but highly educated intelligentsia. Support for these concepts was spurred
on by the forceful and controversial legislation through which the French colonisers in Malta attempted to impose their system of government on their newly found subjects.

On 25 March 1802, following the definitive defeat of Napoleon, the Treaty of Amiens was signed. This provided that Malta was to revert to the Order of St John. When this came to the knowledge of the leaders of the Maltese people, they reassembled their Congress and drew up a declaration of the rights of the inhabitants of the islands of Malta and Gozo. After declaring that King of the United Kingdom of Great Britain and Ireland was to be considered as the Sovereign Lord of Malta, Congress provided that the King had no right to cede the islands to any new power.

The declaration signed in Malta on 15th June 1802 affirmed that “Free men have a right to choose their own religion. Toleration of other religions is therefore established as a right; but no sect is permitted to molest, insult or disturb those of other religious sentiments [...] That no man whatsoever has any personal authority over life, property or liberty of another. Power resides only in the law, and the restraint or punishment, can only be exercised in obedience to law”. (Full text of the declaration is included as Annex IV - Page 131)

That document manifests the belief of the Maltese in religious tolerance, including the protections of all religion against vilification and abuse, in the fundamental principles of the rule of law and of equality before the law. The Maltese proclaimed their conviction that no one had any personal authority over the life, property or liberty of any other person, thereby underlining the fundamental right of equality and the consequential principle that no one should be subjected to improper discrimination.

It is also clear that the representatives of the people had already at that time envisaged the Constitution as being an inviolable charter. With the advent of British rule in 1800 the Maltese legal system became even more exposed to new and more liberal ideas. The independence of the Judiciary, trial by jury in criminal matters, the presumption of innocence of the accused, freedom from arrest without prompt trial (habeas corpus), the rule of law and the equality of all before the law aimed at ensuring speedy and impartial justice in Malta, are notions that have their origin in the first fifty years of Britain’s colonial occupation.

During the long period of British rule, Malta remained thankfully exposed to contemporary, radical and revolutionary ideas that further contributed towards greater awareness of fundamental human rights and the need to promote and protect them. Wider sections of the population became interested in these
ideas, rooted in the empowerment of individuals to participate in public life in a wide sense. This led to a sustained increase in the interest of society generally in the governance of the country. As a result new political parties were set up and there was a strong movement towards self-government and self-determination. Workers became aware of their rights and started to organise themselves in trade unions. The country gradually prepared itself to develop into a modern, democratic state. This process involved campaigns for the recognition of the individual’s fundamental rights including freedom of speech, freedom of expression, and freedom of the press and freedom of association. Moreover, it underpinned the campaign for the country’s self-determination that led to its emancipation from colonial rule culminating in the attainment of independence.

These major developments, throughout the nineteenth and twentieth centuries, provide conclusive evidence that the process of protection and promotion of fundamental human rights is by no means a recent, novel development. On the contrary, it is an ongoing evolutionary process that has taken centuries to materialise. A process that reached its apex with the adoption of Malta’s constitutional human rights provisions and the ratification of international instruments that recognise these fundamental rights and sanction their violation. A specific reference to these important legislative enactments will be made in the following chapters since this is relevant to certain aspects of the functions of the HREC proposed in the White Paper - that like the Office of the Parliamentary Ombudsman, will be another welcome NHRI in the defence of citizens.

The setting up of this new Commission as another NHRI in Malta should be considered as another important instrument that would further consolidate what has been achieved so far in promoting and protecting human rights in the country. Care should therefore be taken to ensure that the proposed set up will fit in and complement existing structures. It must be ensured that the new institution would be another, albeit important, brick in the constitutional and legal edifice that guarantees fundamental human rights and that will provide individuals with further protection for their full enjoyment.
Statutory definition and judicial enforcement of fundamental rights in Malta
Statutory definition and judicial enforcement of fundamental rights in Malta

Before commenting in some detail on the White Paper it is necessary to make a brief reference to the definition and recognition of fundamental rights in Malta and how these are protected and sanctioned by current constitutional, conventional and other legal statutes.

The 1964 Constitution in Chapter 4 contains an extensive and judicially enforceable Bill of Rights largely based on the European Convention of Human Rights. The provisions contained in the 1961 Constitution were in substance retained and amplified. That Constitution had identified fundamental rights as being: a) the right to life, liberty, security of the person and protection of the law; b) freedom of conscience, of expression and of assembly and association; and c) protection for the privacy of one’s home and other property and from deprivation of property without compensation.

The 1964 Constitution introduced further provisions providing among others for non-discrimination, the protection of freedom of movement and the restriction of deportation of Maltese citizens. Other protected rights include the right to life and security of the person, the privacy of the home and other property, the right to a fair trial, the right not to be subjected to inhuman and degrading treatment or to arbitrary arrest. Later amendments provided further protection by identifying discrimination on the grounds of sex, race, place of origin, political opinion, colour, creed and gender as fundamental rights.

All the rights and freedoms of the individual contained in Chapter 4 of the Constitution are qualified as fundamental rights. The same Chapter provides for particular instances in which legitimate derogations of the observance of these rights are allowed. These limitations have to be prescribed by law and must be reasonably justifiable in a democratic society.

Although the Constitution acknowledges the fact that there cannot be a state of absolute liberty or absolute rights, it has not left the question of the limitation of such fundamental rights entirely to the Courts. It defines the scope of the limitations in each and every right and requires that such limitations should be contained in a law or done under the authority of a law. Furthermore, the amendment or repeal of the provisions regulating fundamental rights and freedoms require a qualified two-thirds majority of all members of the House of Representatives and cannot be approved by a simple majority.

On the 19th August 1987, the European Convention on Human Rights was incorporated into Maltese Law when the European Convention Act came
into force. The incorporation of the Convention in domestic law was deemed necessary as it provided for broader rights to the individual, while acknowledging the jurisdiction of the European Courts of Human Rights that ensures that the rights and freedoms laid down in the European Convention are enforceable in a Maltese court. Act XIV of 1987 stipulates that when an ordinary law is inconsistent with the Convention’s protected provisions, the Convention shall prevail and such law shall, to the extent of the inconsistency, be void.

This basic information is enough to draw the following essential conclusions:

1. Only those rights that are specifically listed in the Constitution and in the European Convention, and indeed any other international instrument that has been ratified and forms part of the domestic law of the country, can by law be considered to be fundamental rights that are binding and enforceable as such in Malta.

2. No authority except Parliament can amend or repeal the provisions regulating fundamental rights and freedoms and this can only be done on a motion enjoying the approval of a two-thirds majority of all its members.

3. The Constitution provides for the judicial enforcement of these rights. The Courts are vested with the power to take cognisance of human rights cases and to grant the individual concerned an effective remedy when it is found that his/her rights have been violated or are being threatened and this after he/she had exhausted all other ordinary means of redress.

This means that the ultimate, binding interpretation of the Statutes recognising these fundamental rights, which determines the extent, applicability and limitations of these rights, is by the Constitution left exclusively in the hands of the judicial organs set up by the same Constitution specifically for this purpose.

4. In this respect, the jurisprudence of the Constitutional Court, of the European Court of Human Rights and of the European Court of Justice, have a direct bearing on how provisions regulating fundamental rights in Malta are to be interpreted and applied. This jurisprudence needs to be taken into account because it defines the parameters within which a given fundamental right has to be enforced, as well as the extent and modalities of its application.

5. The distinction between fundamental human rights and other human rights must be emphasised. While the former, because of their universal nature,
are recognised and protected by the Constitution through entrenchment and ad hoc judicial organs, the latter are not and are created and regulated through ordinary legislation enforced by ordinary judicial organs.

This means that one has to be extremely careful to take into account the Constitutional provisions regulating fundamental rights and their judicial protection and enforcement, when considering the setting up of the structures of an institution that could have a quasi-judicial function and that would have within its jurisdiction the consideration of issues concerning fundamental human rights in general or in particular.
Existing judicial structures for the protection and enforcement of fundamental rights in Malta
Existing judicial structures for the protection and enforcement of fundamental rights in Malta

Before embarking on an analysis of what should be the nature and functions of yet another institution to promote and protect fundamental rights, it is advisable to refer briefly to the existing structures that individuals have at their disposal to safeguard these rights and how they developed.

It is the opinion of the Ombudsman that any new mechanism needs to take into account the existing legal order. If it is to be effective it has to integrate with and complement existing institutions. In some cases it has to recognise the authority of these institutions, established by the Constitution or by law, when they exercise their functions within a specific human rights context.

Constitutional protection

Taking the 1964 Constitution as a starting point, one needs to comment briefly on the level of recognition and protection given by the obtaining legal order to those rights and freedoms of the individual eventually declared to be fundamental in the Constitution and therefore meriting to be guaranteed to every individual “whatever his race, place of origin, political opinion, colour, creed or sex, sexual orientation or gender identity”. There can be no doubt that the rights and freedoms declared to be fundamental in Chapter 4 of the Constitution are, in principle and in their totality, recognised as rights in one way or another in the country’s ordinary laws. Malta had at that time already reached a level of democratic development that ensured not only that its ordinary legislation adequately recognised and protected these rights but also provided for their enforcement by independent, judicial authorities ensuring that they are applied equally to all without improper discrimination.

Moreover, the courts had become conscious of the universality of these rights. The country’s legal tradition and consistent jurisprudence traced the origins of these rights to natural law. The concept of their universality was by no means alien to Maltese legal thinking. This element was therefore easily factored in when interpreting ordinary legislation that regulated these rights both as regards their merits as well as the procedures provided by the legislator to enforce them.

Article 32 of the 1964 Constitution, lists the following fundamental rights and freedoms as those that every person in Malta is entitled to:

- “life, liberty, security of the person, the enjoyment of property and the protection of the law;
b. freedom of conscience, of expression and of peaceful assembly and association; and
c. respect for his private and family life.”

Every individual has the right to enjoy these rights “subject to respect for the rights and freedoms of others and for the public interest”. The following articles in Chapter 4 elaborate on the nature and extent of these rights and freedoms and on the limitations designed to ensure that their enjoyment by any individual does not prejudice the rights and freedoms of others or the public interest.

Even from a cursory reading of this Chapter, it is immediately obvious that the rights and freedoms recognised as fundamental as well as their limitations are, with some notable exceptions, recognised and regulated by ordinary statute. Thus for example, the four main codes of the country’s juridical structure, that is the Criminal Code, the Code of Organisation and Civil Procedure, the Commercial Code and the Civil Code, together with the Code of Police Laws recognise rights that the Constitution proclaims to be fundamental and provides for their enforcement.

Every validly enacted law and any subsidiary legislation, rule or regulation made by the Executive on the strength of that law, regulates human activity and therefore creates rights and obligations. Before independence, the country’s legal and judicial structures and legislation that guaranteed the rule of law were already sound and healthy. Unlike what happened in other countries emerging from communism or dictatorship, even in relatively recent times, the Charter of Fundamental Rights and Freedoms in the 1964 Constitution was therefore not drafted in a political or legal vacuum. Malta enjoyed strong democratic credentials and a judiciary that adequately guaranteed the rule of law and the individual’s rights and duties.

It is historically incorrect therefore to state that before 1964 the country was suffering from a serious deficit in the protection of the basic rights that the Constitution eventually defined as fundamental. Indeed the Constitution itself presupposes that these rights were and would continue to be governed by the country’s corpus of ordinary legislation, administered by independent, ordinary courts and tribunals as well as authorities set up by law.

The drafters of the Constitution were not therefore mainly concerned with the creation of new rights and freedoms since these were already recognised by the country’s laws and would continue to be protected by them. They effectively identified which of these rights and freedoms were considered to be basic, meriting special protection, and should therefore be considered as
fundamental and applicable to all individuals. The Charter proclaims that every person in Malta is entitled to these rights and freedoms. Though it is clear that the Constitution recognises these rights and freedoms as fundamental because of their universality, the identification and the definition of these rights and freedoms, as well as the extent of their limitations, remain particular to Malta and are with some exceptions applicable to all persons within the national territory. This principle leads to the important corollary that though these rights and freedoms are fundamental, they might not be of universal application. It is recognised that there could be instances where a right or freedom is declared by the Malta Constitution to be fundamental, when it would not so be considered in the basic law instruments of other countries and vice versa.

The principle of the rule of law requires that a country is governed by its written or unwritten Constitution and all valid laws enacted under it. Every person is bound to observe that legal order. It is therefore not legitimate to consider a right or freedom as fundamental unless it is recognised so to be by the Constitution or any other valid legal instrument applicable in Malta. These rights are accorded special protection in the Constitution. They cannot be amended or repealed by ordinary legislation. Even less can any court or for that matter any other authority, declare that a right is or is not a fundamental right if it is not so qualified in the Constitution.

Moreover, it is only the Courts that have the right to finally interpret and sanction the observance of the fundamental rights and freedoms set out in the Constitution. In fact the First Hall of the Civil Court has an original jurisdiction to hear and determine any application made by any person alleging a breach of his/her fundamental rights or threat to them. From that decision there is an appeal to the Constitutional Court, that is the highest court in the hierarchical system. That Court could be described as the guardian of the Constitution and the guarantor of the fundamental rights in the country. It is the highest judicial organ entrusted with the duty of ensuring the safeguarding and enforcement of the people’s constitutionally protected rights.

These considerations are of the utmost importance when examining some of the functions that the proposed legislative framework for the Human Rights and Equality Commission is meant to have.

Moreover, in the context of these observations there are a number of points that should be clarified.

1. One has to be constantly conscious of the basic distinction between the fundamental rights and freedoms protected by the Constitution and other
Conventions and rights and obligations created by ordinary legislation that are a manifestation of these fundamental rights.

2. The latter are interpreted and applied by the competent legal organs and emanate from ordinary legislation that can be repealed or amended at will by the legislator so long as they are not in conflict with the principles enunciated in the Constitution.

3. It is clear that the drafters of the Constitution opted for a thoroughly tightly controlled, single track judicial remedy when providing for redress against alleged breaches of fundamental rights and freedoms.

They wished to ensure uniformity in the interpretation of the Charter of fundamental rights limiting its final, binding interpretation to a specialised court. This not only to ensure legal certainty but also to avoid the risk that different courts or indeed authorities would identify and qualify as fundamental rights and freedoms that the Constitution does not so recognise.
Conventional Protection
Conventional Protection

Another important and vital development in the judicial protection and enforcement of fundamental human rights in Malta, was the incorporation of the European Convention of Human Rights into the domestic law on the 19th August 1987 when the European Convention Act came into force. That Act makes provision for the substantive articles of the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms to become and be enforceable as part of the domestic law in Malta.

It was deemed necessary to incorporate the Convention in the domestic law since it provided for broader rights to the individuals. It gave all persons within the Maltese jurisdictional boundaries the right to petition the European Court of Human Rights. The incorporation of the Convention was made through ordinary legislation by Act XIV of 1987, which stipulates *interalia*, that when an ordinary law is inconsistent with the Convention’s protective provisions, the Convention shall prevail and such law shall, to the extent of the inconsistency, be void.

It is true that under domestic law the Constitution remains supreme in the sense that in case of an inconsistency with the provisions of the Convention, it is the Constitution that prevails. However, whenever after the exhaustion of domestic remedies, a case is taken to Strasbourg, the European Court of Human Rights applies the provisions of the Convention and that decision is enforceable in Malta. Essentially the argument is that if a human right as expressed in the Constitution, has a more limited extension than that expressed in the Convention, the latter will prevail once it has become part of Maltese law. The principle will always be that when interpreting human rights provisions, the more extensive definition should prevail.

There is no need at this juncture to delve deeper to interpret legal questions that these issues suggest. Enough has been said to underscore the principle that the ultimate remedy for the definition and enforcement of fundamental rights and freedoms rests with the appropriate judicial organs. Moreover, one can only have recourse to these courts, as a last resort, after having exhausted any other adequate means of redress for the alleged contravention that are available under any other law. Adequate means of redress includes recourse to the ordinary Courts, quasi-judicial authorities and other bodies that have the duty to interpret and apply laws, rules and regulations in line with the constitutional and conventional protective provisions of fundamental rights.

Moreover, undoubtedly the promotion, protection and enforcement of fundamental rights are not and cannot become the prerogative or privileged
reserve of any particular authority or body vested with such a specific function. The principles underlying fundamental human rights permeate all aspects of human activity. It is therefore the duty not only of judicial and quasi-judicial authorities to ensure observance of these rights, but also of every other public entity or authority having an executive function which must ensure that all its actions respect fully and conform with recognised fundamental rights. The legislator has been fully aware of this principle and has consistently legislated to create as wide a safety net as possible to ensure maximum possible protection of fundamental human rights and freedoms.
Non-judicial, constitutional protection
Non-judicial, constitutional protection

The Constitution itself recognises that judicial remedies alone do not provide an adequate and comprehensive defence against violations of these rights. Having established that the Constitutional judicial organs are the final arbiter of what is or is not a fundamental right and how it should be interpreted, the Constitution seeks to provide additional guarantees through the setting up of a number of authorities intended to ensure an open, just and transparent public administration. These authorities have the duty when exercising their functions, to ensure the observance of recognised fundamental rights and freedoms and, in particular, the provisions guaranteeing equality and non-discrimination. A few examples will illustrate this point.

1. Power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices is, by the Constitution, vested in the Public Service Commission. Among its functions, this Commission has to ensure that, recruitment of public officers from outside the public service be exercised only “through an employment service provided out of public funds which ensures that no distinction, exclusion or preference is made or given, in favour or against any person by reason of his political opinion ....”.

2. Similarly the Constitution provides that “It shall be the function of the Employment Commission to ensure that, in respect of employment, no distinction, exclusion or preference that is not justifiable in a democratic society is made or given in favour or against any person by reason of his political opinions”.

These constitutional authorities were set up with the specific function inter alia to guarantee to individuals certain aspects of the fundamental right of protection from improper discrimination.

3. The Constitution also sets up the Broadcasting Authority with the function to ensure that as far as possible, in sound and television broadcasting services provided in Malta, due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy, and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties

This Authority is set up to regulate wireless broadcasting and television, and to ensure that their use is in conformity with the fundamental right of the individual for the protection of freedom of expression and to impart and receive information and its limitations.

1 Article 110 (2)(c)
4. The Constitution sets up a Commission for the Administration of Justice “to supervise the workings of all the superior and inferior courts and to make such recommendations to the Minister responsible for justice as to the remedies, which appear to it, conducive to a more efficient functioning of such courts”.

The Commission’s functions are directly concerned with the individual’s fundamental right to secure equal protection of the law and to ensure that the principles of due process that guarantee a just and fair trial by impartial and independent courts and tribunals are strictly observed.

The Constitution has inbuilt clauses that guarantee that, in the exercise of their functions these authorities and others would not be subject to direction or control of any other person or authority. The actions of these authorities are only subject to limited scrutiny by judicial organs. The Courts are not precluded from exercising jurisdiction in relation to any question whether these authorities, had performed their functions in accordance with the Constitution or any other law. That means that when these authorities, in the exercise of their functions, address issues concerning human rights, whether fundamental or not, as they necessarily have to do, they cannot be subjected to the authority of any other person or body. Subject to the Courts limited overall judicial review to ensure the correct interpretation of the constitution and the country’s laws, these authorities remain the final arbiters as to the nature, extent and applicability of the rights and duties they are empowered to administer and that fall within their remit.

In order to ensure an open, transparent and accountable public administration, the Constitution has, within its system of checks and balances, provided that the actions of the Executive should be subjected to the verification, audit and control of Holders of Public Office who are designated as Officers of Parliament. These include the Auditor General and the Parliamentary Ombudsman.

In the exercise of their functions, these are completely autonomous and independent, and their offices fully conform to the Paris and Belgrade Principles. Their founding statutes declare explicitly that, in the exercise of their functions, these officers shall not be subject to the authority or control of any person. They do not have a specific human rights mandate, but in the exercise of their functions, they are required to address and decide human rights issues. In particular, the Ombudsman enjoys a wide jurisdiction on all aspects of human rights violations. He has regularly investigated complaints against the public administration with a strong human rights content, identifying violations and recommending appropriate redress. Though his opinions are not binding, they are in these cases based on his assessment of whether the facts that result
from his investigation constitute a violation of fundamental human rights, as defined by the Constitution and Conventions and interpreted by the competent Courts. It goes without saying that, though his final opinions cannot be subjected to that of any other authority they must conform to binding statutes and established jurisprudence.
Protection by Authorities set up by law
Protection by Authorities set up by law

As a result of the strengthening of democratic institutions following Independence and a growing awareness by the people’s representatives to provide for the country’s social and economic needs, there was an increased cross-party realisation that vulnerable sectors of the population needed to be further protected against the violation of their basic rights. The need was felt from time to time to have specialized authorities that would focus on the particular needs of these vulnerable groups, that would possess the necessary expertise to fully appreciate their requirements, address these issues and recommend and provide adequate remedies when their rights are violated or threatened.

This awareness led to the setting up by law of a number of authorities that enjoy varying degrees of independence and autonomy. Their powers range from education and research, to advising the Executive on legislation that should be enacted to provide further protection. In some cases they are empowered to investigate complaints - a quasi-judicial function to enforce rights and provide remedies.

The jurisdiction of these authorities is generally limited to the rights, whether fundamental or not, that the individuals falling under their remit are entitled to, and that their founding legislation has identified as being in need of specific protection. Even though they are not set up or regulated by the Constitution, the level of independence and autonomy that most of these authorities enjoy extends to the legislative safeguard that in the exercise of their functions they are not to be subject to the control or direction of any other authority or body. That means that, unless and until their founding legislation is amended, these authorities are within the limited parameters of their remit, free to interpret and apply the legislation that they are called upon to administer, subject only to the overall judicial review of the Courts.

Moreover, in an effort to strengthen the country’s democratic credentials by ensuring a clean, open, transparent and accountable public administration, new institutions were set up empowering individuals to enforce the protection of their rights and to seek redress when they are violated. A law setting up an authority, like for example the Ombudsman Act, may confer a general mandate with some exceptions, covering all acts of maladministration and could entitle an individual to seek redress for all complaints falling within its jurisdiction. Alternatively, an authority like the Data Protection Commissioner may be given a limited mandate specifically to oversee the observance of the provisions of a law guaranteeing and regulating the exercise of specific rights to which an individual is entitled on the strength of that statute. These authorities...
are bound to ensure that, in the exercise of their functions, the freedoms of equality, and non-discrimination are fully guaranteed.

Though some of these authorities might not fully conform to the Paris and Belgrade Principles, they still enjoy a marked level of autonomy and independence in the exercise of their functions. Significantly when doing so they cannot be subjected to the control or direction of any other body or person.

These considerations apply, among others, to the following authorities listed by way of example:

1. **The Parliamentary Ombudsman**

The Office of the Parliamentary Ombudsman is set up and entrenched in the Constitution. The Ombudsman and his Commissioners appointed to investigate designated areas of the public administration are Officers of Parliament. Their functions and the way they operate are regulated by law. The matters that are excluded from their investigation are listed in the law. Otherwise there are no limits to their powers to investigate acts of alleged maladministration by the public sector, and these include also allegations of violations of fundamental rights. In the exercise of their functions they need to consider whether the actions or inactions of the public administration in a wide sense, not only conform to the rules established to ensure good governance, but that they also are in accordance with obtaining ordinary laws and regulations and with constitutional and conventional provisions applicable to the merits being investigated.

2. **The Commissioner for Children**

This Commissioner has an office that has the specific remit to promote, safeguard and protect the interests of children within the national territory. Though the office does not enjoy full autonomy and is not fully in conformity with the Paris Principles, the Commissioner enjoys wide functions to act in the defence of children. In some respects, the Commissioner is also given a measure of executive power to ensure effective tutelage of their rights. The Commissioner is the authority set up by law to pronounce itself on legislation that directly affects children. This includes among others the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.
3. The Information and Data Protection Commissioner

The office of this Commissioner is the authority set up by law to administer the Data Protection and Freedom of Information legislation obtaining in Malta. This includes the constitutional and conventional instruments protecting the rights to freedom of information, data protection and the fundamental right to privacy. In some respects it has a quasi-judicial function. It investigates complaints in these areas of law, interprets the applicable provisions and provides for their enforcement.

4. The National Commission for Persons with Disability (KNPD)

The National Commission has been set up specifically to focus on the rights of persons suffering from a disability and to administer the laws which protect their interests and aims to ensure their integration in society. Though the Commission does not enjoy full autonomy and independence and its structures are not fully in conformity with the Paris Principles, it does have wide powers in the exercise of its specialised functions. It is empowered to interpret laws and regulations that are meant to promote equality and to avoid all forms of discrimination against these vulnerable persons. When so doing, the Commission exercises a quasi-judicial function and its decision is not subject to the direction of any other authority, except the scrutiny of the competent judicial organs when this is prescribed by law.

5. The National Commission for the Promotion of Equality (NCPE)

This is a Commission set up ten years ago to oversee the implementation of the Equality for Men and Women Act which effectively transposed the European Union Gender Equality legislation into the domestic legal framework. The setting up of this Commission follows the pattern already adopted for other specialised commissions intended to provide a structure for the implementation of legal instruments including EU Directives, aimed at providing for the protection of vulnerable groups and guaranteeing specific rights, in this case the right to equality and non-discrimination. It is proposed in the White Paper that the functions of this Commission will be taken over by the Human Rights and Equality Commission.

As is the case with other commissions, the legislator did not feel that it had to guarantee to the NCPE full independence and autonomy from the Executive. It does not therefore fully conform to the Paris and Belgrade Principles. The Commission itself recognises that its powers, financial and human resources remain limited and this impacts on its effectiveness. However, it has the right to investigate complaints and to recommend appropriate remedies when it concludes that the complaint is justified.
The Commission interprets the legislation applicable to the facts of the case, and this includes not only constitutional provisions relating to the fundamental right to non-discrimination, but also international statutes like the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Optional Protocol to the Convention of all forms of Discrimination against Women and others. In the interpretation and application of these statutes the Commission is only subject to the overall supervision of the appropriate judicial organs.
The Commission interprets the legislation applicable to the facts of the case, and this includes not only constitutional provisions relating to the fundamental right to non-discrimination, but also international statutes like the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Optional Protocol to the Convention of all forms of Discrimination against Women and others. In the interpretation and application of these statutes the Commission is only subject to the overall supervision of the appropriate judicial organs.

The way forward
The way forward

Enough has been said in the foregoing chapters to establish the undisputed fact that the existing judicial and institutional structures, that have been developed to promote, protect and enforce human rights in the country, whether fundamental or not, are complex, comprehensive and reasonably effective. Of course there is much room for improvement. There are still areas of inequality and discrimination that need to be addressed. Society is constantly changing sometimes radically, and the legislator is required to provide protection to newly identified or recognised minorities or to secure the rights of equality and non-discrimination where they are found to be lacking.

The significant legislative measures taken during the last few years in this respect are proof that the country is becoming increasingly aware of this reality. This is essentially positive. It also shows that progress in this field can be achieved even through existing structures when there is the political will to introduce reform. This however does not mean that there is no need to improve upon and consolidate what has been achieved to date.

The proposals made in the White Paper for the setting up of a national Human Rights and Equality Commission is a step in the right direction. However, the proposals made must be seen against the backdrop of the existing legal order that has been outlined. They should be seen as a process of evolution from what has been achieved so far. They must therefore be made primarily to complement and indeed support and fortify existing legislative, judicial and administrative bodies to better perform their functions in full respect and observance of the freedoms of equality and non-discrimination which all persons are entitled to enjoy.

The setting up of a new national institution will undoubtedly have far reaching consequences. It is therefore imperative that the drafters of the proposed legislation remain fully aware not only of the constitutional and legal constraints that could influence the model chosen, but also on the need not to unduly weaken authorities set up by law to protect and promote human rights that have been functioning well in the exercise of their specialised functions.
Notes on the proposed Equality Act
Notes on the proposed Equality Act

General comments

The Ombudsman cannot but be in favour of the proposal to recast the Equality Act to meet the highest anti-discrimination and equality standards. Indeed, during the last twenty years his Office has been monitoring the actions of the public administration to ensure that the right of the individual to be treated equally and without improper discrimination is rigorously observed.

Undoubtedly and inevitably these are essential, determining elements in every investigation conducted into complaints made with the Ombudsman. These are fundamental concerns that the Ombudsman requires to take into account even when the complaint is not exclusively motivated by allegations of inequality or discrimination. Similarly other national authorities and institutions set up by law to monitor and oversee the implementation of specific rights, or to promote and protect the interests of vulnerable sections of society need to constantly consider these crucial elements in the exercise of their functions.

The Ombudsman and all these authorities and institutions, not to mention the judicial and quasi-judicial authorities, have a crucial role to play to ensure that the provisions of an Equality Act are strictly observed. When doing so they are also required to interpret and apply existing provisions in laws and regulations as well as the general principles of law meant to ensure equality and non-discrimination.

It is difficult to consider the current set up as fragmentation of the existing equality legal framework, as the White Paper seems to suggest. On the contrary, in some instances it could be seen to be an enrichment of the framework in so far as it provides a valuable insight into the interpretation and application of equality and non-discrimination provisions administered by specialised authorities and institutions like the KNPD, the Commissioner for Children, the Data and Freedom of Information Protection Commissioner and many others having the function to protect vulnerable sectors of society, or to promote and enforce specific rights.

This statement of course does not mean that there is no need for active coordination between the various authorities to achieve a degree of uniformity in the interpretation and application of complimentary provisions regulating equality. It is especially in this context that there is need for a redrafting of the Equality for Men and Women Act. This must have as its main object the laying down of binding principles that should govern the application by all across the board of the right of every individual to be treated equally and without
improper discrimination. The Act should provide not only for the definition and promotion of these principles but also for guaranteeing their enforcement.

**Specific considerations**

These general comments lead to a number of specific considerations that need to be taken into account when drafting a new Equality Bill:

1. **Need for correct legislative definition**

   i. It is widely recognised that the State is in duty bound to ensure that rights and freedoms are enjoyed by all, equally and without discrimination. Equality and non-discrimination are often not perceived as stand-alone substantive rights. They are rather essential qualities inherent in the enjoyment of all rights and freedoms. They are legal norms that require to be codified and that can as a rule only exist in relation to other rights and freedoms, whether fundamental or not, determining how they are to be exercised and enjoyed.

   ii. While it is correct to say that the right to equality and non-discrimination cannot be considered in isolation and can usually only be considered in relation to the exercise of another right or freedom, it is the duty of the State to guarantee that all legislation, whether primary or subsidiary, that regulates the activities of all the organs and individuals within its jurisdiction, are exercised according to codified standards of equality and non-discrimination. It is within this context that there is a need to have a comprehensive and effective Equality Act. An act that ensures that these freedoms are correctly reflected in all statutes that create rights and obligations, that they are uniformly interpreted according to accepted standards in a democratic society and that their enforcement is effectively monitored at all levels.

The object and aim of the Equality Act should therefore be to ensure that all rights are conferred and exercised, and all obligations are imposed and executed equally and without improper discrimination. The Act needs to provide that this is done through the correct legislative definition of what constitutes equality and what actions or inactions are considered by law to be improperly discriminatory.

2. **Review of existing legislation**

   iii. Having established the standards of equality and non-discrimination that should be applicable across the whole corpus of the country’s legal framework, it is possible and indeed desirable for the Equality Act to review existing legislation to ensure that all statutory provisions fully conform to these
established standards. Beyond that however, it should not be the object of the Equality Act to allow the creation, outside the ambit of its provisions of new rights and obligations through the mechanism of delegated legislation. This should remain the province of the Legislature that has the duty to ensure that any new law fully conforms to the provisions of the Equality Act it promulgated.

iv. This is the most sensitive aspect in the drafting of the Equality Bill. Oversimplification should be avoided at all costs. While one cannot but agree that every effort should be made to ensure that the text of the law itself is clear and simple to understand, it must be pointed out that legal certainty is often not achieved just by enunciating general principles, leaving much room for interpretation in the law’s application. Allowing for wide areas of interpretation in the hands of judicial or quasi-judicial bodies, and even more in the hands of monitoring authorities, can often lead to conflicts of jurisdiction, counter-productive litigation and contrasting decisions.

Even worse, such a situation could lead adjudicating or monitoring authorities, through their interpretation of the Equality Act, to assume the power to identify and create new rights and impose new obligations purportedly emanating from the freedoms of equality and non-discrimination. It would be unacceptable if the proposed Equality Act allowed for such an eventuality since that would mean invading, albeit indirectly, the functions of the Legislature. It is the elected representatives of the people in Parliament that have the right to enact laws. Laws that can only be interpreted by the competent authorities, within the parameters set out by strict procedural rules.

Two hypothetical examples should help clarify this point. An Equality Act should not for example, be drafted in such a manner as to allow a competent authority to surreptitiously sanction abortion or euthanasia on the ground that this could be justified through an interpretation of the fundamental right of every individual to determine what to do with his/her person and that any limitation of that right would be improperly discriminatory. Similarly, it should not be allowed, through an extensive interpretation of applicable statutes, to decree that hunting is a manifestation of any one or other fundamental right that had to be equally enjoyed by all and that therefore, any decision restricting that sport should be judged in that light.

**Distinction between “creation” and “application of rights”**

A distinction needs to be made between the creation, through a wide interpretation of the provisions of the Equality Act, of new rights and obligations that do not hitherto exist, and the correct application of that legislation to address identified inequality or discrimination, to which disadvantaged persons
or persons having particular characteristics are being unjustly subjected to. In the first case, it is strongly recommended that the creation of new rights and obligations should be reserved to Parliament. Legislating either through the interpretation of existing laws or through the exercise of Ministerial discretion should at all costs be avoided.

The Equality Act should on the other hand allow for the implementation and enforcement of all its provisions in all legislation, when necessary through a proper and correct interpretation that would reap the utmost benefit. Such development would be perfectly legitimate.

Admittedly, to date the haphazard, even if well intentioned, legislative processes meant to address specific areas of inequality and discrimination, failed to adopt a holistic approach. Even though they have resulted in the setting up of a number of specialised authorities that are extremely valid and perform an essential service to disadvantaged minorities. On the other hand it is true that these authorities sometimes lack cohesion in their structures, in the manner they function and in the way they apply and interpret the principles of equality and non-discrimination. These authorities need to be strengthened and revitalised.

In this respect, the Equality Act can and should, where and if possible include provisions to ensure that these institutions are made to conform to the Paris and Belgrade Principles, including those that ensure their full autonomy and independence from the Executive, their transparent composition, and their financial independence. The Act should include clear, binding rules to ensure that the equality and non-discrimination provisions in the proposed Act are scrupulously observed and applied by these authorities. In this respect, the direction of the White Paper is correct and should provide a sure guide for the drafting of the relevant provisions.

Hierarchy of rights to be recognised and respected

It is not quite clear what the White Paper means when it states that the existing Equality legal framework process was further fragmented “both through the establishment of a hierarchy of grounds and unnecessary divisions between complimentary provisions”. One is treading on delicate grounds if by “hierarchy of grounds” the White Paper means “hierarchy of rights”. Essentially all rights are human. Even animal rights exist and are recognised in so far as humans are concerned about their welfare and require that they be protected. There is certainly a trait underlying the philosophy of the White Paper, to group all human rights, whether fundamental or not, together.
In an effort to extend the effectiveness of the proposed Equality Act to all aspects of human activity and to ensure the implementation of its protective provisions within the widest possible spectrum, the Draft refers generally to human rights without distinction. It appears that in the proposed framework, no need is felt to distinguish between fundamental rights and other rights. Indeed the contrary seems to be the case. It is being suggested that all rights should be put on the same level and that consequently they should all be regulated in the same way by the provisions of the Equality Act.

Such an approach could be perceived to bypass the supremacy of the Constitution and its institutional hierarchy of the legal order that require that all legislation enacted by the representatives of the people must conform to its provisions. An observation that could be extended *mutatis mutandis* to the European Union Act which incorporates into Maltese law the European Convention on Human Rights and other ratified conventions. These statutes and International/European conventions form today an integral part of domestic legislation. They however enjoy, a measure of supremacy to the extent that the legislator bound itself to abide by their substantive provisions and in the case of the EU Treaty to transpose its Directives.

**Ignoring hierarchical rights would not be constitutionally correct**

The Equality Act cannot ignore this reality. That would not be constitutionally correct. Indeed the legislator should make it a point to build the provisions of an Equality Act, starting from the very definitions of equality and discrimination, on the constitutional, and conventional provisions setting out these freedoms and how they should be protected and enforced. The Equality Act should have as its objective the creation of an effective and comprehensive legal framework to ensure the observance of these fundamental freedoms throughout the whole spectrum of ordinary domestic law. It should therefore be considered to be an extension of these declared fundamental rights that would give aggrieved individuals further protection through yet another ordinary means of redress. When doing so the legislator would not only be respecting the constitutional order and maximising the effectiveness of its provisions laying down fundamental rights and freedoms. It would also be further guaranteeing their enjoyment through an evolutionary process of ordinary legislation by enacting a law suited to the country’s needs that fits well in the obtaining legal and juridical order.

Questioning this approach of the White Paper when considering the proposed Equality Act is also relevant because it is primarily the provisions of this Act that the new Human Rights and Equality Commission is meant to implement.
Failure to distinguish between fundamental rights and other rights can lead to dangerous pitfalls, especially in those areas of the law that provide for its enforcement.

**Equality Law must be fully compliant**

This is not the place to enter into academic dissertation on the nature of rights and their origin, or whether and to what extent jurisprudence has established a hierarchy in the level of protection accorded to different rights. However, as has been noted before in this document, any proposed legislation has to be fully compliant not only with the Constitution and the European Convention but also with the European Union Act and EU Directives that provide for the definition of fundamental human rights and their protection and their enforcement through the appropriate judicial organs.

There is no doubt that rights defined by these covenants as fundamental, as well as their limitations, must be considered to be pivotal and central to the drafting of the provisions ensuring protection against discrimination and inequality. These statutes proclaim freedom from discrimination and inequality among the list of protected fundamental rights. In this sense therefore both the Equality Act and the setting up of a legal framework to implement it are means towards the securement of these fundamental rights to the individual.

There should therefore be no question that, when dealing with fundamental rights and obligations, the proposed legislation has to conform with the Constitution, the European Convention Act and the European Union Act. It has to abide by and follow their provisions as well as the authoritative interpretative jurisprudence of the national and supranational judicial organs entrusted with their enforcement. The proposed legislation has to be integrated within the existing constitutional and legal framework and not vice-versa. Once this caveat is accepted and implemented most of the stated objectives of the Equality Act as listed in the White Paper can stand.
Relationship between the Equality Act and the HREC
Relationship between the Equality Act and the Human Rights and Equality Commission

Other considerations

At this juncture it is useful to consider the relationship between the proposed Equality Act and the proposed legislative framework for the Human Rights and Equality Commission. Though it is not clear from the White Paper how these two Bills will be constructed to provide the widest, comprehensive, protective framework possible against inequality and discrimination, there is sufficient information about the objects and reasons of these initiatives for one to be able to understand what would be the parameters of these two Bills, how they would relate and complement each other, and what would be the essential points of contact between them.

The drafters of the White Paper indicate as models of best practice that would presumably guide them in drawing up the Equality Act, Sweden’s Discrimination Act (2008), South Africa’s Promotion of Equality and Prevention of Unfair Discrimination Act (2000) and the United Kingdom’s Equality Act (2010). Some basic information on these sources is being included in an annex to this document. (Annex VIII, IX and X)

It will be seen that all three countries chose to adopt different structures they considered most suited for their particular needs and that would integrate well with their existing legal set up. This is in line with what has been emphatically stated in this document. The drafting of the two legislative initiatives outlined in the White Paper, should not be a cut and paste exercise, piecing together in one document what one considers to be the best material from the legislation of other countries. Doing so in an effort to produce on paper, what purports to be the most progressive and modern framework, is not necessarily the best option. Laws have to be crafted and drafted according to the country’s needs to address specific situations that require regulation within the existing juridical order.

Dual pronged initiative

In this regard, it would appear that the drafters of the White Paper have correctly opted for a dual pronged legislative initiative when they suggest two separate laws: the Equality Act providing for the enforcement of the general principles of anti-discrimination in all spheres of life, and the Human Rights and Equality Commission Act that establishes the Human Rights and Equality Commission. This appears to be a different approach from that taken by Sweden in its Discrimination Act. The latter Act not only defines discrimination in detail
under the general headings of direct and indirect discrimination, harassment and sexual harassment and instructions to discriminate, but also identifies how those definitions have to be applied by competent authorities in various areas of social activity including employment, education, labour market policy and business, health and medical care and social services, military service and others.

The same Act provides for the setting up of an Equality Ombudsman who is to supervise compliance of the provisions of the Discrimination Act. The Equality Ombudsman has the function to try, in the first instance, to induce those to whom the Act applies to comply with it voluntarily. If that fails, the Act provides for the imposition of financial penalties, with the defaulter having a right of appeal to a Board of Appeal. The Equality Ombudsman also has the right to bring a court action on behalf of an individual who consents to this. The Swedish model therefore integrates all existing legislation in Sweden governing discrimination into one statute that includes definitions of general application as well as the structures to ensure compliance of protective measures.

**Enforcement by existing competent authorities**

Interestingly however, and this is relevant in the Maltese context, the Swedish Equality Act allows for the enforcement of inequality and improper discrimination legislation by existing competent authorities, regulating specific areas of human activity within parameters determined by the same Act. This part of that Act could serve as a model for the drafting of analogous provisions in the proposed Equality Act that would bind these specialised authorities on how they have to apply the protective provisions against discrimination and inequality as defined in the Act. Such a solution is favoured also because it would respect the independence and autonomy of these authorities and institutions that would be allowed to function freely within the provisions of their founding legislation while taking into account the protective provisions of the proposed Equality Act. It would also mean that any fine tuning of their functions through the proposed Equality Act would be made by Statute and not through imposition by interpretation through a different authority. Consequently, these limitations set out by a law would enjoy the hallmark of legal certainty.

**Need for full consultation**

It is highly recommended that national authorities entrusted with the protection of vulnerable persons or specific human rights are fully consulted when drafting provisions that could affect their functions. Such consultation is especially crucial when drafting the definitions of equality and discrimination in
its various forms and more importantly when the Bill applies those definitions to the areas that fall within the competence of these specialised authorities and institutions.

In this respect it is pertinent to make the following observations, among others-

1. It is essential that the proposed Equality Act states with precision what its objectives are and what areas of human activity it intends to regulate. Clarity, precision of terms and defining parameters of applicability are of the essence of law drafting. The Bill has to state clearly whether it intends to apply the principle of equality and non-discrimination not only to the recognised fundamental rights but also to all other rights created by ordinary legislation. Vague terms in the White Paper like “provisions covering all spheres of life” seem to suggest that it is being proposed to the legislator that the principles of equality and non-discrimination should be made generally applicable to all legislation regulating human activity.

2. It should be noted that generally the term “human rights” in law and specifically in the context of NHRIs refers to those rights that are considered universal to humanity, status, ethnicity, gender or other considerations. As stated, constitutions and all international human rights instruments establish that the fundamental rights they recognise, to which they allow specific limitations or derogations, are to be enjoyed equally and without discrimination.

3. The legislator cannot widen or restrict the parameters of these recognised fundamental rights, as laid down in the Constitution and other statutes applicable to Malta unless through established procedures. It has to be recognised that, unlike other countries like the United Kingdom, Malta has a written constitution and has ratified international instruments that effectively codify its fundamental rights provisions. The Equality Act should base its definitions on these provisions and the authoritative jurisprudence of the competent judicial organs that, through interpretation, extended and sanctioned their application to new and evolving situations.

4. This distinction is being emphasised because one has to keep in mind that, while the principle of equality and non-discrimination has to be rigorously applied in respect of all recognised fundamental rights subject to their accepted statutory limitations, this need not be so in the case of other rights. While the legislator has to ensure that all laws and regulations conform to the constitutional and conventional provisions protecting fundamental human rights, including equality and non-discrimination, it could opt to legislate or otherwise when enacting ordinary legislation.
Indeed it is often the case that the legislator, when creating rights and obligations to address a particular situation, requires, for a justifiable reason, not to treat individuals equally and to properly discriminate.

However, when doing so the legislator has to adopt an equality based approach to human rights that ensures that rights are enjoyed by all, no matter what group they form part of, while respecting the diversity of their characteristics. The right to be treated equally does not equate to a right to be treated identically. The freedom from discrimination does not preclude the legislator from distinguishing between one person or situation and another, and properly discriminating to ensure the observance of rights. Constitutional and Conventional provisions provide for such eventualities where necessary. The legislator can freely do likewise when enacting ordinary legislation.

Indeed positive discrimination is often required to achieve equality. What is essential in such circumstances is that, whether the discrimination arises by positive action or by a failure to ensure non-discrimination, the justification for the differential treatment must meet a legitimate aim and there must be a reasonable relationship of proportionality between that aim and its realisation. In this respect the legislator enjoys a considerable margin of appreciation in assessing whether and to what extent differences in other similar situations justify a difference in treatment.

**Primary Objective of the proposed Equality Act**

5. The primary objective of the proposed Equality Act should be to determine in some detail how the principles of equality and non-discrimination should be translated and applied in ordinary legislation meant to guarantee the exercise of these rights in the different spheres of social and human activity. It is in this delicate area that great care should be taken, especially when drafting all-embracing anti-discrimination clauses and provisions enforcing positive duties and obligations, to ensure that:

a) they correctly reflect the legislative will to provide for the country’s requirements in the sphere of human activity they are intended to cater for;

b) that the rights and obligations that the Act creates and which one augurs would ensure as wide an equality and anti-discrimination safety net as possible, can be harmonised and sometimes reconciled with existing legislation; and
c) that the new rights and obligations created by the Act, that go beyond what is absolutely required as a minimum for the enforcement of fundamental rights and freedoms, are financially and economically sustainable. It is to be stressed that the Equality Act while binding individuals in their relations with others, is primarily aimed at binding Government to administer and act according to its provisions. All adjudicating bodies would be bound to enforce its provisions across the board. Introducing the Equality Act could in certain circumstances involve a financial burden, especially when applied to economic, social and cultural rights like healthcare, social benefits, housing, pensions and other welfare benefits.

**Ordinary Legislation must be economically sustainable**

It is expected that the Equality Act will provide for the definition of the essential terms and general principles of equality and non-discrimination that should be applicable to all laws and regulations. It would then provide provisions to apply these principles to specific areas that it considers requires *ad hoc* legislative measures to ensure that equality and the freedom from discrimination are fully guaranteed to disadvantaged and vulnerable individuals or persons having identified characteristics that need to be protected. It is when applying these provisions to enforce the general principles that the economic implications need to be factored in.

The legislator has to be satisfied that these provisions in the Act would be economically sustainable. The law cannot allow the possibility of Government exempting itself from the provisions of the Act. Nor should Government be able to divest itself from the responsibility to apply fully its provisions, by pleading that applying the principles of equality was not possible because of financial constraints. Nor is it expected that the Act itself, through a specific provision or a provision allowing ministerial discretion would exempt Government from applying provisions that would be binding on individuals.

It has been the experience of the Office of the Ombudsman that Government has been found to be reluctant to implement Final Opinions that recommended redress for identified injustice suffered as a result of improper discrimination on the grounds of age in the provision of a service. Similarly, there have been a number of cases where the Government refused to accept to implement recommendations simply because the cost to remedy the inequality, when extended to all persons suffering from the same disadvantage, was prohibitive and beyond the country’s financial possibilities.

These and other similar situations need to be addressed, clarified and defined in the Act by precise provisions that would allow little room for
interpretation or Ministerial discretion. The Equality Act must be seen as a recognition by the legislator that equality and non-discrimination are fundamental principles that underpin the enjoyment of all human rights. These principles should be as binding on the Executive as they would be upon private individuals if not more because, if anything, Government should lead by example. Exemptions to these principles should therefore be kept to an absolute minimum and applicable to Government and individuals alike. More importantly, they should be expressly provided for in the Act.
Enforcement provisions
Enforcement provisions

The White Paper refers to enforcement provisions that would be included in the Equality Act. It goes without saying that an Act aiming at ensuring equality and non-discrimination can only be effective if it provides for adequate sanctions for breaches of its binding provisions, and for judicial and quasi-judicial structures to impose deterrent penalties on transgressors. The White Paper affirms this principle but gives no indication on how it is proposed to implement it.

Issues requiring mature consideration

In this respect a number of issues can be identified for mature consideration:

1. Rights and obligations created by the Act have to be clearly and unequivocally defined. The range of penalties for infringements and when they could be incurred must be precisely laid down. They must be proportionate to the offence and sufficiently severe to act as a deterrent.

2. The Act must determine whether transgressors would be deemed to have committed a criminal offence punishable as such, or whether their failure to abide by the provisions of the Act would be considered to be an administrative breach and sanctioned as such.

3. This decision is important because on it depends the method of investigation of complaints, how offenders are charged, the procedures to determine guilt, and more importantly, the forum in which such proceedings are to be carried out. Also in this regard, countries have adopted different approaches to suit their requirements to secure enforcement of their Equality Act. They have generally opted to consider violations as administrative offences punishable as such, except for cases of severe or repeated offences that could become liable to criminal charges. The method of enforcement depends on the socio-juridical development of countries but they all attempt to integrate the chosen forum in existing judicial and/or administrative set ups.

Enforcement in other jurisdictions

Reverting to the three main sources quoted by the White Paper, it is noted that:

South Africa

a) Post-apartheid South Africa notoriously faced grave discrimination and inequality issues that required to be strongly addressed. It therefore opted
for a fully-fledged independent Equality Court to enforce its provisions of the Equality and Prevention of Unfair Discrimination Act. That Court is empowered to enquire and determine whether unfair discrimination, hate speech or harassment has taken place and to provide appropriate remedies.

The Court is essentially an administrative one and redress, where appropriate, can take the form of an order made in a civil action. It has wide powers of investigation and enforcement, but is required to fully observe the procedural principles of due process to ensure a fair hearing. The Court has the right to submit a matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the Common Law or relevant legislation.

A strong judicial structure to ensure observance of the law reflects the need of an emerging democracy in which there is not enough awareness of the rights of vulnerable and disadvantaged persons and where ancillary structures to promote and protect their interests were either inexistent or inadequate.

**Sweden**

b) On the other hand, Sweden is by contrast, one of the most progressive, democratic European States, with a well organised society that enjoys established institutions to regulate various spheres of human activity in full respect of fundamental rights. Even so, Sweden felt the need to legislate to combat discrimination and to promote equal rights and opportunities regardless of sex, transgender, identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.

It does this by an Act intended to harmonise legislation in the different areas to ensure increasing awareness of the rights to equality and freedom from discrimination, to provide active measures for their implementation and supervision, as well as for adequate redress through appropriate legal proceedings.

The supervision of the Act is entrusted to an Equality Ombudsman who is to seek in the first instance, to induce those to whom the Act applies to comply with it voluntarily. The Ombudsman may bring a court action on behalf of an individual who consents to this. There is no appeal from the decisions of the Equality Ombudsman except when he orders financial penalties as a means of redress. In such cases, the appeal is to be heard before the Board Against Discrimination that must ensure that all cases are adequately investigated and that the rules of due process, including that of an oral hearing where necessary, are observed.
Interestingly, the Act provides for different methods of enforcement in various sectors. Thus for example, complaints about inequality and discrimination in universities or other higher education institutions, for which the State is responsible, can be appealed before a Higher Education Appeals Board, while complaints concerning employment including compensation and invalidity are to be dealt under the Labour Disputes (Judicial Procedure) Act. The Act also provides that other complaints covering important areas of human activity that it regulates, like matters relating to the supply of services, to membership of organisations, to health and medical care and social services, social insurance systems, national military service and civilian service, public employment and others, are to be examined by a General Court and dealt with in accordance with the provisions of the Swedish Code of Judicial Procedure, that regulates procedures in civil cases in which out of court settlement of the matter is permitted.

The Swedish Act envisages the Equality Ombudsman and the Board Against Discrimination as subsidiary mechanisms. They are meant to ensure enforcement and would only intervene in those cases where there are not already in place other mechanisms, specialised or otherwise, that can guarantee full protection against inequality and improper discrimination.

**United Kingdom**

c) The United Kingdom Equality Act (2010) identifies as characteristics in need of protection; age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation. It examines each characteristic in detail and attempts to identify and regulate every possible circumstance in which that characteristic needs to be protected and secured. Faithful to the British tradition of Statute drafting, the Equality Act is a complex and intricate piece of legislation, difficult to follow unless one possesses a good knowledge of the English juridical system. Certainly it is not an Act that is easy to understand nor an educational tool in itself. It is drafted in a style that is in some ways alien to our traditional law drafting and legal training.

The Act has of late been heavily criticised in the UK and there have been calls for the repeal of specific sections that are considered to be vague, unnecessary and obsolete. In this respect the Act does not appear to have achieved the desired degree of legal certainty and remains at the centre of political controversy. This is partly due to the fact that the Act was tailored as an enabling law, expressly providing that any authority, bound to abide by its provisions, had to take into account any guidance issued by a Minister of the Crown. This was clearly done in an effort to ensure that the Act would have maximum impact on all human activities in the country. There was however real risk that
ministerial intervention would undermine the autonomy and independence of authorities and institutions, emasculating them when determining complaints against Government, giving rise to political controversy. A situation that is unacceptable especially when one considers that issues of equality and non-discrimination involve fundamental human rights and their violation.

The Act attempts to balance this risk by setting up an apparently strong Equality and Human Rights Commission, a non-departmental public body with responsibility for the promotion and enforcement of equality and non-discrimination laws, including the Equality Act. Even here however, the United Kingdom Equality Act appears to have failed the test to set up an overseeing body that attains the stature of an authoritative independent body *supra-partes* that can exercise its functions without fear, favour and undue interference from government.

Indeed while the Commission has been granted much power to oversee the activities of authorities and bodies identified in the Act falling under its jurisdiction - and this again led to grave problems - it does not enjoy autonomy and independence from the Executive. It appears to be completely dependent on government for its funding and there is direct control on its administrative structures, employment of staff and budget. In fact, last year, its financing and workforce were halved, with the Commission maintaining that this was a result of its decisions, chiding Ministers for failing to consider how crucial policies will affect women, disabled people and ethnic minorities.

**Conclusion**

In this respect, Malta has nothing to gain by adopting a similar approach in the drafting of its Equality Act and the setting up of an NHRI. It is recommended that any temptation in this direction be strongly resisted. It is noted that Malta has been extremely fortunate when Parliament decided to adopt the New Zealand model in the setting up of its Ombudsman institution in 1995. A model that completely guarantees its autonomy and independence from the Executive, not only in the exercise of its functions but also in the administrative and financial management of the Office.

Through the Constitutional entrenchment of the Ombudsman in 2010, Parliament confirmed its political will to subject the actions of the Executive to the scrutiny of an independent institution accountable to it on a par with the scrutiny of the country’s financial matters by the Auditor General, also an Officer of Parliament. In this case, Malta leads with democratic credentials that are an example to others. That is the road one augurs will be followed when determining the institutional set up for the projected national human rights institution.
Notes on the proposed Human Rights and Equality Commission (HREC)
Notes on the proposed Human Rights and Equality Commission

General Comments

The White Paper outlines the proposed legislative framework for the Human Rights and Equality Commission, a major initiative that will set up another human rights institution. Its declared objectives reflect a broad, generic mandate to promote and protect human rights, to oversee the observance of these rights, to monitor and advice on potential and occurring systemic violations, and to ensure the observance and enforcement of these rights.

A laudable effort is made to follow closely the guidelines recommended in the Paris Principles that a State is required to follow when establishing such an independent national institution. These Principles outline the different aspects of such an institution under the following headings:

A. Competence and responsibilities;
B. Composition and guarantees of independence and pluralism;
C. Methods of operation; and
D. Principles concerning the status of commissions with quasi-judicial competence that are only applicable in those cases where the institution has such a function.

Guidelines A, B and C are compulsory to obtain international accreditation. Guidelines under D are optional. Such institutions are, as a rule, intended as monitoring, educational and advisory mechanisms and are only sometimes given a quasi-judicial function when they are entrusted with the enforcement of specific rights like equality and non-discrimination. A State can adopt the framework that is considered to be best suited to its particular needs considering the level of its democratic development, so long as the basic guidelines of the Paris and Belgrade Principles are observed.

The roadmap in the White Paper, even if couched in general and non-specific terms, is definitely in this direction. The issue to be debated and determined is whether the suggested model is suitable for Malta’s needs considering its level of democratic development, its observance of human rights generally and the quality and efficacy of its judicial, quasi-judicial and institutional authorities that have a specific or non-specific mandate to promote, monitor and enforce them. The issue will be briefly considered under three headings.

A. Is there a need for another NHRI in Malta?
B. Which NHRI model is best suited for Malta? and
C. Does the chosen model fully comply with the basic guidelines of the Paris Principles?
A. Is there need for another NHRI in Malta?

It is widely acknowledged that NHRI institutions can be of two types. Traditionally, the Parliamentary Ombudsman Institution, which originated from the Scandinavian States, had the function to defend citizens from maladministration by the public authority. Its role is investigative of the actions of the Executive, with the precise task to investigate complaints and to recommend redress when they are found to be justified. Ombudsmen often take a mediatory approach when defending the people’s rights against actions of government and though they often do address issues of human rights, they generally do so in the context of the investigation of a complaint, rather than from the general aspect of shaping national human rights policies.

The national Ombudsman, that satisfies the stringent criteria of the Paris Principles, is universally recognised as an NHRI and qualifies for accreditation by the International Coordinating Committee on National Institutions for the Promotion and Protection of Human Rights (ICC). In fact there is no obstacle for the Office of Malta’s Parliamentary Ombudsman to seek ICC recognition on the strength of its conformity to the Paris and indeed the Belgrade Principles as well as its positive record.

In the latter half of the last century, in the aftermath of the fall of the Berlin Wall and the creation of new democracies, new national institutions known as NHRI s were set up in various countries, especially in Europe, concerned mostly with the implementation of international human rights at national level. These institutions are not as a rule, primarily concerned with maladministration of public authorities but rather have the function to promote and implement human rights in their various manifestations. An NHRI would focus mostly on the prevention of violations of these rights and how to ensure their observance rather than on their enforcement.

In this respect an NHRI would have a wider remit on human rights than the Ombudsman. It would be entitled to address all human rights issues unless it was precluded from doing so by its founding statute. The NHRI would have a wider remit in so far as its functions are not limited to the investigation of the acts of the public administration. It could therefore examine issues from a much broader perspective, assessing all social activities in the country, to determine whether those conform to accepted human rights standards.

This is the fundamental distinction between the two institutions. As is the case with the Ombudsman Institution, there is no standard, uniform model for the setting up of an NHRI. Every country has to tailor the institution to its national requirements, so long as it recognises and implements the principles which are
today embodied in binding instruments that are recognised by international and regional human rights organisations. The two institutions can happily coexist and complement each other. In some countries, the national Ombudsman has been given the exclusive role to act as a NHRI and vice versa.

Originally, NHRIs were mostly set up in those countries that were in transition to democracy and where democratic institutions, and in particular judicial structures, were still very weak. These institutions were considered to be the most effective means to promote good governance in these countries. They were also considered to be the most effective model to promote and protect fundamental human rights in countries that were emerging from totalitarian regimes. Countries with weak judicial structures, still getting accustomed to having independent and impartial courts and tribunals, felt the need to have strong NHRIs that would have executive functions to ensure the enforcement of these fundamental rights.

There is no doubt that Malta’s democratic institutions, compared to those of developing countries, are sufficiently developed to be considered compliant with international human rights standards. Malta enjoys relatively efficient judicial structures and national institutions that give an acceptable measure of protection to human rights. There is a growing awareness of the need to be constantly vigilant on the level of observance of these rights. This is evidenced by the network of non-governmental organisations that is very active in promoting the widening of the spectrum of these rights, in line with what is considered to be acceptable and desirable in a modern, democratic society.

The level of human rights observance in Malta is such that the previous Administration had for many years argued with some justification, that there was no need to create a new NHRI since it could add little to the existing human rights protection framework and it did not seem to be so necessary or beneficial to improve compliance with human rights. Towards the end of the last legislature, the Ombudsman had succeeded in convincing the administration that there was scope for the setting up of such an institution, if it could serve as a catalyst to coordinate the work of the various national institutions, if it could serve as an active coordinator in the application of human rights policies and a promoter of research and new initiatives in the protection of these rights.

There is today consensus that the setting up of such an institution would bring added value to the country’s existing human rights framework. The events of the last years show that there is still a lot to be achieved in this field. The decision of the present Administration to set up such an institution is in itself positive. The consultation process through the White Paper is correctly aimed at identifying the model that would be most suited to Malta’s needs
to ensure that a new, national institution would integrate well with existing ones and would be given the necessary tools to function within properly defined parameters in a national institution that is fully compliant with the Paris Principles.

As stated earlier, the Government has clearly indicated in the White Paper that the proposed legislation will aim at establishing a Human Rights and Equality Commission. The White Paper sketches the outlines of the proposed legislation, without giving much detail on the substance of the proposed legislation. This document will take the relative policy decisions for granted. The Ombudsman’s participation in the process of consultation is aimed to contribute towards the definition of how these declared policies can be best implemented so that the stated aims in the White Paper are fully realised.

**B. Which NHRI model is best suited for Malta?**

**Determining the model**

These outline considerations on the level of protection of human rights in Malta must be taken into account when determining the model of NHRI that is best suited to Malta’s requirements. They suggest that:

a) the new structure should complement and not oversee or even substitute existing institutions. It should not in any way compete with them or invade their sphere of specialised jurisdiction;

b) the functions of the NHRI should therefore be designed in such a manner as to ensure that its field of activities is dovetailed with those of other existing institutions that should be allowed to function freely and without undue interference, within the parameters of their remit;

c) this means that human rights issues that are already the concern of other authorities or specialised institutions should be expressly excluded from the functions of the HREC. The institution should be given the task to address the promotion and protection of rights that do not fall under the purview of other existing national institutions;

d) this is essentially required not only to ensure the continued well-functioning of existing authorities and institutions but also to avoid duplication of activities and initiatives, wastage of human resources and qualified personnel. More importantly, the avoidance of possible contrasts and unnecessary conflict in approach on fundamental issues concerning specific human rights and their interpretation should be ensured at all costs;
e) demotivating well-functioning, established authorities or institutions set up by law is to be avoided. This apart from the fact that the founding statutes of most of these authorities and institutions adequately protect them in the exercise of their functions from the control or interference of any other body or authority. This means that giving the new HREC the function to oversee the human rights situation in Malta in a general way and without limitation, would require amendments in the founding statutes of a number of these authorities and institutions some of which, as indicated above, are constitutionally entrenched;

f) these considerations are of the utmost importance if it is intended to give the new NHRI the power generally to investigate violations of human rights and their threat, and more importantly if such investigations, whether complaint driven or on its own initiative, lead to decisions that can be directly enforced. It has already been indicated that there are some existing authorities or institutions set up by law or the Constitution that have the right to investigate human rights issues falling within their remit and, in some instances, to take material steps to enforce them. In this case it is obvious that the lack of clear definition of the functions of the new institution could lead to issues of jurisdiction and to undesirable conflicting decisions; and

g) finally, one cannot sufficiently stress the determining role that the Constitution endows on the competent judicial structures to interpret authoritatively the constitutional and conventional provisions regulating fundamental human rights. As stated earlier, in so doing, the judicial organs through their interpretation and decisions not only determine the extent and limitations of the declared fundamental rights but also provide for their enforcement. It is clear that constitutional and conventional restraints do not allow for any direct or indirect interference, and even less invasion, of the judicial processes.

Reference is made to the UN General Assembly Resolution 48/134 and the Vienna Declaration on the programme of action that encourage States to create national human rights institutions. These declarations proclaim that the State has “The right .... to choose a framework which is best suited to its particular needs at the national level”. This clearly means not only that there is no one cap fits all model for these institutions but also that, when drafting the founding statute of such an institution, the State has to take into account not only the existing legal and judicial structures that promote and protect human rights but also to carefully outline the niche within which the new institution could be of utmost benefit to the continued development of human rights protection in the country.
The Parliamentary Ombudsman was very conscious of these issues when he declared, in the tail end of his first publication, that it is the government’s prerogative to choose the model best suited to Malta’s needs and that in making its choice the Government should endeavour to provide the individual with optimum protection to the enjoyment of his rights. It is the conviction of the Ombudsman that there is space, within the parameters broadly outlined above, for the setting up of an NHRI that would make a highly positive contribution to the continued promotion and protection of human rights. These parameters indicate the limitations that need to be respected if the new institution is to be well integrated with existing structures. These limitations should not however preclude the new institution from being extremely effective and useful in the exercise of functions which, in the opinion of the Ombudsman, should be proper to it, taking into account the human rights scenario presently obtaining in the country.

Core objectives

The following are some of the core objectives that the new institution could promote:

a) to be a key player in further implementing international human rights standards at national level;

b) to act as an active coordinator between other national institutions and authorities and human rights actors like NGOs;

c) to carry out research on the level of human rights observance in the country;

d) to identify what further protection is required in respect of rights that could be qualified as fundamental and therefore meriting legislative and/or constitutional recognition as additional safeguards;

e) to prepare and propose draft legislation to government and parliament, after consultation with the major stakeholders, aimed at identifying and establishing such rights, providing for their sanctioning through effective enforcement;

f) to assist in the domestic implementation of international human rights norms and help government in complying with its international obligations;

g) to provide a platform at the highest level to discuss sensitive and controversial issues that require to be objectively and professionally analysed,
with a view to providing authoritative opinions on the interpretation of existing human rights statutes and on the need to introduce new legislation in this field that could be of assistance to the legislative and judicial organs of the State;

h) to conduct research and academic studies on all aspects of the human rights scenario in the country and to raise the public’s awareness on the need to respect all human rights through a preventive and coherent human rights policy;

i) to foster a national debate on human rights issues by channelling to the general public information relating to specific topics that need to be highlighted and addressed.

In the exercise of its functions the NHRI could have power to investigate, either on the complaint of an injured party or on its own initiative, allegations of violations of human rights or their threat and to recommend appropriate remedy where necessary. The investigation of individual complaints should be strictly limited to those cases that do not fall under the jurisdiction of judicial authorities or that of other national institutions set up by law.

Malta - a fully-fledged democratic State

Objectively Malta can be considered to be institutionally a fullyfledged democratic State. Its democratic credentials are not in doubt and fundamental rights and freedoms are generally respected. This does not mean that there is not a lot more that needs to be done. The constitutional and legislative network of checks and balances that has been created over the years aims to ensure a good, transparent and accountable public administration that fully guarantees the recognition and protection of human rights. That network needs to be under constant scrutiny, supported and where necessary, extended. Independent authorities set up by law to effectively monitor the actions of the Legislature and the Executive are recognised to be essential and pivotal to promoting the democratic process, ensuring full observance of the rule of law and assuring individuals that their rights, whether fundamental or not, are fully respected.

In this context the setting up of an NHRI to oversee the level of observance of human rights in the country would undoubtedly be a welcome, timely and useful addition to the existing network of monitoring bodies. It should, in the exercise of its functions, strengthen rather than weaken existing mechanisms. It should in fact provide added value not only to the human rights protection scenario in general, but also to specialised institutional authorities having a limited jurisdiction. This especially when, in the exercise of its functions, it acts by consensus following consultation with other key players.
It is in the light of these considerations and with these principles in mind that the Ombudsman will consider the substantive part of the White Paper and the legislative measures it proposes.

Supra-institutional Commission

In his previous publication, the Ombudsman has commented that, considering the developed network of authorities with a human rights mandate already set up, the NHRI model most suitable for Malta would be a supra-institutional commission on which major stakeholders would be invited to sit and participate. Such a commission would be able to draw on the experience and expertise of these institutions and others. It would be able to coordinate activities to promote and protect human rights generally and to devise and execute common policies and initiatives.

He had then suggested that, considering his wide, non-specific mandate on human rights and his constitutional standing, the Ombudsman could be the best person to chair such a commission. That is, however a secondary issue. There is no reason why such a commission could not be chaired by the Equality Commissioner or any other person. The Ombudsman is still of the opinion that his basic advice on how the Commission should be structured remains valid and there is nothing to suggest that it cannot be adopted and implemented within the proposals put forward in the White Paper.

Dual Mandate

The White Paper proposes that the National Commission for the Promotion of Equality (NCPE) will be transformed from an equality body with limited powers, into a fully-fledged Human Rights and Equality Commission (HREC). It appears that the new commission will have a dual mandate. A general mandate to protect and promote human rights and a specific mandate to monitor compliance with Maltese equality and equal treatment laws and, in this respect, will include a complaints handling mechanism.

It is proposed that the new commission will be the legal successor of the existing National Commission for the Promotion of Equality that would be strengthened and made fully compliant with the Paris Principles. The framework proposed in the White Paper is neither novel nor innovative. It is a model that has been adopted by many countries in various stages of democratic development and adapted to their particular needs. The Ombudsman recognises that the choice has now been made and is confident that the proposed framework, if correctly structured to respond to the country’s exigencies, could be an effective human rights instrument that is truly national, that could contribute to ensure that human rights are enjoyed equally and without discrimination.
In this context, the following reflections are submitted for the consideration of the drafters of the proposed bill within the framework set out in the White Paper. They are the Ombudsman’s contribution to the debate on what could to his mind be the best model suited for Malta’s needs. They are being made in outline form and require further in depth study. They are not in any way meant to be critical of the White Paper, which is in this section rather vague, lacking in material detail and limited to general outline principles. The Ombudsman augurs that a frank discussion is carried out during the consultation process to iron out aspects that remain unclear and to allay justified concerns of other stakeholders.

Points that deserve attention

Taking as a starting point the core objectives just outlined, that closely mirror those set out in the White Paper, and analysing them within the context of the development of human rights protection in Malta traced in this document, the Ombudsman considers that the following points amongst others, deserve attention:

1. The Act setting up the HREC must distinguish clearly between the functions of the Commission as an equality body and its functions as a national human rights institution. It appears that the White Paper does not adequately distinguish between these two functions. Indeed it seems to give the impression that these functions are to be exercised by the Commission interchangeably across the board, irrespective of whether the issue being dealt with is a matter that is essentially an equality issue or one regarding other human rights, whether fundamental or not.

2. In the Ombudsman’s opinion such an approach is mistaken and not suitable to the Maltese context. While it is acknowledged that equality and human rights are intrinsically linked, one cannot and should not reduce the functions of an NHRI to an exercise of ensuring that human rights are observed solely from an equality and non-discrimination perspective. The functions of the proposed NHRI need to be, as the White Paper itself proposes, much wider.

3. It is understood, though this again is not expressly stated in the White Paper, that the new Commission will have the primary function to oversee the implementation of the new Equality Act with powers to enforce its provisions when necessary, through appropriate mechanisms. The Ombudsman recommends that enforcement provisions, including those providing for such mechanisms, should be included in the law setting up the HREC and not in the Equality Act. The latter law should retain the nature of a general statute defining principles of equality and non-discrimination, determining how and to
what extent they should be applied and enjoyed. A law that would be binding on all, and that would be enforced like other laws by courts and tribunals set up by law and quasi judicial authorities.

Such an approach would underline the principle that equality and non-discrimination should be the concern of all, that every person is bound to observe them and every authority, whether judicial, administrative or otherwise is bound to take them into account in the exercise of its functions.

4. The proposed HREC should in the opinion of the Ombudsman, therefore have two distinct branches: an Equality Section and a National Human Rights Institution Section. The Equality Section would incorporate a revitalised and strengthened NCPE that will continue to address equality and discrimination issues. The National Human Rights Section would have the function to oversee the observance of human rights generally, to monitor their applicability and enforcement by the various authorities and institutions and to promote human rights awareness and initiatives. The two sections would function separately but in close cooperation within an integrated office, utilising the same administrative structures and investigative services.

5. This dual pronged approach being proposed for the HREC strongly suggests that the draft legislation that will set it up should follow the structure within which the Ombudsman and his Commissioners operate after the 2010 Amendments to the Ombudsman Act. Essentially the HREC would act as an umbrella organisation to monitor and promote human rights nationally, while equality and discrimination issues would be entrusted to a Commissioner who would function independently and autonomously from the HREC but in close collaboration with it.

This model has now been tried and tested for a number of years. The Office of the Ombudsman has functioned extremely well. The legislator is advised to consider its adoption *mutatis mutandis* for the setting up of the proposed HREC. One can identify a number of obvious advantages among others, that would not only greatly enhance the level of protection of human rights in the country but also ensure a degree of uniformity among the institutional authorities set up to provide such protection and in the way they function and operate.

**Homogenous Institutional Development**

This aspect of ensuring a homogeneous institutional development in a very complex situation should by no means be ignored. At this juncture of development in this area of administrative justice, it is time to take stock of
the developments that have taken place to date, and to take initiatives to streamline the different avenues of protection that different laws have made available to citizens to seek redress. Every effort should be made to avoid duplication or confusion of procedures open to aggrieved persons arising out of a multiplicity of remedies that he/she could resort to. This can only be avoided if the parameters of the jurisdiction and functions of the various institutions at different levels, as well as the manner in which they interrelate, are clearly defined. Such definition necessarily presupposes (and can only be achieved through) the setting up of appropriate structures that allow an institution not only to fully exercise its functions but also to do so naturally as an integral part of the national institutional network, devised throughout the years to afford aggrieved citizens with the maximum protection of their rights.

**Must provide Added Value**

When devising new structures such as the proposed HREC it is therefore imperative not only to confer powers that will allow it to effectively carry out its functions and to provide it with the means to do so. It must also be assured that the functions of the new institution provide added value to aggrieved citizens and that they do not unduly invade the area of operations of other institutions with whom it is bound to relate. More importantly, it needs to be ensured that the powers conferred on the institution and the manner in which they are to be exercised, fully conform to and respect the existing constitutional order that decree that rights are conferred and obligations imposed by the legislature and ultimately applied and enforced by the judicial organs of the State.

In this context Malta’s experience in setting up its Ombudsman institution is invaluable. The Ombudsman Act is widely considered to be a progressive law that put in place one of the most advanced models of Ombudsman institutions certainly in Europe and probably elsewhere. An institution that is fully compliant with the Paris and Belgrade Principles and that enjoys full autonomy and independence from the Executive. It exercises its functions within well-defined parameters and has been awarded constitutional status that designates the Ombudsman as an Officer of Parliament. It relates well and seamlessly with the other organs of the State. The system has been well tried and tested for twenty years. There is of course always room for improvement, but its relations with other authorities and institutions have been generally smooth and productive. This does not mean that there is not occasionally confrontation when exercising its functions but that is a positive sign of an effective defence of citizens’ rights.

The 2010 Amendments empowering the Ombudsman to appoint Commissioners in specialised areas of the public administration have aroused
great interest in a number of European Ombudsmen Institutions, considering them as extremely innovative since they introduced procedures that guarantee a measure of specialisation within existing Ombudsman structures, without unduly extending human resources and administrative infrastructure. Rather than trying to reinvent the wheel, it is recommended that the proposed legislative framework for the HREC should be modelled on the Ombudsman Act (Act XXI of 1995), as amended in 2010. A framework that was recently recognised as valid by the House of Representatives when it gave its first reading to the Standards in Public Life Act (Bill No 63 of 2014) that in its essential parts is modelled on the Ombudsman Act.

**Monolithic Structure to be avoided**

Irrespective of the model chosen, the legal framework must ensure that the new Commission would have a structure that will allow it to exercise its functions authoritatively, efficiently and efficaciously. It is highly recommended however that care should be taken to avoid the temptation to set up a monolithic structure with a Commission that is all embracing having wide powers to advance and impose its policies and decisions. This is especially relevant if the Commission is not to be representative of other major players in the human rights spectrum.

**Negative UK experience**

Experience has shown that in such a situation there is a grave risk that the Commission would inappropriately invade the *modus operandi* of other authorities and institutions having a role in the field of human rights. A risk that has to be avoided at all costs. Lessons should be learnt from the experience of Britain’s Equality and Human Rights Commission. Up till 1999 there were three equality commissions in the United Kingdom: the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. The remit of the Equal Opportunities Commission was very wide and included areas proper to disability and disadvantaged persons. It was a much stronger authority and eventually, there were clashes between that Commission and the Disability Rights Commission. The latter Commission felt that its area of jurisdiction was being inappropriately invaded and in a sense, taken over by the Equal Opportunities Commission.

With the passing of the Equality Act 2006, the Disability Rights Commission was suppressed and its functions taken over by the new Equality and Human Rights Commission (EHRC) that was given powers across all equality law including race, sex disability, religion and belief, sexual orientation and age. As a result disadvantaged, vulnerable persons suffering from disability lost
the valid services of a specialised authority looking after their needs. On the other hand, the Equality and Human Rights Commission became a mammoth organisation, operating within a structure that is not fully compliant with the Paris and Belgrade Principles. This in so far as it remains dependent on the Executive for its financing and subject to interference by government in important aspects of its administration.

The way in which it exercises its functions is often considered to be highly controversial because the institution never really achieved full autonomy and independence. For this reason it remains the subject of political controversy. Very recently the Commission has been stripped of its duty to promote a society with equal opportunity for all and has had its budget and workforce halved by government. The Government has also declared that it would seek to implement all substantial reform to ensure that the EHRC’s core functions are discharged effectively and efficiently in the future. The Government has declared that this could mean more fundamental, structural changes to the EHRC’s remit including some functions being carried out elsewhere or splitting its responsibilities across new or existing models.

With the return of the Conservative Party to power, these policies are bound to be implemented. That would mean that in practice, the experience of having a strong Equality and Human Rights Commission would have failed mainly because of the failure of the British Parliament to provide adequate structures to ensure the Commission’s full autonomy and independence and to design its functions and powers on the basis of cooperation and collaboration with existing institutions and authorities, having analogous objectives. Malta should not commit the same mistake.

In this respect it is comforting to note that the White Paper does not include among the models of best practice towards the setting up of the HREC, the United Kingdom experience. The models it recommends are those of the Danish Institute for Human Rights, the Netherlands Institute for Human Rights and the Scottish Human Rights Commission. A computer generated note from the official websites of each of these national institutions is being appended to this document. (Annex V, VI & VII) These notes give a snapshot, graphic idea of the objectives, functions, structures and composition of each Institution. It is obvious that while all three countries have chosen to have a strong national authority to promote and protect human rights, they have set up authorities that are tailor-made to their needs and respond to their particular exigencies, especially when relating to their constitutional and institutional set up and to other existing national authorities and institutions that operate in the field of human rights.
Comparative Exercise of Legislative frameworks

Undoubtedly the drafters of the White Paper have conducted a comparative exercise of the legislative frameworks of these three national institutions and this must have been highly rewarding, fruitful and helpful in their deliberations. This short contribution does not allow for such an exercise to be made in this document. There are a number of points that could however, be made and highlighted-

a) All three countries have achieved a high degree of democratic development but have done so through different constitutional and institutional progression. Malta too has made considerable progress in this respect by adopting a republican constitution and setting up institutions that guarantee the protection of the rights of citizens through a healthy, democratic environment. When doing so, the country wisely did not slavishly adopt the legal frameworks of other countries. It modelled frameworks that respect and reflect the democratic aspirations of its people and its legal and juridical traditions. In doing so Malta has developed and is still developing its own indigenous legal structures to further its democratic evolution and to ensure that fundamental human rights are guaranteed, and vulnerable and disadvantaged persons adequately protected. In some areas Malta has lacked behind, in others it has been in the forefront.

Thus for example the Ombudsman Act of 1995, as amended in 2010, is structurally one of the most progressive in Europe. Similarly when they were set up, authorities aimed to defend the rights of children and the rights of persons suffering from disability were considered - to be highly innovative. Their legal framework, though not perfect, allows them to perform their functions with authority and to provide excellent, specialised service to the persons under their direct care.

This is being pointed out to stress that drafting the legal framework of the HREC should also not be a cut and paste exercise. It should of course draw on the experience of the identified sources. There is much that can be considered to be useful, but essentially the drafters should aim at creating an institution that integrates well with and complements existing institutions and structures and affords more comprehensive coverage and added value in areas where it is considered that there is a deficit in the desired level of protection in specific areas of human rights.

b) All the legal frameworks of the three favoured sources identified in the White Paper attempt to ensure a degree of autonomy and independence for their Institution. This in order to ensure compliance with the Paris Principles...
and secure A1 accreditation. However, it is only the Scottish model that categorically declares its Commission to be independent of Government and of the Scottish and Westminster Parliaments. It defines its Authority as a Scottish parliamentary corporate body that is separate and independent from Government but still accountable for its public funds.

**Malta’s experience**

The Dutch and Danish models on the other hand, declare the independence and autonomy of their Institutes in the exercise of their functions and have a number of inbuilt safeguards to ensure their authority mostly through the appointment of highly qualified academics on their governing body. But both models consider that ministers should retain certain powers in order to be able to exercise ministerial responsibility for their respective Institutes as an autonomous, administrative authority. Even though ministers are not endowed with the power to adopt policy rules and, as an ultimate remedy, to reverse decisions made by the administrative authority and cannot suspend or dismiss members of the Institute by way of the disciplinary punishment, there is still, at least in theory, space for undue interference by the Executive. This especially in matters relating to the funding of the Institute that depends on budgetary decisions by government/ministries and not by parliament.

Malta’s experience has shown that unless the umbilical cord with government is completely severed, independent authorities that partake of the nature of Ombudsman, never really attain complete independence. They remain dependent on Government and answerable to the Ministries to which they are by law accountable. A dependence that ultimately inevitably and negatively affects these authorities in the exercise of their functions. A situation that has been highlighted on various occasions to the Parliamentary Ombudsman by the Commissioner for Children and the Chairman of the Commission for Persons with Disability (KNPD) among others. The law setting up the NCPE is similarly defective.

These models are in this respect fundamentally and conceptually flawed. Indeed, NHRIs in these countries remain essentially government agencies and are not Officers of Parliament, accountable and answerable to it. It is highly recommended that the legal framework for the HREC should be modelled on the Ombudsman Act 1995, that is, not only fully compliant with the Paris Principles but also with the Belgrade Principles that establish the correct relations that such an institution should have with Parliament.
C. Does the chosen model fully comply with the basic guidelines of the Paris Principles?

In the light of Malta’s positive experience during the twenty years since the Ombudsman Act came into force, involving Ministries directly in policy making, composition or administration of the Commission is not advisable and needs to be avoided. Similarly, it is unacceptable that the Commission is made accountable to any Ministry. Such processes seriously dent the autonomy and independence of the Commission, that should be, like the Ombudsman in Malta, a parliamentary authority, accountable only to the representatives of the people.

It is conceptually inconceivable that issues of fundamental human rights, that by definition transcend the powers of the Executive and should be essentially above party politics, are directed or dictated by the government of the day. It is equally juridically incorrect to have an authority accountable to government, when it has among its primary functions the duty to monitor, investigate and decide on complaints that human rights were violated or are being threatened by the public administration. It should be pointed out that the White Paper expressly declares that the new Commission will no longer fall under a Ministry, but will instead be directly responsible to Parliament and that its financial and political independence would be guaranteed by law. These objectives are undoubtedly correct and would ensure A1 accreditation. They now need to be faithfully translated in the draft law.

This is the declared proposition in the White Paper. However in such situations the devil is in the detail. One is not in a position to give a clear and definitive opinion without first having examined the draft legislative framework to be submitted for further consultation. One has necessarily to reserve judgement on this important issue. An issue that determines the compatibility of the HREC with the Paris and Belgrade Principles and whether it would satisfy the stringent requirments for the highest international accreditation.
Need to regulate relationships with other institutions
Need to regulate relationships with other institutions

All three models identified by the White Paper, in different ways, acknowledge the need to regulate relationships between the institution and other authorities having a specific human rights mandate or that can take cognizance of human rights issues in the exercise of their functions. Their legislative frameworks ensure that all authorities and institutions can co-exist and exercise their respective functions with freedom not only by ensuring that the new Commission/Institutes do not invade their areas of jurisdiction but also by promoting a synergy of cooperation and collaboration between them and other authorities that operate within the area of human rights.

Different approaches

All three countries are aware of the serious problems that could arise if these issues are not well defined and regulated. They use different approaches to address a delicate situation that could potentially be very damaging.

a) The Scottish model

The Scottish Commission for Human Rights adopts a radical, direct solution. Its founding statute provides that it is under the duty to ensure that it is not duplicating work that others already carry out. It could provide assistance to any individual in connection with a legal claim. This Commission is essentially mandated to promote and protect human rights that include civil, political, economic, social and cultural rights for everyone in Scotland; to promote best practice of human rights by providing education, advice and training and to publish information and conduct research. It is not therefore directly mandated to investigate complaints though it does have the power to conduct inquiries into the policies or practices of Scottish public authorities working to deliver a particular service or public authorities of a particular description.

b) The Dutch and Danish models

The Dutch and the Danish Institutes are structurally very similar. They both have a wide remit to promote Human Rights and to monitor their own service but essentially they retain a strong equality and non-discrimination component within their functions. In fact the Netherlands Institute of Human Rights is described as an autonomous administrative authority with a double mandate. On the one hand, the Institute has a broad mandate to promote and protect human rights. On the other, it has a specific mandate concerning horizontal relations to monitor compliance with Dutch equal treatment laws, and this includes a quasi-judicial function.
The Danish Institute for Human Rights, that is the national human rights institution, is qualified also as a national equality body in relation to race, ethnicity and gender. It also has a special role in areas of disability where it promotes and monitors the implementation of the UN Convention on the Rights of Persons with Disability. Significantly both these institutions have their genesis in the equality commission of their respective countries. The need was felt to strengthen those commissions and to expand their remit to promote, monitor and protect human rights generally to increase their awareness and ensure their enforcement. An iter that is being followed and recommended in the White Paper.

Though the authorities have the power to investigate any possible violation of human rights if they deem so necessary, they only do so, on an individual complaint in those areas where they have a specific mandate and when the merits of the complaint do not fall within the jurisdiction of any other judicial, quasi-judicial authority or institutions.

Significantly, both these authorities are described by their founding legislation as “institutes” and not commissions. A designation that underscores the strong academic, research and educational elements in their core functions.

It is noted that the White Paper traces the historical development of the proposed HREC on lines very similar to those that led to the establishment of the Dutch and Danish Institutes. It is also evident that the drafters of the White Paper were inspired by the founding legislation of these two institutes when outlining the legal framework of the proposed HREC.

Clearly, the high degree of excellence that these two institutes achieved will not be realised by stating an ideal wish list or high-sounding objectives. Nor is it sufficient to have a good, workable legal framework, though this is no doubt essential. There is need for investment in human and other resources, quality academic support, capable of conducting research projects and a team of highly trained investigators. These are sine qua non requisites if the new Commission is to achieve the degree of excellence required to qualify as a National Institution worthy of A1 accreditation. Moreover, and this is equally important, the proposed framework needs to provide for clear guidelines on how the new Commission is to relate with other existing authorities and institutions.

Both the Danish and the Dutch Commissions were faced with a situation very similar to that obtaining in Malta. The countries not only has a strong judicial system to ensure the observance of human rights, but also has a number of established, national authorities with a mandate to promote and monitor the
enforcement of specific fundamental rights or the rights of vulnerable and disadvantaged persons.

Both Institutes are acutely aware that they cannot provide efficient, effective and comprehensive protection for human rights unless they can rely on the expertise and collaboration of other major players operating in this field. The legal frameworks of these two Institutes attempt to achieve this synergy between them and other national institutions and authorities by setting up Advisory Councils, composed of the representatives of a number of civil society organisations and authorities to *inter alia* oversee the activities of the Institute, propose new activities to their governing board and appoint its members.

The Council of the Danish Institute is made up of a number of Ministries, the Danish Parliamentary Ombudsman, the Danish Independent Police Complaints Authority, the Board of Equal Treatment, political parties and civil society. In the legal structure of the Dutch Institute, emphasis is made on the need to achieve pluralism through a diverse composition of the members of its governing boards. Its Advisory Council is made up *ex officio* of the National Ombudsman, the Chair of the Data Protection Agency, the Chair of the Council for the Judiciary and a number of members drawn from civil society organisations concerned with the protection of one or more human rights, including representatives of authorities with jurisdiction on children’s rights, on the rights of persons with disabilities, social and economic rights.

This Council advises the Minister about the appointment of members and alternate members of the Institute, taking into account of the need for an expert and the independent institute and of the wish to ensure diversity in its membership. The direct involvement of the Parliamentary Ombudsman and other independent, specialised authorities operating in the field of human rights in the administration of the Institute, is meant not only to ensure the input of expert specialised opinion in as wide a spectrum of human rights as possible, but also to guarantee smooth relations between the Institute and these authorities and institutions. These are fundamental notions that need to be embraced and adapted to the Maltese scenario in the drafting of the legal framework of the HREC.
Concluding remarks
Concluding Remarks

The ideal legal framework

Concerns and recommendations

These reflections on the proposals for the setting up of the legal framework of the HREC suggest the following recommendations on what should be the ideal components to create a strong and effective human rights institution, adequate to Malta’s requirements and sufficiently independent from Government to ascertain A1 UN accreditation.

The identified components have been made to fit within the Government’s declared policy in the White Paper, keeping in mind the country’s limitations as well as the legal and social context within which the new Commission will operate.

In an attempt to simplify a complex exercise, these components are being set out in concise point form to facilitate easy reference when mapping out the proposed legal framework.

1. Objectives of the legal framework

The legal framework should be constructed in such a way as to fulfil the White Paper’s dual objectives - that of having a strong equality body and a national human rights institution in a unified structure.

The Ombudsman believes that this is very much in line with his original recommendation, based on the premise that the country has in the field of human rights, adequate judicial and non-judicial structures including the Courts, tribunals and a number of national monitoring authorities and institutions. What is lacking is an efficient mechanism to promote and protect human rights, seeking to keep them high on the national agenda, monitoring the enforcement of legislation and proposing new initiatives. In doing so, it would work in strict collaboration with other existing authorities and institutions, motivating them to implement homogenous and holistic policies, through active dialogue and the sharing of experiences with other key players.

2. Realisation of these objectives

The White Paper recommends that this dual objective should be achieved through the strengthening of the existing NCPE that would have the added function to act as a human rights institution. A solution that finds favour with
the Ombudsman in so far as it would avoid the need to set up a new authority and the considerable additional financial commitment and the drain of human resources that this would entail. The framework of an HREC exercising such a dual function must however be very carefully defined to ensure that:

a) it would exercise its functions as an equality commission more effectively than the NCPE has done to date, given its legislative and administrative limitations; and

b) act as an efficient monitor and protector of human rights, promoting respect for their practice and proposing policy and legislation on the national agenda, thus increasing generally awareness of human rights in all aspects of social activity. An awareness that clearly includes issues of equality and non-discrimination but obviously extends beyond them.

### 3. Structures of the Commission

It is the Ombudsman’s conviction that the legal framework of the proposed Commission must specifically cater for this dual functions. When exercising its functions as an equality authority, the Commission will investigate equal treatment and discrimination cases and give opinions on these matters. It would continue to do all the previous excellent work done by the NCPE to date, but with additional responsibilities in so far as it could be entrusted with the implementation of a greatly improved and more specific Equality Act.

In this respect the HREC would be predominantly a quasi-judicial body and as such needs to be headed by a Commissioner who would be entrusted with the investigation and determination of complaints arising out of infringements of the Equality Act.

On the other hand, the structure of the new Commission needs to provide adequately and appropriately for the exercise of its functions as a human rights institution. The White Paper appears to have discarded the model of the Scottish Human Rights Commission that is essentially a monitoring and advisory body seeking to promote and protect human rights, working to increase their awareness, recognition and respect and making them more relevant and easier to apply in everyday life. The functions of that Commission are essentially advisory, educational and inspirational, with residual powers to conduct enquiries into the policies or practices of the public authorities. The composition of the Scottish Commission is restricted to a Chairman and not more than four other members, individually appointed by a Parliamentary cooperation, that is a cross party organisation.
The White Paper, apparently and with good reason, does not find this model adequate and suitable for Malta. It seems to have drawn inspiration from the Dutch and Danish models, but its proposals regarding the composition of the Commission remain vague and ill-defined. It remains very unclear and doubtful whether the Equality arm of the Commission will also be empowered to generally monitor the implementation of the human rights provisions found in Maltese Laws and other related matters or whether this function, that extends to a much wider remit and has more far reaching implications, is to be exercised by a separate body within the same Commission.

It must be noted that it is generally accepted that, while equality and discrimination issues are best administered by an Equality Commissioner, the monitoring of Human Rights from a national perspective should be entrusted to a collegiate body, even if within the same Commission, that would include the major players operating in the field of human rights in the country.

This solution is highly favoured because it would resolve two important issues:

a) it would avoid the National Human Rights Institution being reduced to a glorified Equality Commission, in which all issues of human rights are seen from the limited perspective of non-discrimination; and

b) it would immensely enrich the Commission with the experience and expertise of highly qualified officials chairing national authorities and institutions, as well as NGOs and academics. This would greatly enhance the authority of its decisions when laying down guidelines and policies for the advancement of human rights.

Adopting such a sensible solution would have the added advantage of achieving a measure of convergence between the new institution and other authorities, thus reducing the risk of unwelcome contrasts and conflicts.

**Composition**

**Recommended Composition**

Taking into account the size of its jurisdiction, the fact that the country has sound judicial structures and is well served by an number of authorities and institutions set-up by law to monitor the observance of specific fundamental human rights or the rights of persons in need of special protection, it is advisable that the HREC should be a representative authority chaired by the Commissioner for Equality and a number of members that would include a number of key players in human rights protection like a representative of the
Commission for the Administration of Justice, chaired by the President of Malta, the Parliamentary Ombudsman, the Commissioner for Children, the Chairman of the Commission for Persons with Disabilities, the Data Protection Commissioner, as well as representatives of NGOs and academics.

In this context, it is recommended that steps should be taken to strengthen the autonomy and independence of a number of these institutions to bring them in line with the Paris and Belgrade Principles.

**Functions**

Reference has already been made earlier on in this document on the need to ensure that the functions of the HREC are very clearly defined.

The need to keep the functions of the HREC as an equality body and as a human rights institution separate and distinct arises out of the historical and institutional development of human rights protection in the country, through its judicial system and the setting up of ad hoc authorities and institutions. A positive experience that should not in any way be prejudiced.

The White Paper apparently opts for a single body with a mandate that extends holistically to cover both equality issues and human rights generally. It would however be negative and certainly counterproductive if such an institution is just super imposed on existing structures and not integrated with them.

It is the Ombudsman’s conviction that in Malta’s case the proposed single structure model can only be usefully maintained if it is meant to create an institution with a strong and efficient equality arm, as well as a human rights arm in which the Equality Commissioner and other national human rights institutions develop strategic plans, policies and business strategies together. This in order to avoid duplication and to develop joint interaction that achieves the right synergy among the more important stakeholders operating in the field of human rights.

The ideal composition of the HREC should be tailor-made to satisfy these exigencies. The functions of the proposed Commission should therefore be designed in such a way as to achieve these two distinct objectives.

a) The equality arm should predominantly concern itself with discrimination issues, identifying areas that require attention, proposing policies to secure even greater equality for disadvantaged persons who need further protection, and to conduct the investigation of complaints that primarily allege discrimination and infringement of the equality laws. In this context,
when drafting the functions of the HREC, one needs to take into account that the Commission would be acting in a quasi-judicial capacity providing valuable support as an additional tool to ensure the enforcement of the statutory binding provisions of the Equality Act.

b) The human rights arm of the HREC should be concerned with the protection and promotion of human rights from a general and holistic perspective drawing on the experience and expertise of its members. The functions of the Commission should therefore reflect the reality that its members, exercising their mandate under the chairmanship of the Equality Commissioner, would mostly be *ex officio* members acting in their official capacity as holders of office of other institutions and authorities. The contribution of these *ex officio* members and other members like NGOs and academics, would enrich the proceedings of the Commission through the diversity of their opinions, moulded by the experience gained in the specialised fields in which they operate.

The functions of the HREC should cater for this objective and facilitate cooperation and collaboration between its various members. This can be done primarily by having the parameters of the functions of the Commission in this respect well defined. Its functions have to determine how the Commission should relate with other authorities and institutions and what are the limits of these relations especially in those cases where other authorities and institutions exercise statutory powers in the field of human rights.

Emphasis is being made on this aspect of the functions of the HREC because essentially this proposal reflects the need to achieve pluralism in the composition of the Commission which has always been considered to be a main feature of a national human rights institution, essential to ensure its legitimacy. In a way, the proposal reflects the Advisory Council that is the pivotal body in the structure of the Danish Institute for Human Rights. However, it is felt that, considering the size of Malta’s jurisdiction and the extent of the existing tutelage of human rights protection, there is no need for an advisory body to advise a governing board to manage the HREC. Such a structure would be cumbersome and involve an additional drain on human and financial resources.

The Ombudsman believes that one should go for a leaner and therefore more efficient structure. He is of the opinion that it should be sufficient if the proposed collective representation is entrusted with the general direction of the human rights functions of the Commission. This can be a very workable arrangement so long as the overall management of the Commission, is entrusted to a strong administration headed by an Executive Director that would be responsible for the execution of policies and projects determined both by the Equality
Commissioner and by the Commission acting as a National Human Rights Institution. An administration that should be instrumental to ensure that both areas of the Commission function well and efficiently, in an integrated office served with well-equipped administrative and investigative facilities capable of carrying out policies, conducting research and investigating complaints.

Delineating the defining line between the functions of the Commission as an equality authority and as a human rights institution must be made irrespective of the composition of the Commission, and even if, as the White Paper seems to suggest, its composition is not meant to be representative of other institutions and authorities.

**Jurisdiction**

The proper drafting of the functions of the Commission, meant to have in any case a dual perspective, is being stressed because this is absolutely essential to define and establish its jurisdiction within the obtaining Maltese scenario. While it is recognised that the jurisdiction of the proposed Commission should be as wide as possible, it is necessary to ensure that in the exercise of its functions it would not invade areas of jurisdiction that are proper to other structures that operate in the field of human rights.

The Commission’s jurisdiction should therefore be dovetailed with those of other authorities and institutions so that it can integrate well with them, supplement and complement the areas covered by their remit, filling any voids that still require attention. Care should therefore be taken when drafting this part of the legal framework to ensure that the new Commission will bring added value to the promotion and protection of human rights without causing unnecessary stress or upheavals.

This matter has been the concern of many jurisdictions, that have attempted to solve it in different ways. Thus the Scottish Human Rights Commission, is by law, expressly bound to ensure it is not duplicating work that others already carry out. It also cannot provide assistance to any person in connection with any legal claim.

While all NHRI s are by definition excluded from interfering in any way in judicial proceedings and they have all to recognise the ultimate supremacy of the Courts in finally determining rights and obligations, most jurisdictions exclude their national human rights intuitions from invading areas which are specifically within the competence of other authorities and institutions.

Problems arose in some countries like the UK where these questions were intentionally not well defined because it was felt that it was better to have
a strong, monolithic structure for the protection of human rights with far reaching powers to deal with any human rights issue it deemed fit, even if it fell within the purview of another specialised authority set up by law.

This can lead to undesirable contrasts and conflicts and more importantly to a weakening of existing institutions.

**Determining jurisdiction**

The determining of jurisdiction of the HREC can be examined at least from three basic angles:

1. **The jurisdiction of the HREC as an equality body**

In this respect the Commission must be given the widest competence to promote an equality based approach to human rights generally. An approach that would ensure that initiatives to protect, promote and fulfil human rights, take account of the diversity of rights holders. An approach that would ensure that human rights are advanced in a manner that contributes to a more equal society.

It is accepted that equality is not only a fundamental principle in human rights but also a tool to ensure that other human rights are enjoyed equally. No limits should therefore be placed on the ability of the HREC to act as an equality commission, exercising all the powers and functions proper to the NCPE but in a much stronger and independent legal framework.

It is noted positively that the White Paper expressly states that in the drafting of the proposed legal framework that no single right or protection that currently exists in Maltese Law will be rolled back. A statement that should not however preclude the equality arm of the HREC from exercising its functions to promote and protect the values of equality and non-discrimination even in matters that fall within the competence of other authorities and institutions. When drafting these functions, care should be taken to provide proper channels how the Commission would be required to act in these delicate situations, establishing, when necessary, the method and level of consultation required to ensure the desired results. Moreover, the exercise of these functions by the HREC in such situations can be greatly enhanced and facilitated if, as recommended, it enjoys a representative composition.

2. **The HREC functioning as a national human rights institution**

Having a representative composition becomes even more relevant when
one considers the functions that the HREC would have as a national human rights institution. The Paris Principles lay down that NHRIIs “should be given as broad a mandate as possible”. As a rule they should therefore enjoy a very comprehensive mandate covering both civil, political, economic, social and economic rights. A mandate that they exercise within a jurisdiction that is not only limited to the public administration but extends to all spheres of human activity in the country.

Within this wide spectrum they also have the function to monitor governmental action and advice government on how to promote and educate about human rights. In some countries, the NHRI has the function to investigate alleged human rights violations and the White Paper proposes that the HREC should have this quasi-judicial function.

Interestingly the Paris Principles also state that the mandate of the NHRI should “be clearly set forth in a constitutional or legislative text specifying its composition and its sphere of competence”. These Principles recognise that the functions of any NHRI must be tailor-made to suit the particular needs of the country and to afford protection of human rights where this is lacking. Its mandate has therefore to specify with precision its sphere of competence and hence the limits of its jurisdiction.

When tracing the functions of the HREC, the White Paper appears to rely on a wholesale reference to the Paris Principles in an attempt to give the new Commission the widest possible remit. Consciously or unconsciously, no effort seems to have been made to contextualise these generic functions within the country’s human rights protection scenario and to relate them to existing legal frameworks. This is a matter of substance and not detail. It needs to be taken into account when drafting the provisions governing the functions of the new Commission.

1. Main functions of an NHRI

The main functions of an NHRI have been broadly classified under two headings:

a) Advising state authorities, especially government, on the level of human rights protection, examining the compliance of draft laws and existing legislation with international human rights standards and also advising government on issues related to the protection and promotion of human rights. As stated, a number of jurisdictions include among the functions of their NHRI the monitoring of and ensuring compliance with human rights legislation. Interestingly the Paris Principles do not include monitoring among the functions they identify. This could be due to the fact that generally, NHRIIs
are set up more to focus attention on the promotion of human rights rather than on their effective enforcement. There are however exceptions and the White Paper indicates that HREC should retain this function.

b) Fostering an awareness of human rights nationally and promoting and educating a human rights culture. The NHRI should not only keep the level of observance of human rights under close scrutiny. It should also through study and research, promote further understanding of human rights issues, identifying new areas which require further protection.

 Those provisions of the Paris Principles that outline the functions of an NHRI are being reproduced as an appendix to this document for easy reference and to avoid unnecessary repetition. (Annex II)

ii. Two caveats

It is clear that, with the exception of the provisions referring to monitoring and compliance, all the functions outlined above can be usefully exercised by the HREC without negatively impacting on other existing authorities and institutions.

There are however two caveats:

a) that these functions, except in matters that concern equality and non-discrimination, would not be exercised exclusively by the Commission to the exclusion of other authorities and institutions that have jurisdiction in that field;

b) that when in the exercise of its functions, the HREC considers issues that fall within the competence of other authorities or institutions, it should be bound to do so in consultation and collaboration with them. This is especially relevant in case that the composition of the HREC is non-representative. Similarly other authorities and institutions should be bound to consult and collaborate with the HREC when addressing matters that impinge on equality and non-discrimination.

It is in this respect that the functions of the HREC need to be carefully fine-tuned. They must acknowledge that there are other public institutions in the country concerned with the protection of specific human rights that are tasked by law or the Constitution to ensure the enjoyment of these rights in the exercise of their functions. There should therefore be clear lines of demarcation between the various authorities and institutions to avoid any conflict of jurisdiction or duplication of activities, and to achieve the maximum protection for citizens through active cooperation and collaboration.
Such a practical approach would foster a proper understanding of the role of the HREC and its relationship with other authorities and institutions, that are all required to operate and exercise their functions in full respect of the autonomy and independence of one another. Reference has already been made to these important issues earlier on in this document. The White Paper broadly hints that these issues will be addressed positively and in the right direction. They however need to be properly defined when drafting the functions of the HREC that should also provide for definite guidelines, possibly in the form of a schedule to the Act regulating how smooth relations between the HREC and other authorities and institutions can be assured. Such legislative regulation is even more important in the case that the composition of the HREC is non-representative of other authorities and institutions.

3. The HREC functioning as a quasi-judicial authority

Finally, reference needs to be made to the quasi-judicial functions of the HREC and the manner of enforcement to ensure compliance with its decisions. This area is not well defined in the White Paper. The White Paper correctly proposes that the complaints mechanism of the new Commission should be strengthened, that it should have the power to investigate infringements not only on the complaint of an injured party, but also on its own initiative. It would appear that this investigative procedure, that is qualified as a quasi-judicial function, is primarily concerned with the implementation of the Equality Act that in the proposed draft, expressly provides that provision would be made to allow for dissuasive sanctions in cases of proven discrimination. Those investigations would refer to complaints that fall directly within the remit of the HREC as an Equality Commission and would properly fall within its competence.

However, the proposed legal framework of the HREC does not appear to limit the investigative powers of this Commission to such complaints. It seems to propose a much wider, general jurisdiction extending to all human rights, whether fundamental or not. If this is so, greater consideration should be given to the problems that could arise not only with other existing authorities and institutions but also with the jurisdiction of courts and tribunals.

Parameters of jurisdiction

In such a scenario, it becomes imperative that the parameters of the Commission’s jurisdiction are carefully and clearly delineated, defining with precision what can or cannot be investigated and what procedure it is to adopt when it receives a complaint that falls outside the parameters of its equality and non-discrimination jurisdiction and falls within those of other authorities or institutions.
It is always very questionable whether an authority that investigates a complaint and identifies an infringement should proceed to charge, try and determine the guilt or innocence of the accused. There is consistent jurisprudence of the European Court of Human Rights that considers such procedures to be in violation of Article 6 of the Convention, that lays down the fundamental right of a person accused of a criminal charge to a fair hearing within a reasonable time, by an independent and impartial court set up by law. Another provision ensures that, in the determination of civil rights and obligations, every person is entitled to an impartial and public hearing within a reasonable time by an independent and impartial tribunal set up by law.

These are guarantees of due process, that are being extended by case law to cover also administrative penalties which are imposed by public authorities in the exercise of a quasi-judicial function. This not only in retribution of the offence committed, but also to act as a deterrent to avoid further violations. In such cases, the European Court of Human Rights has held that these administrative penalties would partake of the nature of a criminal charge that would entitle the person accused of the infringement, to the full guarantees of Article 6 of the Convention.

Safeguards to ensure due process

It is noted that the White Paper expressly states that the Equality Act should include provisions that allow for dissuasive sanctions in cases of proven discrimination. Such provisions would, correctly and avowedly, contain a strong element of deterrence and this could mean that the infringement would be considered by a court to be of a criminal nature, even though the law might qualify it as an administrative one. That would essentially mean, that while the infringements under the Equality Act, subject to administrative penalties, might not be considered to be “hard core criminal law”, they would still be considered to be criminal in nature, meriting the constitutional and conventional safeguards that ensure due process.

This Strasbourg Case Law is being followed by the Maltese Courts, the latest example being the exhaustive judgement given by the Civil Court in its constitutional jurisdiction on 21 April 2015, in the case in the name “Federation of Estate Agents versus Director General (Competition) and Honourable Prime Minister and Attorney General”. The following two excerpts from judgements given by the European Court of Human Rights quoted in that judgement will fully illustrate the concerns at issue.

The first quote is taken from the judgement “Usilla versus Finland” (Appeal 73053/01), in which the Court referred to established Case Law that sets out
the three criteria to be considered in the assessment of the applicability of the criminal aspect of an infringement, known as the “Engel Criteria”. In paragraph 43 of that judgement the court maintained that:

“There are clearly “criminal charges” of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a “criminal charge” by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (Öztürk, cited above), prison disciplinary proceedings (Campbell and Fell v. the United Kingdom, 28 June 1984, Series A no. 80), customs law (Salabiaku v. France, 7 October 1988, Series A no. 141-A), competition law (Société Stenuit v. France, 27 February 1992, Series A no. 232-A), and penalties imposed by a court with jurisdiction in financial matters (Guisset v. France, no. 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency (see Bendenoun and Janosevic, § 46 and § 81 respectively, where it was found compatible with Article 6 § 1 for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body, and, a contrario, Findlay, cited above).”

The Maltese judgement also refers to a very recent decision of the European Court A. Menarini Diagnostics SRL vs Italia (Appeal No 43509/08) that in paragraph 57 to 59 elaborated further on these points:-

“57. La Corte osserva che i motivi di gravame della società ricorrente riguardano il diritto di accesso ad un giudice avente piena giurisdizione e il controllo giurisdizionale, presumibilmente incompleto, della decisione amministrativa dall’AGCM.

58. In questo caso, la sanzione contestata non è stata inflitta da un giudice dopo un procedimento nel contraddittorio delle parti, ma dall’AGCM. Se conferire alle autorità amministrative il compito di perseguire e punire le contravvenzioni non è incompatibile con la Convenzione, va sottolineato, tuttavia, che il soggetto interessato deve essere in grado di impugnare ogni decisione adottata nei suoi confronti davanti ad un giudice che offra le garanzie di cui all’articolo 6 (Kadubec c. Slovacchia, 2 settembre 1998, § 57, Raccolta delle sentenze e decisioni 1998-VI, e Canady c. Slovacchia, non 53371/99, § 31, 16 novembre 2004).

59. La conformità con l’articolo 6 della Convenzione non esclude che in un procedimento di natura amministrativa, una “pena” sia inflitta da
un’autorità amministrativa. Si presuppone però che la decisione di un’autorità amministrativa che non soddisfi le condizioni di cui all’articolo 6 § 1 debba subire un controllo a posteriori da un organo giudiziario avente giurisdizione piena (Schmautzer, Umlauft, Gradinger, Pramstaller, e Palaoro Pfarrmeier c. Austria, sentenza del 23 ottobre 1995, la nostra serie A, 328 AC e 329 AC, § § 34, 37, 42 e 39, 41 e 38). Tra le caratteristiche di un organo giudiziario avente piena giurisdizione vi è il potere di riformare in ogni modo, in fatto come in diritto, la decisione, resa da un organo di grado inferiore. Detto giudice deve essere competente a giudicare tutte le questioni di fatto e di diritto rilevanti per la controversia per cui è adito (Chevrol c. Francia, no 49636/99, § 77, CEDU 2003-III, e Silvestro Horeca Service c. Belgio, n. 47650/99, § 27, 4 marzo 2004).”

Exercise of quasi-judicial powers

This means that even though it would be legally possible for an authority, exercising a function under the Equality Act, to impose an administrative penalty that would only be considered to be legitimate if the basic rules of due process were observed by the authority and if its decisions were subject to a judicial review by a court or tribunal set up by law on all the merits of the case both on issues of fact and of law.

Of the three identified preferred sources in the White Paper, it is only the Netherlands Human Rights Institute that is a predominantly quasi-judicial body. It has litigation powers in so far as it can bring proceedings before a court in its own name to ensure that human rights that fall within its remit are fully observed. It also has the power to formally decide on complaints which it investigates. However, its decisions or recommendations are not legally binding though they have of course, the authority of decisions given by an authoritative Institute and would, as a rule, be respected.

The core quasi-judicial functions of this Institute relates to the conduct of investigations into the protection of human rights, focussed mainly on whether discrimination has taken or is taking place. The Institute can also conduct investigations on its own initiative to determine whether discrimination is systematically taking place and it can also publish its findings. Crucially, the Institute may bring legal action with a view to obtaining a ruling that conduct is contrary to equal treatment law requesting that such conduct be prohibited or that the court orders that the consequences of such conduct be rectified.

This Institute’s quasi-judicial function therefore does not extend to a binding determination of guilt or the imposition of penalties. These issues ultimately are to be referred to a court of law where the rules of due process with full
guarantees a fair hearing would be observed. Similarly, questions regarding the final interpretation and application of provisions in the Equality Treatment Law is referred to the competent judicial authority.

Practically all national human rights institutions follow this pattern. These include the United Kingdom Equality and Human Rights Commission that has full powers of investigation in a wide area of remit. The effective sanctioning of proved infringements is by law referred by it to the appropriate, competent courts and tribunals.

In this respect, the chapter in the White Paper on the proposed legislative framework for the Commission in the White Paper limits itself to the following references:

1. that the Commission will help to create a society in which the observance of human rights is assured for all;
2. that it will receive and investigate complaints from the public;
3. with a mandate to look at horizontal relations to monitor compliance with Maltese Equality and Equal Treatment laws which include a complaint mechanism;
4. that it will be vested with the ability to perform human rights and equality investigations as it deems necessary;
5. that the complaints mechanism will be widened and will no longer rely exclusively on cases brought forward by individual victims; and
6. that it will have the right to conduct own initiative investigations.

As stated earlier, it is proposed that in the Equality Act, provision will be made to allow for dissuasive sanctions in cases of proven discrimination. The Act would also allow: a) NGOs to submit cases on behalf of victims; b) class actions and c) cases of discrimination to be processed without the need for an individual victim.

There are positive indications in the White Paper that the Human Rights and Equality Commission would be tasked with the function to investigate allegations of infringements of the Equality Act, both on its own initiative and on the complaint of an injured party. One is given to understand, and this is as it should be, that this is the main investigative function of the Commission. There is however, as stated, reference to a residual, general function to investigate any issue concerning human rights, including complaints made by aggrieved persons on any ground.
Investigative process

If this is a correct reading of the White Paper, there are a number of considerations to be made and questions to be addressed to ensure a correct and effective investigative process.

The proposed legal framework must keep in mind the basic distinction between an investigation, whether on an own initiative or provoked by a complaint, that:

i) will by law, result in the determination of guilt or innocence of the person accused of a breach of human rights and the consequent imposition of a penalty; or

ii) whether the investigation would only lead to a final opinion of the Commission that there was such a breach and to its recommendation on how that violation should be remedied either through administrative or judicial action. In such cases the matter is referred to a competent Court or tribunal set-up by law for final decision.

This distinction is fundamental because it is crucial to determine the precise nature of the quasi-judicial function of the Commission and hence the statutory procedure to be adopted when conducting its investigations

A. The Commission acting as a tribunal

It is clear that when determining the guilt or innocence of the accused and even more when imposing appropriate penalties, the Commission would be assuming the functions of a tribunal. Apart from the serious reservations regarding this matter to which reference has just been amply made, it is clear that the Commission exercising such a function would have to ensure that the basic rules of due process are duly observed to guarantee that the accused is given a fair hearing. This needs to be especially so if the Commission has the right to impose penalties that can be qualified as dissuasive sanctions. It has to be stated that the person concerned might be entitled to some of these procedural guarantees, even at the pre-trial stage and therefore during the investigation by the Commission. These include the right to be made aware that he is being investigated, the nature of the charge, and the presumption of innocence.

It should also be clear that when exercising a quasi-judicial function that partakes of the nature of a tribunal, the Commission can only investigate a complaint that is directly related to a specific breach of the Equality Law or any other statute falling under its jurisdiction, and for which a commensurate sanction has been determined by law.
The right to legal certainty to which every accused is entitled, epitomised in the maxim *nullum crimen sine lege*, must be guaranteed to ensure that proceedings are fair. Similarly, in such instances other basic requirements that comprise the elements of a fair hearing like the principle of equality of arms, an adversarial process, disclosure of evidence and the right to be given a reasoned decision, must be built in the provisions of the Bill regulating the method of investigation of complaints. Moreover, if any or some of these basic requirements are absent, the law must, as a minimum provide for the right of the accused to appeal before an independent and impartial court on all the merits of the case, including issues of fact and points of law.

**B. If the investigation leads only to recommendation**

If on the other hand, the investigation of the Commission could only lead to a final opinion that there was a breach of human rights and a consequent recommendation on how that violation could be redressed, it is strongly suggested that the provisions in the Ombudsman Act of 1995 as subsequently amended, that regulate the conduct of investigations could be adopted *mutatis mutandis* in the proposed legislation.

These provisions have been well tried for the last twenty years and have withstood the test of time. Their validity have very recently been recognised when they were included, with appropriate amendments, in the Bill to provide for the appointment of a Commissioner and a Standing Committee of the House of Representatives with power to investigate breaches of statutory or ethical duties of categories of persons in public life.

These procedures can also be adopted in case the legal framework, as the White Paper seems to suggest, empowers the HREC or its Commissioner following the investigation, to proceed judicially before the competent authority against any person who it identifies *prima facie* to be responsible for the alleged violation. Needless to say, the procedures can also be fully utilised both by the Commissioner and the HREC for own initiative investigations, so long as the end result is not that of definitely determining the innocence or guilt of any person identified as having been responsible for a breach of human rights.

**Procedural Improvements**

Provisions allowing NGOs to submit cases on behalf of victims, class actions and cases of discrimination without the need of an individual victim are definite improvements on procedures established in the Ombudsman Act. The Ombudsman has wide powers to deal with issues of malpractice in the public administration that allow him to investigate similar complaints even though
these powers are not spelt out in his Act. However, as there is today a growing awareness of the effective role of NGOs and the validity of class actions, it is opportune and proper to have these rights specifically detailed in the functions of the HREC. Indeed, they should also be extended to the Ombudsman and other national authorities and institutions having such a remit in the protection of human rights.

**The processing of complaints**

In the preferred set up recommended in this document, in which the HREC is chaired by a Commissioner tasked with the investigation of cases of alleged violations of the right to equality and non-discrimination and a Commission that is representative and that has a general mandate to address human rights issues and advice on human rights priorities in the country, it is proposed that the following procedures should be adopted in the handling of complaints:

a) all complaints received by the Commission should be addressed to the Commissioner of Equality as Chairman of the HREC;

b) the Commissioner will retain for his/her personal investigation, all complaints that mainly involve issues of equality and discrimination;

c) these complaints will as hitherto, be investigated and concluded under the supervision of the Commissioner without the need to refer them to the Commission, unless the Commissioner himself/herself considers this to be necessary and opportune;

d) any other complaint is to be referred by the Commissioner to the Commission that will then decide whether to investigate it itself or else refer it for investigation to the appropriate authority or institution with a specialised jurisdiction to take cognisance of its merits. It is noted that this system of referral is generally adopted by the Ombudsman and should become common practice among all authorities and institutions operating in the field of human rights; and

e) the HREC would be the final arbiter on which complaints it should retain for investigation.

The objective should be that, even in the exercise of its investigative function, the HREC should endeavour to create the right synergy with other authorities and institutions that like it, even if in varying degrees, have the same powers to examine complaints in specialised areas of human rights.
The common aim should be to provide aggrieved individuals with as wide and efficient a safety net as possible to seek redress. All authorities and institutions operating in this field including the HREC, should exercise their powers in full respect of one another’s independence and autonomy. A synergy, based on trust and cooperation, that recognises the validity of the expertise and experience that specialised bodies can contribute, that would ultimately lead to the possibility of conducting joint or multiple investigations by the HREC and other specialised interested authorities or institutions.

Successful initiatives in this respect have been undertaken by the Ombudsman when authorising own initiative investigations that required the input of different specialised Commissioners operating within his Office. Such a beneficial process would naturally be greatly facilitated if the composition of the HREC is a representative one.

**Effectiveness and enforceability of decisions**

Emphasis is being made on the fundamental distinction between the Equality arm of the HREC and its overall human rights remit in the exercise of its investigative function, because this is crucial to the drafting of a legal framework that will allow the HREC to adequately and competently attain its stated objective.

It is also a distinction that has a direct bearing on the effectiveness and enforceability of the Commission’s decisions and final opinions. In this respect, one has to keep in mind that - unlike the Ombudsman or other authorities that have a limited jurisdiction - in the case of the Ombudsman the public administration, and in the case of other authorities the protection of a particular right or a particular sector - the jurisdiction of the Commission would have no limits in so far as it would seek to generally improve the human rights situation in the country. Its jurisdiction therefore applies to the whole of society. Interestingly that statement extends also to the equality arm of the Commission in so far, as previously illustrated, equality and non-discrimination though rights in themselves, are essential constituent elements of all other human rights.

When outlining the functions of the HREC the White Paper follows the Paris Principles very closely. It emphasises that like the Ombudsman, the Commission should primarily have a mediatory role trying to reconcile contrasting positions to ensure the observance of human rights by all. When mediation fails however, the legal framework must provide for the best means to ensure effectiveness of the Commission’s decisions and how they could be enforced to redress the proven injustice.
This issue requires further study and a number of basic points need to be kept in mind.

1. Emphasising the mediatory role of the HREC, both when acting as a human rights institution and as a Commission for equality and discrimination, renders it difficult for it to function as a tribunal giving binding decisions. Mediation has been found to be incompatible with adjudication. Certainly a mediator, who could eventually convert to an adjudicator, cannot easily gain the trust of both parties to a dispute. Moreover, it is quite possible for the mediator to become privy, also in confidence, to crucial evidence during the mediation process that would render his/her position as a fair and impartial adjudicator untenable.

2. This matter is closely related to the nature of the investigative function that the HREC is to perform. There is absolutely no problem when the HREC investigates issues to ensure the observance of human rights generally to promote awareness and respect for human rights, to ensure that everyone can participate with freedom and dignity, free from any prejudice or discrimination and develop their full potential. Nor is there any problem if the HREC, following an investigation, acts in an advisory capacity to authorities and others on how best to promote and protect human rights or to individuals who may have been discriminated against. In the exercise of all these functions, that are the core objectives of the Paris Principles, both the HREC and its Commissioner are free to act in their absolute discretion since the end result of their investigation would not be the determination of any right or obligation, or the guilt or innocence of any person. In such cases, the issue of enforcement does not arise.

On the other hand, however it is acknowledged that the draft Bill setting up the HREC should make provision to ensure that final opinions and decisions of the Commissioner and the Commission, even if not enforceable, are rendered as efficacious as circumstances allow. In this respect, once there is agreement that the Commissioner and the members of the Commission are to be considered as Officers of Parliament, there is no reason why the provisions in the Ombudsman Act empowering the Ombudsman to bring those final opinions that so merit, to the attention of the House of Representatives, should not be applied to the HREC. Moreover, there should also be a statutory provision mandating the Speaker to forward such decisions or final opinions to the appropriate Select Committee of the House or to a special Committee exclusively dealing with human rights issues and that, that Committee would be bound to put them on its agenda for discussion.
Having the merits of the findings of the investigation of the Commissioner and the HREC discussed by Parliament would not only give them the widest possible publicity, raising awareness of the issues involved to the highest level and subjecting them to the scrutiny of public opinion. It could also eventually lead to a political decision on whether the findings of the HREC or its Commissioner should be adopted.

A small step in this direction has recently been taken when the House decided that any report referred to it by the Ombudsman on behalf of the Commissioner for Health in his Office should be forwarded to the newly set up Select Committee to consider health issues. More importantly, such a procedure would acknowledge the supremacy of Parliament that should have the final say on whether proposals or recommendations made by the HREC or its Commissioner, in its investigative/advisory role, should be adopted or not.

3. The proposed legal framework must recognise the role of Parliament as the supreme authority in the country not only to make laws but also to ensure that those laws are observed. The Executive is accountable to Parliament. It is when verifying that accountability that the representatives of the people together with the Courts, perform the supreme democratic function to uphold the rule of law. Parliament together with judicial organs of the State has the duty to ensure that the actions of the Executive conform to the laws it enacts. It can best perform this function through the services of national authorities and institutions, whether constitutionally recognised or not, that are accountable to it and are set up to monitor and investigate the acts of the Executive. These include the Office of the Ombudsman, that of the Auditor General and others, and will also now include the HREC.

The exercise of this vital function in practice underscores the basic, often blurred, distinction between Parliament and the Executive. It also stresses the constitutional norm that the Executive has the duty to administer the country according to laws and regulations enacted by the elected representatives of the people. There is no doubt that transparency and accountability in the public administration can be more effectively monitored if the services of these national authorities and institutions are better utilised by Parliament.

Regrettably, not much progress has been made in establishing a strong, constant relationship between Parliament and the Ombudsman and indeed other similar institutions that verify the actions of the public administration. This with the exception of the Office of the Auditor
General where progress has been made in cases where Parliament directly requests the office to investigate specific issues. The services of the Ombudsman and of other authorities and institutions have been underutilised by Parliament. This needs to be addressed.

Parliament needs to develop a strong and effective network of national authorities and institutions accountable to it, tasked with the function to oversee the level of observance of legislation and investigate complaints of maladministration. There is little point in declaring an institution or authority like the Auditor General and the Ombudsman, and now the HREC, to be Officers of Parliament unless strong and effective mechanisms are put in place to ensure that citizens are adequately protected at least by having their legitimate grievances brought to the attention of their representatives in the House and actively considered by them.

Essentially, legislation setting up the offices of the Auditor General and the Ombudsman adequately provide for this access to the House of Representatives. They only need to be better utilised. They can be transposed with necessary modifications into the proposed legal framework for the HREC. A procedure that should be available both as regards final opinions on investigations into a complaint by an injured party and also following an own initiative investigation.

4. As stated, the situation is completely different if the White paper intends investigations undertaken by the HREC to lead to the identification of persons who have violated equality laws or breached human rights, possibly charging them with committing an offence and, if found guilty, subjecting them to a deterrent penalty. In such cases the HREC would be functioning as a quasi-judicial body, if not a tribunal, and in this context the bond between it and Parliament would be severed.

In such a case, procedural rules regulating due process and guaranteeing a fair hearing would have to be applied, possibly very early in the investigation. The legal framework must provide for such an eventuality. For reasons already explained earlier on in this document, it is highly recommended that in any case the law should not provide for the HREC to function as a full-fledged tribunal, conducting the investigation to the final stage of determining the guilt or innocence of an accused person. It should however have the right to remit the records of the investigation to the appropriate court or tribunal that would proceed with the hearing of the case, delivering final judgement and where necessary, applying appropriate penalties in a process fully guaranteeing the fundamental right of a fair hearing.
Almost the totality of laws setting up national human rights institutions in European countries and others have adopted this solution. In some countries the NHRI have direct access to these courts or tribunals and can also act as prosecutors in the cases they refer to them. It is a practical solution that avoids the setting up of yet another tribunal, that makes use of existing specialised structures and avoids the possibility of conflicting or contrasting decisions. It also avoids issues of conflict of interest and ensures maximum impartiality in the adjudicating process. In this context reference of cases to the administrative court is recommended. Procedures should be direct, speedy and at minimum cost.

**Appointment and tenure of Office**

The White Paper limits itself to stating that the approval of the members of the Commission will become the prerogative of Parliament. It also lays down two important principles:

1. that the new Commission will no longer fall under a Ministry but will instead be directly responsible to Parliament; and
2. the Commission would be enlarged and a mechanism put in place to ensure wider representation of society.

No further details are forthcoming on the method of appointment of the members of the Commission. However once it is acknowledged that the new Commission would be directly responsible to Parliament, it goes without saying that the appointment of its members should be made by the President, on a motion approved by the House of Representatives. Years of experience in the appointment of the Parliamentary Ombudsman and the Auditor General, that are considered to be Officers of Parliament, have shown that their founding legislations very wisely require that motions of appointment and removal of the holders of these high offices should enjoy the support of at least two-thirds of the Members of the House.

That provision not only ensures security of tenure on a par with that of a Judge and effectively secures the positions against any undue political interference. More importantly, it also guarantees that the nominees to these high office positions enjoy the widest possible approval, support and respect from the representatives of the people. It is strongly recommended that if the HREC aims at achieving an A1 accreditation with the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), this method of appointment and removal should be adopted at least in respect of the Commissioner who will chair it.
Any other method of appointment that would effectively mean a rubberstamping by Parliament of a ministerial appointee should at all costs be avoided. Moreover, the process of nomination of its members would be greatly simplified if the suggestion is accepted that the composition of the members of the Commission should be a representative one, including mostly *ex officio* holders of office of other national authorities and institutions operating in the field of human rights as well as from NGOs and academics.

The possibility of political confrontation and horse trading would be avoided because all these *ex officio* members would have passed through their own rigid selection process. They would have been judged to be qualified and suited to occupy their respective offices that all require a high level of integrity, independence and autonomy. The adoption of such a solution in the proposed legal framework would have obvious advantages not least that it:

- a) would ensure automatically that the enlarged Commission would have a wider and specific representation of society;
- b) that such representation would be established by law and not left to Ministerial discretion or to a decision of the Commission itself; and
- c) it would ensure that the HREC, as a national human rights institution, would be constituted at all times.

**Term of office**

In the recommended preferred set up, the *ex officio* members would retain their position as members of the HREC so long as they remain the holder of the offices they represent. On the other hand, the term of the Commissioner must be laid down by law. Legislation for similar offices like the Office of the Parliamentary Ombudsman and the Auditor General provide for a term of five years renewable for a further period of five years.

The Parliamentary Ombudsman favours a revision of this practice. He believes that there should be one long term of seven or nine years. This would enable the incumbent sufficient time to promote and realise what he/she believes should be the reforms to be undertaken in the field of human rights in the country as well as to fully exercise his/her functions as Equality Commissioner and Chairman of the HREC, in collaboration with the other members.

While it is fair to say that the present two term system of appointment, both in the case of the Parliamentary Ombudsman and of the Auditor General, did not appreciatively, negatively affect the functioning of the institution, there have
been cases of uncertainty in the transition period from one term to another due
to lack of political decision, attributable to a number of factors not necessarily
connected with the office. This uncertainty over the reappointment of the
Commission could have undesirable effects on the autonomy and efficiency of
the institution. The legal framework must ensure that the HREC as a national
human rights institution is at all times functioning at its best to guarantee
maximum protection to all.

The Executive Director

The White Paper makes reference to the post of an Executive Director who
would play a key role in the HREC and whose approval would also be a
prerogative of Parliament. There is no indication about what the role of the
Executive Director will be, whether his office would be a purely administrative
one or whether he would be in charge of executing policies under the direction
of the Commissioner of Equality and the HREC as a national human rights body.
More importantly it is not indicated whether this director would have a role in
the investigation of complaints or in the conduct of own initiative investigations
and if so, to what extent would his involvement be decisive on their outcome.

While there is no objection for a Commission like the HREC to have an Executive
Director, acting under the direction and instruction of the Commission to execute
policies and realise projects, such an official must at all times be accountable to
it. His area of autonomous and independent decision must therefore be limited
and specified in the law. Matters of human rights from a national perspective
should not be entrusted in the hands of any one official however important or
qualified. All investigations, whether on a complaint of an injured party or on
the own initiative of the Commissioner or the Commission itself and especially
if conducted in the exercise of a quasi-judicial function, must be determined
directly by the HREC and under its authority.

In the absence of any information on the nature and function of the office of
the Executive Director one has to reserve one’s judgement on the opportunity
to require parliamentary approval for the holder of this post, as well as on the
validity of the role and its standing within the setup of the HREC.

On the other hand, it is recognized that the HREC, especially if modelled on
the lines suggested in this document, will require a qualified, competent
and efficient Executive Director whose main task would be to coordinate the
initiatives and activities both of the equality arm and the human rights arm of
the Commission. He would serve as the operational hub of the Commission
ensuring that its directives are executed and its policies implemented according
to instructions given. The Director would also ensure that both arms of the
Commission would be well serviced by a strong and efficient administrative and investigative structure. He would also be responsible for the financial management of the Commission and would at all times be accountable to it.

Financial independence

The Belgrade Principles lay down categorically that Parliament should ensure the financial independence of NHRI by including in their founding law appropriate provisions. The Principles provide that an NHRI should submit to Parliament a strategic plan of an annual programme of activities and a budget proposal to be discussed and approved by Parliament to ensure its financial independence. Once that annual budget is approved, the NHRI should be allowed to administer its budget freely without any ministerial interference.

The management of the NHRI’s financial affairs are to be subject to the routine control of the Office of the Auditor General. Otherwise the NHRI has to be free to manage its own affairs, including full freedom in the administration of its material and human resources, and specifically in the employment and recruitment of personnel required for the fulfillment of its functions.

These essential requisites laid down in the Belgrade Principles, proclaimed on 22/23 February 2012, fully reflect the analogous provisions in Malta’s Ombudsman Act 1995. It is recommended that similar, if not identical, provisions are included in the legal framework for the HREC. The overriding principle should always be that the HREC should be accountable to Parliament and not to Government for the conduct of its affairs. Like the Ombudsman, the Commission should not be subject to the direction or control of any other person or authority, and this includes Parliament. However, while Parliament cannot direct it as to how it exercises its functions, the Commission must accept the general oversight of Parliament in the discharge of its duties. Indeed, Parliament will always reserve the right to make general rules for its guidance in the exercise of its functions.

It is strongly recommended that the provisions in the Ombudsman Act regulating the administrative and financial management of the institution, that have been well tried and tested, should be wholly incorporated mutatis mutandis in the proposed legal framework. This should not be difficult in view of the positive statement in the White Paper that the aim is to ensure full financial independence of the HREC. An independence that would only be meaningful if it is reflected in its complete operational and administrative autonomy.
Final reflection
Final reflection

In conclusion the Parliamentary Ombudsman thinks it is proper to place these reflections in their proper context.

• The function of the Parliamentary Ombudsman is to promote and protect the fundamental right of the individual to a good public administration. It is his duty to ensure an open, transparent and accountable administration that treats all individuals fairly and justly.

• The Ombudsman exercises this function by defending the rights of individuals, whether fundamental or not. He ensures that all individuals are treated by the public administration equally and without improper discrimination.

• The Ombudsman believes that the legislative initiatives outlined in the White Paper, if properly implemented, will further enhance the awareness of society on the need to ensure that the right to be treated equally and without improper discrimination should be extended beyond the limited boundaries of the public administration to cover all aspects of human activity in society. In this respect the proposed Equality Act would be an invaluable tool not only to give substance and definition to this right but also to ensure its enforcement.

• The Parliamentary Ombudsman has for years been promoting the setting up of a national human rights institution to monitor the level of enforcement of human rights, to identify new areas where such protection needs to be extended to afford further protection to vulnerable and disadvantaged sections of society as well as to adopt strategic programmes based on research and underpinned by consultation with and participation of civil society.

• The Ombudsman has always been of the opinion that these objectives can best be attained through the setting up of a Commission, that would be representative of authorities, institutions and NGOs that have for years been the main players in the promotion of human rights.

• The Ombudsman has advocated a measure of convergence among the major players in the promotion and protection of human rights. He is convinced that the setting up of a Commission, on the lines suggested in this document and that fits well with the objectives set out in the White Paper, would provide a strong, viable and efficacious platform on which a comprehensive, holistic and protective network could be built.
A network that would enable the new HREC to draw upon the valuable expertise and experience of its representative members, while respecting the independence and autonomy of the institutions and authorities they represent.

- The Parliamentary Ombudsman is convinced that, once the parameters of their respective institutions are clearly defined, the setting up of the new institution should in no way conflict with the Office of the Ombudsman. In the words of Ms Lauren Koster, on behalf of the Netherlands Institute for Human Rights that recently underwent the transition from an Equal Treatment Commission to a National Human Rights Institute, “The present solution has strengthened the equal treatment, and the Ombudsman has lost nothing of his position. And I consider it an advantage that there is more than one institution to criticize the government”2. The Ombudsman is of the same opinion. The same positive result can be achieved if the legal framework, adopted following the publication of the White Paper, is an expression of good will by those in authority, inspired by a willingness to provide citizens with the most comprehensive protection for the enjoyment of his rights, whether fundamental or not, when they are violated or threatened both by the public administration or by others.

- It is in this spirit that the Parliamentary Ombudsman augurs that the Equality Act will meet the highest anti-discrimination and equality standards and provide for effective enforcement of its provisions. This not only through its application by judicial and quasi-judicial structures but also through the monitoring of their enforcement by a strengthened, autonomous Equality Commission. He is hopeful that the legal framework of the proposed HREC would be fully compliant with the Paris and Belgrade Principles. He trusts that the proposed setup would not only ensure that the Malta institution meets the minimum international standards but also attains a superior level of autonomy and independence that the Office of the Ombudsman enjoys. A high standard that would surely secure A1 accreditation with the International Coordinating Committee on National Institutions for the Promotion and Protection of Human Rights (ICC) of the United Nations.

2 The correspondence exchanged between Ms Koster and the Parliamentary Ombudsman is being appended to this document since it provides valuable insight on developments leading to the publication of the White Paper and the consistent position taken by the Parliamentary Ombudsman.
Annexes
Annex I

Further reading

1. The setting up of an National Human Rights Institution - A proposal by the Parliamentary Ombudsman - October 2013

2. On the strengthening of the Ombudsman Institution - A proposal by the Parliamentary Ombudsman - January 2014


5. Statement of compliance with the Paris Principles of the Netherlands Institute for Human Rights - December 2013
Annex II

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,


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;
(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 rational 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 III

Belgrade Principles

BELGRADE PRINCIPLES ON
THE RELATIONSHIP BETWEEN NATIONAL HUMAN RIGHTS INSTITUTIONS
AND PARLIAMENTS
(Belgrade, Serbia 22-23 February 2012)

The 2012 International Seminar on the relationship between National Human Rights Institutions (NHRIs) and Parliaments, organised by the Office of the United Nations High Commissioner for Human Rights, the International Coordinating Committee of National institutions for the promotion and protection of human rights, the National Assembly and the Protector of Citizens of the Republic of Serbia, with the support of the United Nations Country Team in the Republic of Serbia.

In accordance with the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations General Assembly Resolutions 63/169 and 65/202 on the role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, 65/172 and 64/161 on National Human Rights Institutions for the promotion and protection of human rights and the Human Rights Council Resolution 17/9 on National Human Rights Institutions for the promotion and protection of human rights.

Recognising that the principles relating to the status of national institutions (the Paris Principles, adopted by United Nations General Assembly Resolution 48/134) state that NHRIs shall establish an “effective cooperation” with the Parliaments.

Noting that NHRIs and Parliaments have much to gain from each other in performing their responsibilities for the promotion and protection of human rights.

And recalling the need to identify areas for strengthened interaction between NHRIs and Parliaments bearing in mind that the different institutional models of NHRIs should be respected.

Adopts the following principles aimed at providing guidance on how the interaction and cooperation between NHRIs and Parliament should be developed:

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1 The Conference was attended by experts from NHRIs, Parliaments and Universities from Ecuador, Ghana, India, Jordan, Kenya, Mexico, New Zealand, Portugal, Serbia and the United Kingdom
1. **Parliament’s role in establishing a National Human Rights Institution (NHRI) and securing its functioning, independence and accountability**

A) **Founding Law**

1) Parliaments while deliberating the draft legislation for the establishment of a national human rights institution should consult widely with relevant stakeholders.

2) Parliaments should develop a legal framework for the NHRI which secures its independence and its direct accountability to Parliament, in compliance with the Principles related to national institutions (Paris Principles) and taking into account the General Observations of the International Coordinating Committee of national institutions for the promotion and protection of human rights (ICC) and best practices.

3) Parliaments should have the exclusive competence to legislate for the establishment of a NHRI and for any amendments to the founding law.

4) Parliaments, during the consideration and adoption of possible amendments to the founding law of a NHRI, should scrutinise such proposed amendments with a view to ensuring the independence and effective functioning of such institution, and carry out consultation with the members of NHRI and with other stakeholders such as civil society organisations.

5) Parliaments should keep the implementation of the founding law under review.

B) **Financial independence**

6) Parliaments should ensure the financial independence of NHRI by including in the founding law the relevant provisions.

7) NHRI should submit to Parliaments a Strategic Plan and/or an Annual Programme of activities. Parliaments should take into account the Strategic Plan and/or Annual Programme of activities submitted by the NHRI while discussing budget proposals to ensure financial independence of the institution.

8) Parliaments should invite the members of NHRI to debate the Strategic Plan and/or its annual programme of activities in relation to the annual budget.

9) Parliaments should ensure that NHRI have sufficient resources to perform the functions assigned to them by the founding law.
C) **Appointment and dismissal process**

10) Parliaments should clearly lay down in the founding law a transparent selection and appointment process, as well as for the dismissal of the members of NHRI.s in case of such an eventuality, involving civil society where appropriate.

11) Parliaments should ensure the openness and transparency of the appointment process.

12) Parliaments should secure the independence of a NHRI by incorporating in the founding law a provision on immunity for actions taken in an official capacity.

13) Parliaments should clearly lay down in the founding law that where there is a vacancy in the composition of the membership of a NHRI, that vacancy must be filled within a reasonable time. After expiration of the tenure of office of a member of a NHRI, such member should continue in office until the successor takes office.

D) **Reporting**

14) NHRI.s should report directly to Parliament.

15) NHRI.s should submit to Parliament an annual report on activities, along with a summary of its accounts, and also report on the human rights situation in the country and on any other issue that is related to human rights.

16) Parliaments should receive, review and respond to NHRI reports and ensure that they debate the priorities of the NHRI and should seek opportunities to debate the most significant reports of the NHRI promptly.

17) Parliaments should develop a principled framework for debating the activities of NHRI.s consistent with respect for their independence.

18) Parliaments should hold open discussions on the recommendations issued by NHRI.s.

19) Parliaments should seek information from the relevant public authorities on the extent to which the relevant public authorities have considered and responded to NHRI.s recommendations.

**11. Forms of co-operation between Parliaments and NHRI.s**

20) NHRI.s and Parliaments should agree the basis for cooperation, including by establishing a formal framework to discuss human rights issues of common interest.
21. Parliaments should identify or establish an appropriate parliamentary committee which will be the NHRI's main point of contact within Parliament.

22. NHRI's should develop a strong working relationship with the relevant specialized Parliamentary committee including, if appropriate, through a memorandum of understanding. NHRI's and parliamentary committees should also develop formalized relationships where relevant to their work.

23. Members of the relevant specialized parliamentary committee and the NHRI should meet regularly and maintain a constant dialogue, in order to strengthen the interchange of information and identify areas of possible collaboration in the protection and promotion of human rights.

24. Parliaments should ensure participation of NHRI's and seek their expert advice in relation to human rights during meetings and proceedings of various parliamentary committees.

25. NHRI's should advise and/or make recommendations to Parliaments on issues related to human rights, including the State's international human rights obligations.

26. NHRI's may provide information and advice to Parliaments to assist in the exercise of their oversight and scrutiny functions.

III. Cooperation between Parliaments and NHRI's in relation to legislation

27. NHRI's should be consulted by Parliaments on the content and applicability of a proposed new law with respect to ensuring human rights norms and principles are reflected therein.

28. Parliaments should involve NHRI's in the legislative processes, including by inviting them to give evidence and advice about the human rights compatibility of proposed laws and policies.

29. NHRI's should make proposals of amendments to legislation where necessary, in order to harmonize domestic legislation with both national and international human rights standards.

30. NHRI's should work with Parliaments to promote human rights by legislating to implement human rights obligations, recommendations of treaty bodies and human rights judgments of courts.
31) NHRIIs should work with Parliaments to develop effective human rights impact assessment processes of proposed laws and policies.

IV. Co-operation between NHRIIs and Parliaments in relation to International human rights mechanisms

32) Parliaments should seek to be involved in the process of ratification of international human rights treaties and should consult NHRIIs in this process of ratification, and in monitoring the State’s compliance with all of its international human rights obligations.

33) NHRIIs should give opinions to Parliaments on proposed reservations or interpretative declarations, on the adequacy of the State’s implementation of human rights obligations and on its compliance with those obligations.

34) Parliaments and NHRIIs should co-operate to ensure that the international treaty bodies are provided with all relevant information about the State’s compliance with those obligations and to follow up recommendations of the treaty bodies.

35) NHRIIs should regularly inform Parliaments about the various recommendations made to the State by regional and international human rights mechanisms, including the Universal Periodic Review, the treaty bodies and the Special Procedure mandate holders.

36) Parliaments and NHRIIs should jointly develop a strategy to follow up systematically the recommendations made by regional and international human rights mechanisms.

V. Co-operation between NHRIIs and Parliaments in the education, training and awareness raising of human rights

37) NHRIIs and Parliaments should work together to encourage the development of a culture of respect for human rights.

38) NHRIIs and Parliaments should work together to encourage that education and training about human rights is sufficiently incorporated in schools, universities and other relevant contexts including vocational, professional and judicial training in accordance with relevant international standards.

39) NHRIIs and Parliaments should work together to improve their mutual capacity on human rights and parliamentary processes.

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2 In relation to the United Nations Declaration on Human Rights Education and Training.
NHRIs, Parliaments and all Parliamentarians should seek to work together in public awareness, education campaigns and encourage mutual participation in conferences, events and activities organized for the promotion of human rights.

VI. Monitoring the Executive’s response to Court and other judicial and administrative bodies’ judgements concerning human rights

41) Parliaments and NHRIs as appropriate should co-operate in monitoring the Executive’s response to Judgments of Courts (national and, where appropriate, regional and international) and other administrative tribunals or bodies regarding issues related to human rights.

42) NHRIs should monitor judgements against the state concerning human rights, by domestic, regional or international courts, and where necessary, make recommendations to Parliament about the appropriate changes to law or policy.

43) Parliaments should give proper consideration to NHRIs recommendations about the response to human rights judgements.

44) Parliaments and NHRIs as appropriate should encourage the Executive to respond to human rights judgements expeditiously and effectively, so as to achieve full compliance with human rights standards.
Annex IV

Full text of the declaration of the rights of the inhabitants of the islands of Malta and Gozo signed on 15 June 1802

‘We, the Members of the Congress on the Islands of Malta and Gozo and their dependencies, by the free suffrage of the people during the siege, elected to represent them on the important matter of ascertaining our native rights and privileges (enjoyed from time immemorial by our ancestors, who, when encroached upon, have shed their blood to regain them), and of fixing a constitution of Government, which shall secure to us and our descendants in perpetuity, the blessings of freedom and the rights of just law, under the protection and sovereignty of the King of a free people, His Majesty the King of the United Kingdom of Great Britain and Ireland. After long and mature deliberation, we make the following declaration, binding ourselves and our posterity for ever, on condition that our now acknowledged Prince and Sovereign shall, on his part, fulfil and keep inviolate his compact with us.

‘1st. That the King of the United Kingdom of Great Britain and Ireland is our Sovereign Lord, and his lawful successors shall, in all times to come, be acknowledged as our lawful Sovereigns.

‘2d. That His said Majesty has no right to cede these Islands to any power. That, if he chooses to withdraw his protection, and abandon his sovereignty, the right of electing another Sovereign, or of governing these Islands, belongs to us, the inhabitants and aborigines alone, and without controul.

3d. That His Majesty’s governors or representatives in these islands and their dependencies are, and shall ever be, bound to observe and keep inviolate the Constitution, which, with the sanction and ratification of His said British Royal Majesty, or his Representative or Plenipotentiary shall be established by us, composing the general congress, elected by the people, in the following proportion, viz.

‘Cities.-Notabile and Casal Dingli, 14 members; Valletta, 12; Vittoriosa, 4; Senglea, 4; Cospicua, 4.

‘Casals or Burghs.- Birchircara, 6 members; Attard, 3; Lia and Balzan, 3; Curmi (also a city), 12; Nasciar, 4; Gregorio, 3; Musta, 5; Zebbug (also a city), 8; Siggieni, 4; Luca, 3; Gudia, 1; Zurico, 4; Micabiba, 2; Crendi, 2; Zabbar, 3; Tarshien, 2; Hasciach, 1; total members, 104.
4th. That the people of Malta, Gozo, and their representatives in popular Council assembled, have a right to send letters, or deputies, to the foot of the throne, to represent and to complaint of violation of rights and privileges, or of acts contrary to the constitution of the Government, or of the spirit thereof.

5th. That the right of legislation and taxation belongs to the Consiglio Popolare, with the consent and assent of His Majesty’s representative, without which the people are not bound.

6th. That His Majesty the King is the protector of our holy religion, and is bound to uphold and protect it as heretofore; and without any diminution of what has been practised since these islands have acknowledged His Majesty as their Sovereign to this day; and that His Majesty’s representatives have a right to claim such church honours as have always shown to the regents of these islands.

7th. The interference in matter spiritual or temporal, of no other temporal sovereign, shall be permitted in these islands; and reference in spiritual matters shall only be had to the Pope, and to the respective generals of the Monastic Orders.

8th. That freemen have a right to choose their own religion. Toleration of other religions is therefore established as a right; but no sect is permitted to molest, insult, or disturb those of other religious professions.

9th. That no man whatsoever has any personal authority over the lives, property, or liberty of another. Power resides only in the law; and restraint, or punishment, can only be exercised in obedience to law.'

Signed by all Representatives, Deputies and Lieutenants of the Villages and Towns.
Annex V

The Danish Institute of Human Rights

The Danish Institute for Human Rights is an independent state-funded institution. Their mandate is to promote and protect human rights and equal treatment in Denmark and abroad.

The institute is Denmark’s national human rights institution. They are also a national equality body in relation to race and ethnicity and gender. They also have a special role in the disability area where we promote and monitor the implementation of the UN Convention on the rights of persons with disabilities.

Functions

As national human rights institution, the Danish Institute for Human Rights works to further and promote human rights in Denmark and abroad. The Institute works within various areas – from human rights in the digital world to the conditions of children of imprisoned to responsible business conduct.

One of the institute’s most important jobs is to monitor, meaning to observe Danish legislation and make sure that it is in accordance with human rights. We carry out this task by observing how Denmark actually implements international conventions and EU legislation. In connection to this the institute serves as advisor to the government and parliament.

A key monitoring task is to write legal briefs. In the legal briefs, the institution, estimates whether a specific suggestion is in accordance with human rights. If this is not the case, the institute produces suggestions on how it may be changed along with other recommendations. Approximately 150 legal briefs a year are produced.

Mandate

The institute is specially appointed to further equal treatment of all people regardless of gender, race or ethnic origin. Furthermore, we are responsible for the task of monitoring, promoting and protecting the implementation of the UN convention on rights for people with disabilities in Denmark.

The work consists, among other duties, in counselling people who have been subject to discrimination. They publish reports that create awareness and bring forth new knowledge to these areas.
Activity

The Danish Institute for Human Rights implements human rights programmes in partnership with state institutions and civil society organizations in Denmark and internationally. They support a number of organizations in their work to promote human rights. It is the aim of the institute to make the projects sustainable and nationally anchored.

The work is rights based and rooted in the human rights obligations held by Denmark. Among other things, the Institute contributes with knowledge, concepts and analyses and forms part of various networks. The institute selects different focus areas and works strategically with these in various ways.

Business and Human Rights

As globalisation has accelerated around the world, it has become increasingly clear that companies - whether local or multinational, publicly or privately operated - have major impacts on human rights, both positive and negative.

The Danish Institute for Human Rights (DIHR) is dedicated to addressing these impacts. Through research, tools and partnerships with key stakeholders, DIHR aims to contribute to building a global environment in which adverse business impacts are minimised, and opportunities for business’ potential for positive contribution to human rights are realised.

The Board

The Board is the supreme controlling body of the Danish Institute for Human Rights. The Board lays down guidelines and policy for the Institute’s activities, and appoints the Institute’s Director. The Chairperson and Deputy Chairperson of the Board are appointed by the Council of Human Rights.

From August 1, 2013, the board is composed by 14 members:

- 6 members are appointed by the rectors of the Danish Universities:
- 1 member is appointed by the Rector of Aalborg University
- 1 member is appointed by the Rector of Aarhus University
- 1 member is appointed by the Rector of University of Copenhagen
- 1 member is appointed by the Rector of University of Southern Denmark
- 2 members are appointed by the Danish Rectors’ Conference under Universities Denmark
- 6 members are appointed by the Council for Human Rights (DIHR)
- 1 member is appointed by the Human Rights Council of Greenland
- 1 member is appointed by the employees of DIHR
The Council of Human Rights

Denmark’s Council for Human Rights is composed of the representatives of a number of civil society organisations and authorities who meet to discuss the undertakings of the Danish Institute for Human Rights.

The Council assess the design and execution of DIHR activities and may propose new activities to the Board. The Council for Human Rights also appoints six of the Board members.

The Board appoints members of the Board according to a public consultation procedure repeated at least every 4 years. The members are appointed in such a way as to reflect the attitudes of the civil society organisations that engage in human rights activities.

The Council is composed by Ministries, The Danish Parliamentary Ombudsman, The Danish Independent Police Complaints Authority, The Board of Equal Treatment, Political Parties and Civil Society
Overview

The Netherlands Institute for Human Rights has a legal basis in Dutch law and is an independent body. Its task is to monitor human rights in the Netherlands. It can give solicited and unsolicited advice to our government or any other organisation and has the power to investigate any possible violation of human rights it deems necessary.

The work of the Netherlands Institute for Human Rights incorporates the work of the previous Equal Treatment Commission and has therefore also the authority to investigate discrimination cases and give opinions in these matters. Netherlands Institute for Human Rights is a predominantly quasi-judicial body.

In the Netherlands, Article 1 of the Constitution prohibits discrimination. Dutch equal treatment laws elaborate on this norm and prohibit unequal treatment in specific fields and on a limited number of grounds.

The Dutch Equal Treatment Commission (Commissie Gelijke Behandeling, CGB) was an independent organisation that was established by the Equal Treatment Act (Algemene Wet Gelijke Behandeling: AWGB), which came into force in 1994, to promote and monitor compliance with these laws. The Commission also gave advice and information about the standards that apply.


Anyone in the Netherlands, be it individuals or private or public organisations or institutions, could ask the Commission for an opinion or advice about a specific situation concerning unequal treatment. This way, the Commission kept a key position in the process of communication and discussion about the impact of non-discrimination and equal treatment law in everyday life and provided easy access to an independent and expert opinion in matters of alleged discrimination. There are no registry fees, legal representation is unnecessary and the procedure is less formal than a court procedure.

On 1st October 2012 a new law came into force: Netherlands Institute for Human Rights Act (Wet College voor de Rechten van de Mens (WCRM)). The Netherlands Institute for Human Rights (NIHR) was established in compliance with the Paris Principles. The NIHR is currently in the process to gain A-status. The NIHR has incorporated the work of the former Equal Treatment Commission:
the task to provide expert opinions in matters of alleged discrimination. The NIHR also explains, monitors and protects human rights, promotes respect for human rights (including equal treatment) in practice, policy and legislation, and increases the awareness of human rights in the Netherlands. It has the power to investigate any possible violation of human rights it deems necessary.

Mandate

- Powers: the The Netherlands Institute for Human Rights is a predominantly quasi-judicial body;
- Litigation powers:
  - Bringing proceedings in its own name;
  - Formally deciding on complaints (decision or recommendation) - not legally binding.

Activities

- Promotional activities aimed at duty bearers (by way of trainings, guidance material, etc.);
- Promotional activities aimed at potential victims (trainings, awareness raising, etc.);
- Communication activities;
- Publications and research projects;
- Providing duty bearers with requested and not-requested advice;
- Number of inquiries / complaints lodged and cases handled per year: 1317 (inquiries in 2011), 719 (cases handled in 2011)

Structure

1. Management structure

- Type: Collegiate headed body (led by a distinct board);
- Details: The NIHR consists of twelve members, including a Chair and two Vice-Chairs. In addition there are at least nine deputy members. All members and deputy members are appointed for a fixed period of six years, after which time it is possible to be re-appointed. They are appointed by Royal Decree.

2. Institutional structure

- Type: stand alone dedicated national equality body.
- Details: The NIHR’s independence is safeguarded in different ways: The member’s salary and working conditions are provided for in a specific
regulation provided for by the WCRM; neither the Government nor any Ministry has the power to give instructions to the NIHR; members of the NIHR can only be dismissed after a procedure similar to that followed in the judiciary.

3. Nomination of senior staff and board:

The WCRM provides for an office to be set up to assist the NIHR in the performance of its duties (Section 18 WCRM). The NIHR’s office has a staff of approximately 60 people. The NIHR appoints its own staff. The members of the NIHR are appointed by Royal Decree. Legal experts and research assistants help members of the NIHR to investigate complaints about alleged discrimination. Some experts in job evaluation schemes also work at the NIHR’s office, along with a public relations officer and a documentation assistant. Management assistants and secretaries provide support to both the members of the NIHR and members of the staff. Besides its own staff, the NIHR may call on the assistance of civil servants designated by the appropriate Ministers and/or call in other experts.

4. Accountability (reporting to)

Ministry of Security and Justice.
Annex VII

The Scottish Human Rights Commission

The Scottish Human Rights Commission (SHRC) is the national human rights institution for Scotland. It was established by an Act of the Scottish Parliament and started its work in 2008. The Commission is independent of Government, and of the Scottish and Westminster Parliaments. It seeks to promote and protect the human rights of everyone in Scotland, working to increase awareness, recognition and respect for human rights, and make them more relevant and easier to apply in everyday life. The Commission aims to help everyone understand their rights and the shared responsibilities everyone has to each other and to their community.

It is a Scottish Parliamentary Corporate Body (SPCB) supported body meaning that it is separate and independent from Government but still accountable for its public funds. The chairman of the Commission is Professor Alan Miller.

The Scottish Human Rights Commission is the newest of the three national human rights institutions (NHRIs) in the United Kingdom and, like the Northern Ireland Human Rights Commission (NIHRC) and the Equality and Human Rights Commission (EHRC), it has secured “A status” accreditation from the International Co-ordinating Committee of NHRIs (the ICC).[1] The Scottish Parliament, when establishing the Commission in 2008, ensured that it complied with United Nations Principles Related to the Status of National Institutions, known as the Paris Principles - a series of recommendations on the role, status and functions of NHRIs. The Commission has a strong international profile and can participate in parallel reporting mechanisms for UN treaty processes. In October 2010 it hosted the biennial world conference of NHRIs in Edinburgh. [2] The Commission was elected as Chair of the European Group of National Human Rights Institutions during a meeting in Geneva on 17 May 2011.

Mandate

- To promote and protect the human rights - civil, political, economic, social and cultural - of everyone in Scotland.
- To promote best practice on human rights in Scotland by providing education, advice and training.
- To publish information and conduct research.

The Commission must lay annually before the Scottish Parliament a general report on the exercise of its functions during the year. Issues concerning equality, and some non-devolved human rights matters, are the responsibility of the
EHRC. The SHRC, NIHRC and EHRC participate with the Equality Commission for Northern Ireland in the “independent mechanism” to promote, protect and monitor implementation in the UK of the UN Convention on the Rights of Persons with Disabilities.

Powers

The Scottish Commission was established by the Scottish Commission for Human Rights Act 2006, an Act of the Scottish Parliament. The legislation sets out:

- The power to conduct inquiries into the policies or practices of Scottish public authorities working to deliver a particular service, or public authorities of a particular description.
- The ability to provide education, training and awareness raising, and by publishing research.
- Recommending such changes to Scottish law, policy and practice as it considers necessary.
- The power to enter some places of detention as part of an inquiry, and the power to intervene in civil court cases where relevant to the promotion of human right and where the case appears to raise a matter of public interest.

The Commission is under a duty to ensure it is not duplicating work that others already carry out. It cannot provide assistance to any person in connection with a legal claim. Assistance includes advice, guidance and grants.

Work of the Commission

The Commission is currently working from its Strategic Plan 2012-2016. The strategic priorities for this time period are as follows:

1. Empowering people to realise their rights through promoting greater awareness and respect for human rights.
2. Supporting the implementation of human rights in practice.
3. Improving human rights protection in Scotland through influencing law and policy.
4. Progressing the realisation of human rights of people in Scotland and beyond through further developing our international role.
5. Ensuring the Commission is effective, efficient, professional and accountable.
The Commission presented its first Strategic Plan to the Scottish Parliament in June 2009, after a national consultation which took in a wide range of responses from civic society, individuals, public authorities and representatives from local and national government. It identified its key priorities as promoting and protecting human dignity in Scotland, addressing emerging human rights issues, bringing human rights to life and supporting human rights in the world. The work of the Commission focuses on implementing a human-rights–based approach at the heart of policy choices and practice in Scotland to ensure that human rights are at the centre of how organisations in Scotland work, as well as how they measure success.

**Independence**

Scottish Commission for Human Rights Act 2006 was created in accordance with the United Nations Principles relating to the Status of National Institutions (The Paris Principles), which require National Human Rights Institutions to be given legislative competence to promote and protect human rights and must be independent.

Schedule 1 (2) The Commission:

(a) is not a servant or agent of the Crown and  
(b) has no status, immunity or privilege of the Crown.

Schedule 3 (1) The Commission, in the exercise of its functions, is not to be subject to the direction or control of:

(a) any member of the Parliament  
(b) any member of the Scottish Executive, or  
(c) the Parliamentary corporation.

Schedule 4 (1) A person is disqualified from appointment, and from holding office, as a member of the Commission if that person is:

(a) a member of the House of Commons,  
(b) a member of the Scottish Parliament, or  
(c) a member of the European Parliament.

Schedule 4 (2) A person is also disqualified from such appointment if that person has, in the relevant period, held any of the offices set out in subparagraph (1) (a) to (c).
Schedule 4 (3) The relevant period is:

(a) in relation to the appointment of a member to chair the Commission, the year preceding the date of nomination,
(b) in relation to the appointment of any other member of the Commission, the year preceding the proposed date of appointment.

Financial Independence

Scottish Commission for Human Rights Act 2006 Schedule 1 (14)(1) 1

The Parliamentary corporation is to pay:

(a) the remuneration and allowances of each member of the Commission, and
(b) any expenses incurred by the Commission in the exercise of its functions, so far as those expenses are not met out of sums received and applied by it under section 3(3).

The Scottish Human Rights Commission is designated as a direct funded body under the annual Budget Act in Scotland.

The composition of the Commission

Scottish Commission for Human Rights Act 2006 Schedule 1, (1)(1)

The Commission consists of the following members

(a) a member appointed to chair the Commission, and
(b) not more than 4 other members.

As of 2011, the Commission has a full-time chair, and three Commissioners who work an average of 30 days a year. The Commission is supported by 10 staff.

Appointment

The member appointed to chair the Commission is to be an individual appointed by Her Majesty on the nomination of the Scottish Parliament. The other members are to be individuals appointed by the Parliamentary corporation a cross party organisation.
Annex VIII

The Swedish Equality Ombudsman

Overview

The Equality Ombudsman is an independent Government agency established on 1 January 2009. The Ombudsman’s tasks include the supervision of compliance with the Discrimination Act and the promotion of equal rights and opportunities regardless of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.

Brief history

The Equality Ombudsman – an independent government agency - was formed on 1 January 2009 when four previously existing anti-discrimination ombudsmen were merged into a new body. The Ombudsman was established by an Act of Parliament (Discrimination Act 2008:567). As set out in the Act (2008:568) concerning the Equality Ombudsman, the Ombudsman shall Supervise compliance with the Discrimination Act. To this end, the Ombudsman may, inter alia, receive and consider complaints from individuals asserting that they have been the victims of discrimination. Following such an investigation the Equality Ombudsman may bring a legal action for damages on behalf of the individual concerned; Work to ensure that discrimination associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age does not occur in any areas of the life of Swedish Society; Work in other respects to promote equal rights and opportunities regardless of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age. More specifically, the statutory responsibilities of the Equality Ombudsman include the provision of advice and other support so as to help enable anyone who has been subjected to discrimination to claim their rights. Within its sphere of competence, the Equality Ombudsman shall further: Inform, educate, discuss and have other contacts with government agencies, enterprises, individuals and organizations; Follow international developments and have contacts with international organizations; Follow research and development work; Propose legislative amendments and other anti-discrimination measures to the Government; Initiate other appropriate measures.

Mandate

- Powers: the Equality Ombudsman is a predominantly promotion-type and legal support body;
• Litigation powers: - Representing in front of courts; - Bringing proceedings in its own name; - Formally deciding on complaints (decision or recommendation) – not legally binding.

Activities

• Promotional activities aimed at duty bearers (by way of trainings, guidance material, etc.);
• Promotional activities aimed at potential victims (trainings, awareness raising, etc.);
• Communication activities;
• Publications and research projects;
• Number of complaints received per year: 2353 (in 2011).

Structure

1. Management structure

• Type: single headed equality body (led by a Director-General);

• Details:

The Equality Ombudsman is headed by a Director-General (the “Equality Ombudsman”). The Director-General acts on behalf of the agency and is solely responsible for its activities.

Pursuant to the Ordinance with instructions for the Equality Ombudsman, an Advisory Committee has been created. The task of the Advisory Committee is to provide the agency with advice and support, inter alia through the provision of expertise in discrimination issues and other matters of relevance to the Equality Ombudsman’s sphere of activities. The members of the Advisory Committee are appointed by the Equality Ombudsman.

2. Institutional structure

• Type: stand alone dedicated national equality body.

3. Nomination of senior staff and board:

The Equality Ombudsman is appointed by the Government. All other staff members are appointed by the Equality Ombudsman.
4. **Number of staff**

Approximately 90 staff members (2011).

**Accountability (reporting to)**

The Equality Ombudsman reports to the Government by producing an annual report.
Annex IX

United Kingdom - Equality Act

Summary

The Act has two main purposes – to harmonise discrimination law, and to strengthen the law to support progress on equality.

The Act brings together and re-states all the enactments listed in paragraph 4 above and a number of other related provisions. It will harmonise existing provisions to give a single approach where appropriate. Most of the existing legislation will be repealed. The Equality Act 2006 will remain in force (as amended by the Act) so far as it relates to the constitution and operation of the Equality and Human Rights Commission; as will the Disability Discrimination Act 1995, so far as it relates to Northern Ireland.

The Act also strengthens the law in a number of areas. It:

- places a new duty on certain public bodies to consider socio-economic disadvantage when making strategic decisions about how to exercise their functions;
- extends the circumstances in which a person is protected against discrimination, harassment or victimisation because of a protected characteristic;
- extends the circumstances in which a person is protected against discrimination by allowing people to make a claim if they are directly discriminated against because of a combination of two relevant protected characteristics;
- creates a duty on listed public bodies when carrying out their functions and on other persons when carrying out public functions to have due regard when carrying out their functions to: the need to eliminate conduct which the Act prohibits; the need to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and the need to foster good relations between people who share a relevant protected characteristic and people who do not. The practical effect is that listed public bodies will have to consider how their policies, programmes and service delivery will affect people with the protected characteristics;
- allows an employer or service provider or other organisation to take positive action so as to enable existing or potential employees or customers to overcome or minimise a disadvantage arising from a protected characteristic;
• extends the permission for political parties to use women-only shortlists for election candidates to 2030;
• enables an employment tribunal to make a recommendation to a respondent who has lost a discrimination claim to take certain steps to remedy matters not just for the benefit of the individual claimant (who may have already left the organisation concerned) but also the wider workforce;
• amends family property law to remove discriminatory provisions and provides additional statutory property rights for civil partners in England and Wales;
• amends the Civil Partnership Act 2004 to remove the prohibition on civil partnerships being registered in religious premises.
Annex X

Powers and functions of equality court of South Africa

(1) The equality court before which proceedings are instituted in terms of or under this Act must hold an

a) inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or
b) harassment, as the case may be, has taken place, as alleged.

(2) After holding an inquiry, the court may make an appropriate order in the circumstances, including

(a) an interim order;
(b) a declaratory order;
(c) an order making a settlement between the parties to the proceedings an order of court;
(d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;
(e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
(f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;
(g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
(h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
(i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
(j) an order that an unconditional apology be made;
(k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
(l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
(m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court’s order;
(n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation;
(o) an appropriate order of costs against any party to the proceedings;
(p) an order to comply with any provision of the Act.

(3) An order made by an equality court in terms of or under this Act has the effect of an order of the said court made in a civil action, where appropriate.

(4) The court may, during or after an inquiry, refer

(a) its concerns in any proceedings before it, particularly in the case of persistent contravention or failure to comply with a provision of this Act or in the case of systemic unfair discrimination, hate speech or harassment to any relevant constitutional institution for further investigation;
(b) any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation.

(5) The court has all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts.
Annex XI

Correspondence between the Parliamentary Ombudsman Chief Justice Emeritus Joseph Said Pullicino and Ms Laurien Koster, Chair of College voor de Rechten van de Mens.

PR Ombudsman Office

From: Koster, L (Mensenrechten) <lkoster@mensenrechten.nl>
Sent: 17 April 2014 18:18
To: equality@gov.mt; helpdesk@knpd.org; pro@ombudsman.org.mt
Subject: Project to establish a NHRI in Malta

National Commission for the Promotion of Equality to the attention of Ms Renee Laiviera
National Commission for persons with disabilities to the attention of Mr Joseph M Camilleri, Chair
Chief Justice Emeritus Joseph Said Pullicino

Dear colleagues,

Mr Silvan Agius from the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties approached us about the establishment of a National Human Rights Institute in Malta. We have been informed by Mr Agius that the National Commission for the Promotion of Equality and the Ombudsman are involved in this process as well and that the Institute will be integrated with the NCPE. The Netherlands Institute for Human Rights recently underwent the transition from Equal Treatment Commission to a National Human Rights Institute; we are willing to provide you with all sorts of assistance as older NHRI’s have assisted us at their turn. To us it has been very important that we - as the existing equality body, which was supposed to be integrated in the new body - were present already in the process of drafting the law: we were able to closely monitor the future independence and compliance with the Paris Principles of the Institute to be. We have also managed our own stakeholders consultations. And the Equal Treatment Commission got the quartermaster role for the new institution. In the whole process we also have sought the advice of OHCHR in Geneva.

Attached you will find the Act establishing the NIHR, the explanatory memorandum to the act, our statement of compliance with the Paris Principles for our accreditation and the annual report of our first year as an NHRI for your information. Some information is also available on our website.

Mr Silvan Agius is considering to pay you a visit after studying the documents. Of course you would be welcome too, together or separately.

Please do not hesitate to contact Esther van Weele (e.van.weele@mensenrechten.nl) or myself with any questions you may have.

Kind regards,

Laurien Koster
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COLLEGE VOOR
DE RECHTEN
VAN DE MENS
Office of the Ombudsman

From: Office of the Ombudsman <office@ombudsman.org.mt>
Sent: 16 May 2014 11:55
To: 'l.koster@mensenrechten.nl'
Subject: Project to establish a NHRI in Malta

OMB/1/24/P2

16 May 2014

Ms Laurien Koster
Chair
College voor de Rechten van de Mens
Kleinesingel 1-3
Postbus 16001
3500 DA Utrecht

Email: l.koster@mensenrechten.nl

Dear Ms Koster

I thank you for your e-mail of 17 April and your kind invitation to participate in the consultation exercise you are carrying out, on behalf of the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, on the setting up of a NHRI in Malta.

You may wish to note that this is the first time that the Ministry has officially, directly recognised the involvement of my Office in this initiative. I have never been directly approached to give an input on the proposed setting up of this institution that we have been promoting for the last seven years. This notwithstanding, we welcome the opportunity to collaborate with your prestigious Institute in formulating the best possible legislative and administrative structure for a NHRI in Malta.
Our campaign in favour of establishing this institution culminated last year in the publication of a document entitled "The setting up of a National Human Rights Institution in Malta". This document sets out what in our opinion is the operational structure best suited to the country’s particular needs and institutional set up. This document can be accessed at our website: www.ombudsman.org.mt. A hard copy is being forwarded to you for your information together with a hard copy of this e-mail.

I understand that your remit is to advise on the setting up of a "NHRI that will be integrated with the NCPE". That is a political decision that defines the parameters within which you and indeed ourselves have to direct our efforts. I am on record in the final paragraphs of our publication that the way forward had to recognise that there are various models of NHRI's in Europe and elsewhere:

"It is the government’s prerogative to choose the model best suited to Malta’s needs. In making its choice the government should endeavour not only to provide the individual with optimum protection for enjoyment of his fundamental human rights, and this without unduly burdening the country with unnecessary additional expense, but also and more importantly, it should ensure that the model chosen will merit and receive the maximum level of accreditation - an A status - with the ICC. As a Member of the European Union that should pride itself on the level of respect of fundamental rights and their observance Malta deserves nothing less".

I have perused the interesting material you have attached on the development, status and structure enjoyed by your country’s NHRI, and especially the explanatory memorandum to the Act and your statement of compliance with the Paris Principles for accreditation to the ICC. As you can see from our published document, your thoughts are very much in line with what we are proposing should be the functions, status, level of autonomy and independence of the institution to be set up in Malta.
You may wish to note that I am emphasising that any such institution should enjoy the same level of administrative independence and financial autonomy that the Office of the Parliamentary Ombudsman enjoys, culminating eventually in the acquisition of the status of a constitutional authority that my Office attained some years back. You might care to peruse the constitutional and legislative instruments setting up my Office that can also be accessed on our website (http://www.ombudsman.org.mt/about-us/legislation/), and which I believe, shall as a minimum, serve as a guide on which the proposed institution should be modelled.

I can point out that in some respects perhaps, the Parliamentary Ombudsman in Malta is even more independent and autonomous than the NHRI in your country, in so far as it is essentially accountable only to Parliament (in fact the Ombudsman and Commissioners appointed by him are Officers or Parliament) and in no way responds or is dependent on the Executive and the public administration that are subject to his scrutiny. My Office fully conforms to the Paris Principles and would certainly acquire the highest level of accreditation of the ICC if it asked for it.

That was one of the main reasons why I had proposed that the Office of the Parliamentary Ombudsman should ideally be developed into a NHRI, serving as an umbrella organisation, coordinating the work of other autonomous authorities that have a function to monitor human rights in specific areas of social activity eg Commissioner for Children, The Data and Freedom of Information Commissioners, The National Commission for Persons with Disability and others.

In other respects, the set up in your country provides extremely interesting data that needs to be studied and that could eventually serve as positive indicators on the way forward in Malta. It would be interesting to examine the relationship between your NHRI and your
In my case I strongly advise that a short visit to Malta would greatly help you in your efforts to arrive at a correct and objective appreciation of what type of institution the country needs, considering its size and limited resources on the one hand, and the discreet level of protection of fundamental human rights already attained in Malta on the other. I am quite sure the Ministry would be happy to arrange such a visit.

I am of the opinion that collecting the right data on the ground would be even more fruitful than a one to one meeting in your office. Of course it will be a pleasure for me to do so, if you think such an encounter would be useful.

Kind regards

Joseph Said Pullicino
Parliamentary Ombudsman

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Office of the Ombudsman

From: Koster, L (Mensenrechten) <l.koster@mensenrechten.nl>
Sent: 27 May 2014 11:48
To: Office of the Ombudsman
Subject: RE: Project to establish a NHRI in Malta

Dear Mr Pullicino,

Thank you very much for your extensive letter and the booklet you send me.
In the mean time I have read everything, very interesting.
Maybe there is some misunderstanding about my role towards the government of Malta. I have no remit whatsoever and I will not take such a remit.
I am just providing information about the process the Dutch NHRI has gone through and from that position I could provide you, the government and other parties involved with information and perhaps a vision. As to my experience governments in general do not right away only good things when establishing a NHRI I took the precaution to inform you and the two other institutions about the information we had provided to the government.
The discussion where to vest the new institution has also been very vivid in the Netherlands. At that time the Dutch Equal Treatment Commission, the study- and information Center of Utrecht University, the Ombudsman and the Data Protection Authority had formed a consortium to speed up the establishment of a NHRI. Finally the government decided to merge this with the equal treatment commission as there was “no ambition to extend the powers of the ombudsman”.
The present solution has strengthened the equal treatment and the ombudsman has lost nothing of his position. And I consider it as an advantage that there is more than one institution to criticize the government. But of course there is a difference in the number of inhabitants of our countries.
If you wish to bring the establishment of a NHRI further a national conference with stakeholders could be a possibility. The EU and the Council of Europe or national parliaments have organized such conferences in other countries too. Representatives of different European NHRI’s and equality bodies gave presentations about different models and solutions without promoting their own model but facilitating the discussion and the choice. I have contributed to such conferences myself in Belgium, Morocco, Turkey and Tunisia.
Anyway, is I can be of any help please let me know.

Met vriendelijke groet,

Laurien Koster
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Dear Ms Koster

I thank you for your email of 27 May and the necessary clarification you made on your relationship with the Malta Government.

I understand your position and appreciate your willingness to help. From your reply I gather that my concerns about the setting up of an NHRI in Malta have been positively addressed in your country and that you yourself contributed to finding solutions that proved acceptable to other institutions working in the field of fundamental human rights.

Your suggestions regarding the way forward have been noted and will be taken on board in discussions with the Malta Government.

Meanwhile thank you once again for your offer to continued help and I will not fail to avail myself of your offer if and when the occasion arises.

Sincerely yours

J Said Pullicino
Parliamentary Ombudsman