

**GUARDIAN OF GOOD GOVERNANCE: EXPANDING THE  
JURISDICTION OF THE PARLIAMENTARY OMBUDSMAN  
IN MALTA**

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## ABSTRACT

This dissertation, coinciding the 30<sup>th</sup> anniversary of the establishment of the Parliamentary Ombudsman in Malta, critically examines whether the institution's jurisdiction should be expanded to address contemporary challenges in governance and human rights protection. It focuses on two central questions: whether the Ombudsman's remit should be extended to cover private entities delivering essential public services, and whether a formal mandate should be conferred for the protection and promotion of fundamental rights.

The first part of the study assesses the implications of privatisation on administrative oversight. It contends that the current legal definition of 'public authority' under Maltese law is unduly narrow, excluding private bodies that perform functions of a public nature. Drawing on comparative models – most notably the broader interpretation found in the United Kingdom's Human Rights Act 1998 and the French concept of public service – the research argues for legislative reform to ensure such entities fall within the Ombudsman's jurisdiction. Relevant Maltese jurisprudence and academic proposals are examined to support these recommendations.

The second part of the study evaluates the absence of an explicit human rights mandate in the existing legal framework. It analyses two national proposals to establish the Ombudsman as Malta's National Human Rights Institution in accordance with the Paris Principles. While both proposals seek to enhance institutional capacity for rights protection, the 2024 proposal is preferred for its integration of a comprehensive human rights mandate directly into the Ombudsman's statutory role.

The dissertation concludes that expanding the Ombudsman's jurisdiction is both necessary and timely. It recommends specific legal reforms to equip the institution with the tools required to meet evolving public expectations, enhance accountability in the context of privatisation, and align Malta's institutional framework with international human rights standards.

**Keywords:** *Parliamentary Ombudsman, Jurisdiction, Privatisation, Human Rights, National Human Rights Institution.*

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### **Foreign Statutes**

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### **International Instruments**

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27 April 2010

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## **ABBREVIATIONS**

CA – Court of Appeal

Charter – Charter of Fundamental Rights of the European Union

COPC – Code of Organization and Civil Procedure

DoR – Defender of Rights

ECHR – European Convention on Human Rights

ENNHR – European Network of National Human Rights Institutions

EU – European Union

FH – Civil Court, First Hall

FR – France

GANHRI – Global Alliance of National Human Rights Institutions

GħSL – Għaqda Studenti tal-Liġi

HRA 1998 – Human Rights Act 1998 of the United Kingdom

HREC – Human Rights and Equality Commission

IOI – International Ombudsman Institute

NGO – Non-Governmental Organisation

NHRI – National Human Rights Institution

NZ – New Zealand

UK – United Kingdom

UN – United Nations

# INTRODUCTION

## Background

The Ombudsman originated in Sweden as the *Justitieombudsman*<sup>1</sup> by way of the Swedish Constitution of 1809.<sup>2</sup> The term ‘Ombudsman’ means ‘representative of the people’,<sup>3</sup> reflecting its primary function of ensuring that public officials and judges adhered to the law.<sup>4</sup> Its establishment aimed to promote democratic principles, particularly the rule of law and the separation of powers, by fostering legal compliance and balancing of power among the branches of Government.<sup>5</sup>

Malta’s journey towards creating its own Ombudsman evolved gradually over several years, reflecting broader global developments in the institution. The office of the Ombudsman was formally founded in 1995.<sup>6</sup> Prior to this, the Commission for Investigations of Injustice was set up to examine claims of injustice allegedly committed by the Government.<sup>7</sup> Eventually, the Ombudsman institution was established which provided Malta with:

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<sup>1</sup> Victor O Ayeni, ‘Ombudsmen as Human Rights Institutions: The New Face of a Global Expansion’, (9<sup>th</sup> International Ombudsman Institute (IOI) World Conference, Stockholm, June 2009) 1 <[https://www.theioi.org/downloads/32c9h/Stockholm%20Conference\\_09.%20Workshop%201\\_Victor%20Ayeni.pdf](https://www.theioi.org/downloads/32c9h/Stockholm%20Conference_09.%20Workshop%201_Victor%20Ayeni.pdf)> accessed 4 January 2025.

<sup>2</sup> The Office of the Parliamentary Ombudsman, ‘The Ombudsman Remedy in Malta – Speech by the Parliamentary Ombudsman at Quarterly Law Seminar’ (*Parliamentary Ombudsman Malta*, 26 April 2023) <<https://ombudsman.org.mt/en/news-and-events/the-ombudsman-remedy-in-malta-speech-by-the-parliamentary-ombudsman-at-quarterly-law-seminar/>> accessed 4 January 2025.

<sup>3</sup> Ayeni (n 1) 4.

<sup>4</sup> Hans-Gunnar Axberger, ‘The Original Recipe: 200 Years of Swedish Experience’, (9<sup>th</sup> IOI World Conference, Stockholm, June 2009) 5 <[https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.theioi.org/downloads/144gi/Stockholm%2520Conference\\_23.%2520Back%2520to%2520the%2520Roots\\_Hans%2520Gunnar%2520Axberger.pdf&ved=2ahUKEwjN5MrM8-6MAxVp2QIHaldH9UQFnoECBwQAQ&usg=AOvVaw1OcILkxzJh5d4ZRP522--](https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.theioi.org/downloads/144gi/Stockholm%2520Conference_23.%2520Back%2520to%2520the%2520Roots_Hans%2520Gunnar%2520Axberger.pdf&ved=2ahUKEwjN5MrM8-6MAxVp2QIHaldH9UQFnoECBwQAQ&usg=AOvVaw1OcILkxzJh5d4ZRP522--)> accessed 4 January 2025.

<sup>5</sup> Riitta-Leena Paunio, ‘The Ombudsman as Human Rights Defender’, (9<sup>th</sup> IOI World Conference, Stockholm, June 2009) 4 <[https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.theioi.org/downloads/22891/Stockholm%2520Conference\\_08.%2520Workshop%25201\\_Riitta-Leena%2520Paunio.pdf&ved=2ahUKEwj8oomB9e6MAxXN1QIHHWP6C78QFnoECBoQAQ&usg=AOvVaw0B9JIAtqOFpyi3uc83RNgg](https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.theioi.org/downloads/22891/Stockholm%2520Conference_08.%2520Workshop%25201_Riitta-Leena%2520Paunio.pdf&ved=2ahUKEwj8oomB9e6MAxXN1QIHHWP6C78QFnoECBoQAQ&usg=AOvVaw0B9JIAtqOFpyi3uc83RNgg)> accessed 4 January 2025.

<sup>6</sup> Tonio Borg, *Maltese Administrative Law* (Kite Group 2021) 127.

<sup>7</sup> Ivan Mifsud, *The Ombudsman Remedy in Malta: Too Soft a Take on the Public Administration?* (Book Distributors Limited Publications 2020) 12.

an independent institution with the function not only to monitor the acts or omissions of the public administration and defend citizens in pursuit of their rights, thus rendering it more open, transparent, and accountable, but also that the institution would have the required standing to give authoritative opinions on what society considers to be reasonable, just, fair, correct, and right.<sup>8</sup>

The Maltese legislator envisioned the Parliamentary Ombudsman (Ombudsman) as a vigilant watchdog over the public administration and a leading advocate for good governance.<sup>9</sup> Therefore, the Ombudsman was granted extensive powers to fulfil this role.<sup>10</sup> In fact, ‘the Ombudsman is responsible for investigating any action taken by or on behalf of the Government ... in the exercise of their administrative functions’,<sup>11</sup> and to notify the relevant department of his findings and justifications and potentially offer recommendations.<sup>12</sup> The Ombudsman’s jurisdiction essentially encompasses all organs of the public sector.<sup>13</sup> Thus, extending to the Government, statutory bodies, partnerships, local councils, and any entity in which the Government or any of the aforementioned bodies holds a controlling interest.<sup>14</sup>

Malta’s administrative landscape has undergone significant transformation in recent years, with widespread reforms across all economic sectors, including public administration.<sup>15</sup> Traditional regulations and practices have faded, while many public services have been privatised, and regulatory powers are now often vested in commercially driven private entities.<sup>16</sup> Consequently, citizens now face weaker safeguards against maladministration, as private entities fall outside the Ombudsman’s

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<sup>8</sup> Joseph Said Pullicino, ‘*The Right to Good Administration: The Ombudsman’s Role*’, in Edward Warrington (ed), *Serving People and Parliament: The Ombudsman Institution in Malta, 1995-2020* (The Office of the Ombudsman 2020) 55.

<sup>9</sup> The Office of the Ombudsman, ‘Quarterly Law Seminar’ (n 2).

<sup>10</sup> Ivan Mifsud, ‘The State’s Duty to Care when Acting in an Administrative Capacity’ (Doctoral Dissertation University of Malta 2008) 235.

<sup>11</sup> Ombudsman Act 1995, Chapter 385 of the Laws of Malta, Article 13(1).

<sup>12</sup> *ibid* Article 22(3).

<sup>13</sup> Borg, *Maltese Administrative Law* (n 6) 130.

<sup>14</sup> Ombudsman Act (n 11) Article 12.

<sup>15</sup> Joseph Sammut, ‘*The Ombudsman: A Knight in Shining Armour*’, in Edward Warrington (ed), *Serving People and Parliament: The Ombudsman Institution in Malta, 1995-2020* (The Office of the Ombudsman 2020) 14.

<sup>16</sup> *ibid*.

purview.<sup>17</sup> In light of these developments, as public administration adapts to growing economic and social demands, the Ombudsman's role must also evolve to address these new challenges.<sup>18</sup> The author will advocate for extending the Ombudsman's oversight over private entities delivering essential public services by introducing a comprehensive definition of 'public authority'.

Over time, the Ombudsman's role has expanded beyond ensuring good administration to actively promoting and protecting human rights.<sup>19</sup> While the Ombudsman acknowledged that the office was not initially designed to function as a human rights defender, it can still uphold the observance of human rights without going beyond its legal mandate.<sup>20</sup> Although current legislation does not explicitly confer this function,<sup>21</sup> the present Ombudsman is actively advocating for its inclusion.<sup>22</sup> Indeed, in November 2024, the Ombudsman's office proposed a revised Ombudsman Act which offers a 'practical, resource-efficient solution for establishing a National Human Rights Institution (NHRI) in Malta'.<sup>23</sup> Although the Government retains the final say on the most appropriate model for Malta, this author will support establishing an NHRI under the Ombudsman's administration and will argue in favour of the reform proposed in November 2024.

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<sup>17</sup> Parliamentary Ombudsman, 'On the Strengthening of the Ombudsman Institution' [2014] 35.

<sup>18</sup> Sammut (n 15) 14.

<sup>19</sup> Thomas Hammarberg, 'Ombudsmen Need Independence to Speak Out for Human Rights' (9<sup>th</sup> IOI World Conference, Stockholm, June 2009) 1

[https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.theioi.org/downloads/42ga1/Stockholm%2520Conference\\_10.%2520Workshop%25201\\_Thomas%2520Hammarberg.pdf&ved=2ahUKEwjbt-Bgu-MAxXg2gIHRRUCNUQFnoECB0QAQ&usg=AOvVaw3NrtKQyggG83eFWSVHBn\\_S](https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.theioi.org/downloads/42ga1/Stockholm%2520Conference_10.%2520Workshop%25201_Thomas%2520Hammarberg.pdf&ved=2ahUKEwjbt-Bgu-MAxXg2gIHRRUCNUQFnoECB0QAQ&usg=AOvVaw3NrtKQyggG83eFWSVHBn_S) accessed 4 January 2025.

<sup>20</sup> The Office of the Ombudsman, 'Quarterly Law Seminar' (n 2).

<sup>21</sup> The Office of the Ombudsman, 'Thematic Lecture: The Parliamentary Ombudsman Experience – Reflections on the Past, Present, and Looking to the Future' (*Parliamentary Ombudsman Malta*, 6 February 2024) <https://archive.ombudsman.org.mt/thematic-lecture-the-parliamentary-ombudsman-experience-reflections-on-the-past-present-and-looking-to-the-future/> accessed 4 January 2025.

<sup>22</sup> ibid.

<sup>23</sup> Parliamentary Ombudsman, 'Towards Establishing the Ombudsman as the National Human Rights Institution in Malta' [2024] 4 <https://www.ombudsman.org.mt/media/qwmcphlq/new-ombudsman-act-proposal.pdf> accessed 4 January 2025.

## **Research Question**

Taking the above into account, this dissertation conducts a legal analysis to explore the following research question:

Should the jurisdiction of the Parliamentary Ombudsman in Malta be expanded, and if so, how can this be achieved effectively, and to what aim?

## **Structure of Dissertation**

In addition to this introduction, the dissertation shall consist of 4 chapters:

### **Chapter I: Understanding the Functions and Jurisdiction of the Parliamentary Ombudsman of Malta**

The first chapter sets the stage by analysing the current role of the Maltese Ombudsman in upholding administrative justice, democracy and the rule of law, with a focus on his functions, jurisdiction, and role as a guardian of good governance.

### **Chapter II: Reassessing the Ombudsman's Jurisdiction in the Wake of Privatisation: Comparative Perspectives and Reform Proposals**

The second chapter aims to explore how the Ombudsman's oversight could be broadened to encompass private entities delivering essential services. It begins by outlining the privatisation process and its effect on the Ombudsman's existing remit. This is followed by a comparative analysis of the Maltese Ombudsman institution and its counterparts in New Zealand and France, to evaluate the scope of their oversight and highlight the main similarities and differences. The chapter then explores possible approaches to extending the Ombudsman's jurisdiction, with particular emphasis on redefining 'public authority' as developed under the Human Rights Act 1998 (HRA 1998) of the United Kingdom (UK). It concludes by addressing the main considerations and implications involved in adopting such a reform.

### **Chapter III: Expanding the Parliamentary Ombudsman's Jurisdiction to Include an Explicit Human Rights Mandate and Advocating for the Setting up of a National Human Rights Institution in Malta**

The third chapter will further explore the extension of the Ombudsman's jurisdiction, focusing specifically on human rights. It will begin by examining the Ombudsman's evolving role in the protection and promotion of human rights. The chapter will then assess the Maltese Ombudsman's current contributions to human rights within his existing mandate. While Malta's judicial framework provides adequate human rights protections, the absence of an NHRI remains a significant gap. Therefore, the chapter will discuss the Ombudsman's ongoing efforts to take on this role. The main thrust of this chapter will be the analysis of the proposals made by the former Ombudsman in 2013 and by the present Ombudsman in 2024, respectively, to establish a Maltese NHRI. In doing so, it will highlight the reasoning behind these proposals and the advantages of the Ombudsman institution serving as the NHRI. This chapter will conclude by considering the practical implications of establishing such an institution, particularly concerning Malta's eligibility for accreditation by the Global Alliance of National Human Rights Institutions (GANHRI).

### **Chapter IV: Conclusion**

The fourth chapter will serve as the concluding chapter, synthesising the main findings from the preceding chapters. It will include a reconsideration of the research question and an evaluation of the dissertation. This chapter will also highlight notable observations, areas for further analysis, and anticipated future developments in the field. In doing so, it will also present the author's reflections and recommendations.

### **Research Methodology**

This dissertation adopts doctrinal, comparative, and empirical research methodologies. Doctrinal analysis forms the basis for examining Maltese law to assess the scope of the Ombudsman's jurisdiction and functions. A comparative approach is employed to evaluate the Ombudsman frameworks in New Zealand and France. New Zealand was selected because Maltese Ombudsman legislation is based on the former's model, while

France was chosen for its broader mandate, offering valuable contrasts and reform insights. The empirical component of this research highlights the implications of the Ombudsman's limited mandate, particularly in relation to citizens' access to non-judicial remedies. This is supported by a qualitative interview with the current Ombudsman, providing perspectives that enrich the legal and comparative analysis, all aimed at addressing the central research question.

This dissertation states the position as of 20<sup>th</sup> March 2025.

## **Literature Review**

This dissertation results from research conducted in the field of public law and administrative law. Due to word limit constraints and the specific nature of the topic, this section is limited to local scholarly sources. Hence, the following is a survey of the current and salient local scholarly sources including dissertations, a long essay, two books, and a proposed bill.

Paula Mifsud Bonnici's dissertation<sup>24</sup> compared the Maltese Ombudsman institution under the 1995 Ombudsman Act to that of other foreign jurisdictions, examining its jurisdictional limits and emphasising the need for the Ombudsman to take on a stronger role in defending fundamental human rights. Joseph Chetcuti's long essay<sup>25</sup> discussed the issue of non-compliance with the Ombudsman, proposing *inter alia* that he should monitor private entities that provide public services. Martha Mifsud<sup>26</sup> examined the role of non-judicial defenders in human rights, arguing for formal recognition of the Ombudsman as a human rights defender. Anita Giordimaina<sup>27</sup> evaluated the Ombudsman institution after twenty years of being in operation. She advocated for

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<sup>24</sup> Paula Mifsud Bonnici, 'The Ombudsman under the Ombudsman Act of 1995: A Comparative Study' (Master's Dissertation, University of Malta 1997).

<sup>25</sup> Joseph Chetcuti, 'The Institution of the Ombudsman in Malta: The Issue of Non-Compliance' (Diploma Long Essay, University of Malta 2012).

<sup>26</sup> Martha Mifsud, 'The Independence and Impartiality of Non-Judicial Defenders of Human Rights in Malta: Time We Questioned It!' (LL.D Thesis, University of Malta 2014).

<sup>27</sup> Anita Giordimaina, '20 Years of Ombudsman in Malta: An Appraisal' (LL.D Thesis, University of Malta 2015).

extending the Ombudsman's oversight to private entities providing essential services and argued in favour of the Ombudsman serving as Malta's NHRI.

Relevant book publications include Ivan Mifsud's book,<sup>28</sup> in which one chapter examines the Ombudsman's jurisdiction and highlights the obstacles that undermine it, such as privatisation. Similarly, Tonio Borg<sup>29</sup> dedicates a chapter of his book to describe the Ombudsman institution. When discussing jurisdiction, he cites the Ombudsman's 2014 Annual Report, to support extending oversight to private companies delivering essential public services. Additionally, *Għaqda Studenti tal-Liġi* (GħSL) proposed the Judicial Review Act,<sup>30</sup> which aims to redefine 'public authority' in light of privatisation.

While previous dissertations have advocated for expanding the Ombudsman's jurisdiction to address both privatisation and human rights, most stop short of providing an in-depth analysis, focusing instead on the institution's purpose, structure, strengths, and weaknesses. This study differs by focusing exclusively on the Ombudsman's remit, offering a comprehensive examination of both aspects. It also introduces a novel argument for redefining 'public authority' in Maltese law to address privatisation, a perspective not previously presented in academic discourse. Moreover, it thoroughly analyses the present Ombudsman's proposal to amend the Ombudsman Act, explicitly incorporating human rights functions and having the Ombudsman serve as Malta's NHRI.

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<sup>28</sup> Mifsud, *The Ombudsman Remedy* (n 7).

<sup>29</sup> Borg, *Maltese Administrative Law* (n 6).

<sup>30</sup> GħSL, 'Judicial Review Act: A Proposed Bill to Reform a Fragmented and Improper Law', (GħSL 2023) <<https://www.ghsl.org/wp-content/uploads/2023/04/Judicial-Review-Act-A-Proposed-Bill-to-Reform-a-Fragmented-and-Improper-Law.pdf>> accessed 4 January 2025.

# **CHAPTER I: UNDERSTANDING THE FUNCTIONS AND JURISDICTION OF THE PARLIAMENTARY OMBUDSMAN OF MALTA**

## **1.1 Introduction**

The Parliamentary Ombudsman has been described as ‘the shield of the citizen and the conscience of the Public Administration’,<sup>31</sup> owing to his dual role in safeguarding aggrieved citizens, while simultaneously supporting the Government in improving the efficiency of the public service by identifying administrative shortcomings.<sup>32</sup> Therefore, to effectively argue for the expansion of the Ombudsman’s jurisdiction, as well as understand the methods for achieving this and its significance, one must first have a clear understanding of his existing role in promoting administrative justice, democracy and the rule of law.

## **1.2 The Functions of the Parliamentary Ombudsman**

### **1.2.1 The Parliamentary Ombudsman as a Defender of Citizens’ Rights**

The main function of the Ombudsman is to provide aggrieved citizens with a platform to challenge administrative decisions, ensuring that their claims are examined and that appropriate recommendations are made.<sup>33</sup> Hence, the Ombudsman aims to foster administrative justice, fairness, equity, and transparency within Malta’s public sector, while enabling and motivating citizens to defend their rights against injustice, maladministration, and improper discrimination.<sup>34</sup>

In this regard, it is essential to note that the Ombudsman has the power to initiate investigations independently, without requiring formal complaints from citizens, although these investigations are often prompted by citizens seeking redress.<sup>35</sup> Thus,

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<sup>31</sup> Parliamentary Ombudsman, ‘The State’s Duty to Inform’ (The Office of the Ombudsman 2015) 6.

<sup>32</sup> Mifsud, ‘The State’s Duty to Care’ (n 10) 236.

<sup>33</sup> Parliamentary Ombudsman, ‘Strengthening the Ombudsman Institution’ (n 17) 4.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid* 5.

by initiating investigations, the Ombudsman is proactively protecting citizens' rights by overseeing the actions of all the bodies that fall within his jurisdiction.<sup>36</sup>

Similar to many other Ombudsmen worldwide, the Maltese Ombudsman does not possess executive authority in the course of his principal duty as a protector of the rights of citizens.<sup>37</sup> The Ombudsman can suggest a variety of remedies, but nevertheless, they may be dismissed by public authorities since they are not legally enforceable.<sup>38</sup> Therefore, in contrast to Courts of law that issue binding decisions, the Ombudsman serves as an intermediary between citizens and the public administration.<sup>39</sup> Moreover, the success of the Ombudsman in achieving certain outcomes is dependent on 'the quality of the arguments he makes, the respect he commands in the country and the moral authority inherent in his Office'.<sup>40</sup>

### **1.2.2 The Parliamentary Ombudsman as a Catalyst for the Improvement of the Public Administration**

Another important function of the Ombudsman, which although not explicitly stated in the Ombudsman Act is still strongly pursued, is the institution's role in fostering improvements within the public administration.<sup>41</sup> Mifsud states that this role:

involves taking a proactive approach and becoming a watchdog with a positive, cooperative outlook, who highlights administrative shortcomings regarding them as lessons to be learned, errors to be avoided in the future;<sup>42</sup>

He also engages in discussions on these issues and provides guidance accordingly.<sup>43</sup> As a result, the Ombudsman has worked with the Government and the public administration on numerous occasions to establish, *inter alia*, internal complaint systems, consumer protection bodies, and open and just promotion processes.<sup>44</sup>

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<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid* 6.

<sup>42</sup> Mifsud, *The Ombudsman Remedy* (n 7) 15.

<sup>43</sup> *ibid.*

<sup>44</sup> Parliamentary Ombudsman, 'Strengthening the Ombudsman Institution' (n 17) 6-7.

Moreover, there have been times where public authorities themselves would have requested the Ombudsman's guidance to develop fair procedures that address citizens' concerns.<sup>45</sup>

### **1.3 The Parliamentary Ombudsman as a Guardian of Good Governance**

The fundamental right to good administration enables citizens to insist that public authorities, who are responsible for managing public matters, adhere to the principles of good governance.<sup>46</sup> In turn, this ensures that public authorities uphold good administration.<sup>47</sup> Hence, this fundamental right 'calls for ongoing promotion, protection, and affirmation, until it becomes an effective tool securing its benefits, to which all are entitled.'<sup>48</sup>

In countries like Malta striving for democratic development, the Ombudsman serves as a guardian of good governance ensuring that the right to good administration is protected and promoted.<sup>49</sup> It is up to the Ombudsman to guarantee that citizens can easily exercise this right, while also providing strong safeguards against maladministration or abuse of power.<sup>50</sup> The Council of Europe set out principles of good governance, most of which align closely with the objectives of the Ombudsman institution, namely: responsiveness to citizens; efficiency and effectiveness, openness and transparency; the rule of law; ethical conduct; competence and capacity; and accountability.<sup>51</sup> It is held that:

These principles draw attention to the ultimate purpose of parliamentary scrutineers such as the Ombudsman which extends beyond resolving grievances or censuring failure to comply with the rules. In the turbulent, conflict-ridden,

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<sup>45</sup> *ibid* 7.

<sup>46</sup> Joseph Said Pullicino, '*The Right to Good Administration Part 1: A Philosophical and Legal Exposition*', in Edward Warrington (ed), *Serving People and Parliament: The Ombudsman Institution in Malta, 1995-2020* (The Office of the Ombudsman 2020) 21.

<sup>47</sup> *ibid* 22.

<sup>48</sup> *ibid*.

<sup>49</sup> *ibid*.

<sup>50</sup> *ibid* 23

<sup>51</sup> Anthony C Mifsud, '*Serving People and Parliament in an Era of Transformation*', in Edward Warrington (ed), *Serving People and Parliament: The Ombudsman Institution in Malta, 1995-2020* (The Office of the Ombudsman 2020) 77.

and profoundly unequal societies of the twenty-first century, the Ombudsman affirms common values and nurture public virtue; they challenge the conflicts of interest and maladministration which corrode both social harmony and the integrity of governance.<sup>52</sup>

In this respect, the Ombudsman has established and continuously developed a framework for good administration.<sup>53</sup> In 1997, the Ombudsman had introduced a concise checklist encouraging public officials to evaluate their performance and refine their practices accordingly.<sup>54</sup> This initiative led to the 2004 ‘Guide to Standards of Best Practice for Good Public Administration’<sup>55</sup> and, in 2009, the ‘Guidelines for Good Governance’. The latest edition comprises of headings such as ‘Act lawfully’, ‘Provide open, accessible and accountable service’, ‘Make amends for injustice or hardship resulting from maladministration or service failure’ and ‘Seek continuous improvement’.<sup>56</sup> Furthermore, he has promoted these principles through annual reports, case notes, publications, and investigation reports submitted to government authorities.<sup>57</sup>

## 1.4 Jurisdiction of the Parliamentary Ombudsman

Maltese legislation explicitly establishes the Ombudsman’s remit,<sup>58</sup> authorising him to examine ‘administrative actions carried out by or on behalf of the Government and other authorities.’<sup>59</sup>

### 1.4.1 Acts subject to the Ombudsman’s Jurisdiction

In carrying out his investigation, the Ombudsman assesses whether the action of the public administration:

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<sup>52</sup> *ibid.*

<sup>53</sup> Mifsud, *The Ombudsman Remedy* (n 7) 15.

<sup>54</sup> The Office of the Ombudsman, ‘Annual Report 1997’ [1998] 14.

<sup>55</sup> The Office of the Ombudsman, ‘Annual Report 2004’ [2005] 104-106.

<sup>56</sup> Parliamentary Ombudsman, ‘Guidelines for Good Governance’ (The Office of the Ombudsman 2009).

<sup>57</sup> Mifsud, ‘The State’s Duty to Care’ (n 10) 237.

<sup>58</sup> Interview with Judge Emeritus Joseph Zammit McKeon, Maltese Parliamentary Ombudsman (Ombudsman Office Valletta 18 February 2025).

<sup>59</sup> Ombudsman Act (n 11) Preamble.

appears to have been contrary to law; or was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a law or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or was based wholly or partly on a mistake of law or fact; or was wrong<sup>60</sup>, or

a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.<sup>61</sup>

The law clearly defines the actions that can be examined by the Ombudsman. Interestingly, this provision distinguishes between illegality and maladministration, meaning that an action can be unjust, oppressive, or incorrect even if it is legally permissible.<sup>62</sup>

#### **1.4.2 Acts not subject to the Ombudsman's Jurisdiction**

The Second Schedule to the Ombudsman Act lists six actions that fall outside of the investigative scope of the Ombudsman. These include: any issue confirmed by the Prime Minister as impacting Malta's security; actions in areas confirmed by the Minister for Foreign Affairs as impacting Malta's relations with other governments or international organisations; 'action taken by the Minister responsible for justice under the Extradition Act'; 'any criminal investigation by the Police'; the institution of civil or criminal proceedings before Maltese Courts or tribunals, or of proceedings regarding a military offence under the Malta Armed Forces Act, or cases before an international court or tribunal; and finally, the use of the Prime Minister's authority under Article 515 of the Criminal Code.<sup>63</sup>

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<sup>60</sup> ibid Article 22(1).

<sup>61</sup> ibid Article 22(2).

<sup>62</sup> Borg, *Maltese Administrative Law* (n 6) 129.

<sup>63</sup> Ombudsman Act (n 11) Second Schedule.

#### **1.4.3 Persons and Authorities subject to the Ombudsman's Jurisdiction**

Article 12(1) of the Ombudsman Act expressly provides for who falls within the remit of the Ombudsman's jurisdiction, which essentially includes all organs of the public sector.<sup>64</sup> These include the Government, its departments and authorities; Ministers and Parliamentary Secretaries; members of authorities; statutory bodies and partnerships; or any other body 'in which the Government or any one or more of the said bodies aforesaid or any combination thereof has a controlling interest or over which it has effective control, including any director, member, manager or other officer'; or any local councils, along with their committees, mayors, councillors and members of staff.<sup>65</sup>

Moreover, Article 2(2) of the Ombudsman Act expands this list to include agencies regulated under Article 26 of the Public Administration Act of Malta such as the Court Services Agency and the Land Registration Agency; foundations, statutory bodies, partnerships and other bodies established directly by the Government or by government bodies; as well as the chairmen and members of boards, committees, commissions, and other decision-making bodies, whether created by law or by administrative action.

#### **1.4.4 Persons and Authorities not subject to the Ombudsman's Jurisdiction**

In turn, the law explicitly identifies the persons and bodies which are excluded from the Ombudsman's scrutiny.<sup>66</sup> These include the President, the House of Representatives, and the Cabinet,<sup>67</sup> whose exclusion ensures consistency with Malta's legal and constitutional framework.<sup>68</sup> Similarly, the Judiciary and any tribunals established by or under the law.<sup>69</sup> This is because their main purpose is to administer justice, hence making them unsuitable for review by the Ombudsman.<sup>70</sup> This exclusion also applies to

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<sup>64</sup> Borg, *Maltese Administrative Law* (n 6) 130.

<sup>65</sup> Ombudsman Act (n 11) Article 12(1).

<sup>66</sup> *ibid* Article 12(3)(a).

<sup>67</sup> *ibid* First Schedule, Part A.

<sup>68</sup> HR Deb 12 June 1995 (7 430) 566.

<sup>69</sup> Ombudsman Act (n 11) First Schedule, Part A.

<sup>70</sup> HR Deb (n 68) 566.

bodies, *inter alia*, the Commission for the Administration of Justice, the Electoral Commission, and the Malta Broadcasting Authority.<sup>71</sup>

Moreover, the Public Service Commission and the Armed Forces of Malta are generally exempt from the Ombudsman's purview; however, the Ombudsman may examine issues pertaining to appointments, promotions, pay, and pension rights within the Armed Forces of Malta, if 'proof to the satisfaction of the Ombudsman is produced showing that all available means of redress have been exhausted'.<sup>72</sup>

## **1.5 Conclusion**

A clear understanding of the Ombudsman's functions and authority in reviewing administrative actions not only emphasises his vital role in fostering good governance, but also highlights the need to broaden his jurisdiction, which would, in turn, enhance his capacity to uphold administrative justice, reinforcing accountability and fairness within the public sector.

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<sup>71</sup> Ombudsman Act (n 11) First Schedule, Part A.

<sup>72</sup> *ibid* Article 12(3)(b).

# **CHAPTER II: Reassessing the Ombudsman's Jurisdiction in the Wake of Privatisation: Comparative Perspectives and Reform Proposals**

## **2.1 Introduction**

The Ombudsman institution requires continuous development to remain effective in overseeing the public administration and protecting citizens' rights.<sup>73</sup> A pertinent issue that needs to be addressed is whether the Ombudsman's mandate should be revised to expand his jurisdiction to areas that currently fall outside of his authority, or that have been excluded due to evolving social and economic factors.<sup>74</sup> This discussion begins by explaining the privatisation process and its impact on the Ombudsman's jurisdiction. The author then proceeds by conducting a comparative analysis of the Maltese Ombudsman and its counterparts in New Zealand and France. Finally, it will examine the potential extension of the Ombudsman's jurisdiction and shed light on the challenges that such a reform may entail.

## **2.2 The Privatisation of Essential Public Services and its Impact on the Parliamentary Ombudsman's Jurisdiction**

To assess how privatisation of essential services has affected the Ombudsman's authority, it is crucial to first examine the distinction between the public and private sectors in delivering these services. Originally, these were regarded as separate domains, each governed by its own legal framework.<sup>75</sup> The public sector was understood as the domain in which the State interacts with citizens, while the private sector operated under market-driven principles.<sup>76</sup>

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<sup>73</sup> The Office of the Ombudsman, 'Annual Report 2014' [2015] 23  
<<https://ombudsman.org.mt/media/p1vk05/office-of-the-ombudsman-annual-report-2014.pdf>>  
accessed 20 January 2025.

<sup>74</sup> Parliamentary Ombudsman, 'Strengthening the Ombudsman Institution' (n 17) 34.

<sup>75</sup> Javed Sadiq Malik, 'The Ombudsman Reaching Outside the Public Sector', (9<sup>th</sup> IOI World Conference, Stockholm, June 2009) 1  
<[https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.theioi.org/downloads/52kah/Stockholm%2520Conference\\_11.%2520Workshop%25202\\_Javed%2520Sadiq%2520Malik.pdf&ved=2ahUKEwjSofff4\\_KMAxWR4QIHHc6bEnAQFnoECBqQAQ&usg=AOvVaw2hb2-locUm4c6u2w0HnEaX](https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.theioi.org/downloads/52kah/Stockholm%2520Conference_11.%2520Workshop%25202_Javed%2520Sadiq%2520Malik.pdf&ved=2ahUKEwjSofff4_KMAxWR4QIHHc6bEnAQFnoECBqQAQ&usg=AOvVaw2hb2-locUm4c6u2w0HnEaX)> accessed 20 January 2025.

<sup>76</sup> ibid.

Over time, societal advancements have further strengthened consumer rights, particularly in relation to essential services necessary for daily life.<sup>77</sup> Liberalisation and privatisation of public services have blurred this distinction because many of these essential services, initially managed by public authorities, transitioned to the private sector which operates within a free market.<sup>78</sup> These private companies now wield public power without the direct involvement of the State.<sup>79</sup> Consequently, this has led to a growing trend of delegating public power to private companies or forming public-private partnerships to execute certain functions.<sup>80</sup>

Privatisation, when properly implemented, can improve service efficiency and sustainability while attracting foreign investment.<sup>81</sup> It also aligns with European Union (EU) Directives that favour the State's role as a regulator rather than as a service provider.<sup>82</sup> However, this shift must not deprive consumers of their right to seek redress from the Ombudsman in cases of maladministration.<sup>83</sup> In a small State like Malta, total privatisation risks creating monopolies, limiting consumer choice, and eroding independent oversight, ultimately weakening safeguards for fair and accountable service delivery.<sup>84</sup>

This transition raises questions about whether administrative law offers adequate protection in such scenarios,<sup>85</sup> since its mechanisms typically do not extend to private bodies.<sup>86</sup> Consequently, administrative law has had to evolve to address these changes.<sup>87</sup> As Javed Sadiq Malik notes, 'The ability of administrative law to respond to such power will depend largely on the extent that it can overcome the limitations imposed on it by the public-private dichotomy'.<sup>88</sup> He also observes that various

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<sup>77</sup> Parliamentary Ombudsman, 'Strengthening the Ombudsman Institution' (n 17) 79.

<sup>78</sup> *ibid.*

<sup>79</sup> Malik (n 75) 1.

<sup>80</sup> *ibid* 2.

<sup>81</sup> The Office of the Ombudsman, 'Ombudsplan 2017' [2016] 12.

<sup>82</sup> *ibid* 13.

<sup>83</sup> *ibid* 12.

<sup>84</sup> *ibid* 13.

<sup>85</sup> Malik (n 75) 2.

<sup>86</sup> *ibid* 1.

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

jurisdictions have addressed this by expanding Ombudsman oversight to include the private sector.<sup>89</sup>

The limitations of administrative law in addressing privatisation are evident in Malta, where the Ombudsman's jurisdiction has been significantly reduced. Initially, when the Ombudsman Act was enacted in 1995, the Ombudsman's jurisdiction was broad, covering all public entities.<sup>90</sup> However, as privatisation peaked in the early 2000s, the Ombudsman's authority over numerous important public services, such as telecommunications and major state-owned entities,<sup>91</sup> including Malta's sole airport, the postal service, the shipyards and various banks,<sup>92</sup> was significantly curtailed.<sup>93</sup> This transition of service delivery and service provider status, achieved through the sale of public assets and outsourcing of state services, aimed to enhance service delivery and relocate government resources to more essential areas.<sup>94</sup>

In this regard, Mifsud draws from personal experience working with the Ombudsman institution, stating that following the privatisation of the Malta International Airport, the entity refused to engage with the Ombudsman with regard to pending investigations.<sup>95</sup> Subsequently, not only was the Ombudsman forced to reject new complaints related to these privatised entities, but had to cease all investigations which were underway at time of privatisation.<sup>96</sup>

This jurisdictional gap has had tangible effects, as illustrated in Case G 117,<sup>97</sup> where the Ombudsman could not complete an investigation after Maltacom plc was privatised. The complainant, an aggrieved employee, approached the Ombudsman to challenge the

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<sup>89</sup> ibid.

<sup>90</sup> Mifsud, *The Ombudsman Remedy* (n 7) 25.

<sup>91</sup> Edward Warrington (ed), 'Serving People: Trends and Themes in the Ombudsman's Caseload', in Edward Warrington (ed), *Serving People and Parliament: The Ombudsman Institution in Malta, 1995-2020* (The Office of the Ombudsman 2020) 123.

<sup>92</sup> Mifsud, *The Ombudsman Remedy* (n 7) 25.

<sup>93</sup> Warrington (n 91) 123.

<sup>94</sup> The Office of the Ombudsman, 'Annual Report 2010' [2011] 31

<https://ombudsman.org.mt/media/lxynl0ou/annual-report-2010.pdf> accessed 20 January 2025.

<sup>95</sup> Mifsud, *The Ombudsman Remedy* (n 7) 25.

<sup>96</sup> ibid.

<sup>97</sup> The Office of the Ombudsman, 'Case Notes 2008' [2008] 26 (note).

board's selection for Head of the Mechanical Maintenance Unit after his appeal was unsuccessful.<sup>98</sup> Yet, since the company was privatised after the complaint was submitted, the Ombudsman's inquiry was confined to the company's conduct before privatisation, as its new status rendered it beyond his jurisdiction.<sup>99</sup> As a result, the Ombudsman lacked the necessary authority to assess the complainant's request for appointment after the selected candidate retired.<sup>100</sup>

## **2.3 The Former Parliamentary Ombudsman's Stance on This Jurisdictional Limitation**

### **2.3.1 Advocacy for Reform**

The Ombudsman has consistently called for independent supervision of private entities delivering essential public services.<sup>101</sup> Various proposals sought to extend his remit to such activities, granting him the authority to investigate levels of service provision, examine complaints regarding quality standards, and ensure that these obligations are upheld in the best interest of citizens.<sup>102</sup>

Despite this, the 2010 Annual Report noted that this proposal was overlooked.<sup>103</sup> However, the amendments made to the Ombudsman Act in 2010 'left the door ajar and served to register the first inroad into areas that were hitherto out of bounds for the Maltese ombudsman institution.', by granting the Commissioners for Administrative Investigations wider powers of review, particularly concerning public-private partnerships in the areas of healthcare and higher education.<sup>104</sup> Thus, recognising that certain privatised sectors, although under private ownership, continue to provide essential public services.<sup>105</sup>

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<sup>98</sup> *ibid.*

<sup>99</sup> *ibid* 29.

<sup>100</sup> *ibid* 29-30.

<sup>101</sup> The Office of the Ombudsman, 'Annual Report 2010' (n 94) 30.

<sup>102</sup> *ibid* 30-31.

<sup>103</sup> *ibid* 31.

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*

The author believes that while the amendment recognised the public-private dichotomy, it did so selectively, covering only certain sectors. This initial extension should have led to broader reforms extending oversight to other essential privatised sectors. The Ombudsman had pledged to continue advocating for this change, ‘urging the authorities to counter the erosion of his jurisdiction to provide an efficient oversight of service provision that has been divested in favour of private operators.’<sup>106</sup> Fifteen years later, the time is ripe for the Maltese legislator to pursue a more comprehensive solution to address this issue.

### **2.3.2 Proposed Expansion of the Parliamentary Ombudsman’s Jurisdiction to Cover Essential Public Services**

In January 2014, the former Ombudsman, Chief Justice Emeritus Joseph Said Pullicino, proposed several recommendations to improve the Ombudsman institution.<sup>107</sup> Among these, he advocated for an expansion of his jurisdiction, with the first recommendation focusing on extending oversight to essential services delivered by private service providers.<sup>108</sup>

He argued that privatisation removed several economic sectors from the Ombudsman’s scrutiny<sup>109</sup> as his mandate is limited to entities of the public sector.<sup>110</sup> Despite being managed by the private sector, these services still carry significant public service obligations.<sup>111</sup> Hence, they should be subject to scrutiny to guarantee that consumers continue to receive essential services at a standard deemed necessary for society.<sup>112</sup> However, this proposed jurisdictional expansion should be restricted to the rendering of services and their impact on consumers in terms of their quality and effectiveness.<sup>113</sup>

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<sup>106</sup> *ibid* 33.

<sup>107</sup> Parliamentary Ombudsman, ‘On the Strengthening of the Ombudsman Institution Executive Summary’ (The Office of the Ombudsman 2014) 1.

<sup>108</sup> *ibid* 6.

<sup>109</sup> *ibid*.

<sup>110</sup> Ombudsman Act (n 11) Article 12.

<sup>111</sup> Parliamentary Ombudsman, ‘Executive Summary’ (n 107) 6.

<sup>112</sup> *ibid*.

<sup>113</sup> *ibid*.

To implement this reform, he proposed amending the Ombudsman Act to specify which private entities providing essential public services should fall within his jurisdiction, the scope of his jurisdiction, and how it would be exercised.<sup>114</sup>

## **2.4 A Comparative Analysis of Different Ombudsman Models: New Zealand, France, and Malta**

### **2.4.1 A Comparative Analysis between the New Zealand Ombudsman and the Maltese Ombudsman**

#### **2.4.1.1 The New Zealand Ombudsman Model**

Section 13(1) of New Zealand's Ombudsmen Act 1975 defines the scope of the Ombudsman's jurisdiction by specifying the actions and entities subject to review. The Ombudsman may investigate decisions, recommendations, acts, or omissions concerning administrative matters that impact individuals.<sup>115</sup> This jurisdiction extends to public service agencies and organisations listed in Parts 1 to 1C and 2 of the First Schedule, committees and subcommittees of local organisations listed in Part 3 of the First Schedule, and officers, employees, or members of these entities.<sup>116</sup>

Sections 13(7) and (8) of the New Zealand Ombudsmen Act 1975 outline exclusions from the Ombudsman's jurisdiction. Subsection (7)<sup>117</sup> prevents investigations into matters where the complainant has a legal right of appeal, objection, or review, as well as actions by trustees, legal advisers to the Crown, and constables (except with regard to terms and conditions of service). Subsection (8)<sup>118</sup> prevents investigations into military matters concerning members of the New Zealand Navy, Army, or Air Force if they relate to service conditions or military commands and penalties. Moreover, the Ombudsman's jurisdiction does not extend to the private sector, so complaints cannot be brought

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<sup>114</sup> *ibid.*

<sup>115</sup> Ombudsmen Act 1975, s 13(1) (NZ).

<sup>116</sup> *ibid.*

<sup>117</sup> *ibid* s 13(7).

<sup>118</sup> *ibid* s 13(8).

against private individuals, companies, or private training establishments.<sup>119</sup> Other exclusions include lawyers, members of Parliament, decisions made by a full council, and rulings issued by courts or tribunals.<sup>120</sup>

Following widespread privatisation in the 1980s and 1990s, both public and private sectors in New Zealand began delivering public services.<sup>121</sup> This poses as a potential risk to citizens because private entities are typically not subject to the protective mechanisms of administrative law.<sup>122</sup> While some public law tools, such as judicial review, have been extended to the private sector, many others are still limited to the public sector.<sup>123</sup> Alastair Cameron highlights that this limitation is particularly concerning for the Ombudsman's role.<sup>124</sup> Many argue that services once provided by the public sector and are now outsourced to private companies should be considered as public services.<sup>125</sup> Despite calls for reform, no changes have been made to address this gap.

#### **2.4.1.2 Comparative Observations**

Malta's Ombudsman model<sup>126</sup> is based on that of New Zealand,<sup>127</sup> with both institutions having jurisdiction over Government and the public sector.<sup>128</sup> However, both institutions lack jurisdiction over the private sector. This stems from how the respective institutions define public services, by focusing on the entity delivering the service rather than the nature of that service. Alastair, like the former Maltese Ombudsman, maintains that any

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<sup>119</sup> Ombudsman, 'How the Ombudsman Works', (*Ombudsman*, 2023)

<<https://www.ombudsman.parliament.nz/what-ombudsman-can-help/complaints-about-government-agencies/how-ombudsman-works>> accessed 2 February 2025.

<sup>120</sup> *ibid.*

<sup>121</sup> Alastair Cameron, 'The Ombudsmen: Time for a Jurisdictional Expansion: The Case for Extending the Jurisdiction of the Statutory Ombudsmen to Cover the Exercise of Public Power in the Private Sector' [2001] 32 550 <<https://heinonline.org.ejournals.um.edu.mt/HOL/PrintRequest?collection=journals&handle=hein.journals/vuwl32&id=649&print=section&div=31&ext=.pdf&format=PDFsearchable&submit=Print%2FDownload>> accessed 2 February 2025.

<sup>122</sup> *ibid.*

<sup>123</sup> *ibid.*

<sup>124</sup> *ibid.*

<sup>125</sup> *ibid* 554.

<sup>126</sup> For a description of the Maltese Ombudsman's jurisdiction, see Chapter 1.4.

<sup>127</sup> Said Pullicino (n 8) 53.

<sup>128</sup> Ombudsman Act (n 11) Article 12(1) ; Ombudsmen Act 1975 (n 135) s 13(1) (NZ).

jurisdictional expansion should not allow interference in commercial decisions, but should simply permit investigation into unfair practices.<sup>129</sup> Consequently, citizens in both jurisdictions lack Ombudsman protection against the misuse of public power by private entities. Hence, this author argues that it is time for both Malta and New Zealand to take steps to grant this necessary jurisdictional extension.

#### **2.4.2 A Comparative Analysis between the French Defender of Rights (Défenseur des Droits) and the Maltese Ombudsman**

The main responsibility of the Ombudsman globally is to defend individuals from government misconduct or abuse of power.<sup>130</sup> The institution's evolution is shaped by the unique political and legal developments within each country.<sup>131</sup> This is particularly evident in the different paths taken by France and Malta, influenced by their distinct administrative and public service traditions.<sup>132</sup>

##### **2.4.2.1 The Defender of Rights of France**

The *Défenseur des Droits* (Defender of Rights)<sup>133</sup> was established by Organic Law 2011-333 on 29<sup>th</sup> March 2011.<sup>134</sup> The institution is tasked with safeguarding rights and freedoms, promoting equality, and ensuring that authorities uphold democratic principles.<sup>135</sup>

Article 71-1 of the French Constitution states that, 'The Defender of Rights shall ensure the due respect of rights and freedoms...' in five areas defined by law.<sup>136</sup> Article 4(1) of

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<sup>129</sup> Alastair (n 121) 569.

<sup>130</sup> Giordimaina (n 27) 72.

<sup>131</sup> *ibid.*

<sup>132</sup> Ivan Mifsud and Cécile Plaidy, 'The Roles of Administrative Courts and Ombudsmen in France and Malta: A Review of Two Contrasting Systems' (Brill 2006) 29  
<<https://www.um.edu.mt/library/oar/bitstream/123456789/114324/1/The%20roles%20of%20administrative%20courts%20and%20ombudsmen%20in%20France%20and%20Malta%20-%20a%20review%20of%20two%20contrasting%20systems%282023%29.pdf>> accessed 2 February 2025.

<sup>133</sup> Giordimaina (n 27) 74.

<sup>134</sup> Sophie Latraverse, 'Report on Measures to Combat Discrimination Country Report 2012' [2013] 10.

<sup>135</sup> Giordimaina (n 27) 74.

<sup>136</sup> Loi Organique 2011-333 du 29 mars 2011 relative au Défenseur des droits [Law 2011-333 of March 29, 2011 on the Defender of Rights] Article 4 (FR).

Organic Law 2011-333 specifies that the Defender of Rights (DoR) is responsible ‘To defend rights and freedoms in the context of relations with state administrations, local authorities, public institutions and bodies entrusted with a public service mission’.

Article 4(1) of Organic Law 2011-333 highlights the DoR’s oversight which covers both public and private entities tasked with public service obligations. An organisation was broadly interpreted as having a ‘public service mission’ when its role was to serve the public interest or when it was subject to administrative control.<sup>137</sup> As held by L Neville Brown and John S Bell, ‘In French eyes, transferring the provision of the service to the private sector does not necessarily mean that it is no longer a public service...’.<sup>138</sup>

#### **2.4.2.2 Comparative Observations**

A key distinction between the Maltese Ombudsman<sup>139</sup> and the French DoR lies in their jurisdictional scope, particularly how each system defines and applies the concept of public service. The Maltese Ombudsman’s oversight is strictly limited to government bodies, public authorities, and entities in which the State holds a controlling interest.<sup>140</sup> Hence, while private entities are excluded from the Maltese Ombudsman’s jurisdiction, the French DoR also oversees private entities entrusted with a public service mission. This broader oversight stems from the French administrative law tradition, which considers certain private organisations as integral to the public service function, reinforcing the notion that transferring a service to a private entity does not necessarily mean that it is not a public service.<sup>141</sup> Thus, these differences underscore how each system reflects its respective legal and administrative framework, with Malta maintaining a narrower approach and France embracing a broader approach. It is submitted that Malta should consider adopting a similar approach by extending the Ombudsman’s mandate to include oversight of private entities entrusted with public service responsibilities.

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<sup>137</sup> Mifsud and Plaidy (n 132) 48.

<sup>138</sup> L Neville Brown and John S Bell, *French Administrative Law* (5<sup>th</sup> edn, Oxford University Press 1998) 131.

<sup>139</sup> For a description of the Maltese Ombudsman’s jurisdiction, see Chapter 1.4.

<sup>140</sup> Ombudsman Act (n 11) Article 12.

<sup>141</sup> Brown and Bell (n 138) 131.

## 2.5 Expanding the Parliamentary Ombudsman's Jurisdiction in the Context of Privatisation

The central argument for expanding the Ombudsman's jurisdiction is to align the definition of 'public authority' under Maltese law with the broader definition established in the UK's HRA 1998. Under Article 469A(2) of the Code of Organization and Civil Procedure (COPC),<sup>142</sup> a 'public authority' includes 'the Government of Malta, its Ministries and departments, local authorities and any body corporate established by law and includes Boards which are empowered in terms of law to issue warrants for the exercise of any trade or profession.'. This definition clearly restricts the scope of review to government branches and statutory bodies created by an act of Parliament or by an order of the Prime Minister, as authorised by the Public Administration Act.<sup>143</sup> It excludes entities established under laws such as state-owned companies formed under the Companies Act,<sup>144</sup> and foundations set up under the Civil Code.<sup>145</sup>

Conversely, Section 6(3) of the HRA 1998 defines a public authority as 'a court or tribunal, and any person certain of whose functions are functions of a public nature, ...'. The law intentionally avoids defining a public function,<sup>146</sup> because as stated by the Home Secretary during the Parliamentary Debates, 'the test must relate to the substance and nature of the act, not to the form and legal personality'.<sup>147</sup> Hence, the HRA 1998 differentiates between 'pure' and 'hybrid' public authorities.<sup>148</sup> 'Pure' public authorities refer to entities formally established and funded by the State to provide government services,<sup>149</sup> whereas 'hybrid' public authorities are private entities that also provide

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<sup>142</sup> Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta.

<sup>143</sup> Public Administration Act, Chapter 595 of the Laws of Malta, Articles 8 and 9.

<sup>144</sup> Companies Act, Chapter 386 of the Laws of Malta.

<sup>145</sup> Civil Code, Chapter 16 of the Laws of Malta, Second Schedule, Article 26(1).

<sup>146</sup> Justice, 'Public Authorities under the Human Rights Act 1998', (Justice) <<https://justice.org.uk/public-authorities-human-rights-act-1998/#:~:text=What%20is%20the%20definition%20of,performing%20a%20%27public%20function%27>> accessed 2 February 2025.

<sup>147</sup> HC Deb, 17 June 1998, col 433.

<sup>148</sup> Justice (n 146).

<sup>149</sup> The British Institute of Human Rights, 'Hybrid Public Bodies: What is a "Public Authority" under the Human Rights Act?', (The British Institute of Human Rights) <<https://www.bihr.org.uk/get-informed/legislation-explainers/hybrid-public-bodies-what-is-a-public-authority-under-the-human-rights-act>> accessed 2 February 2025.

public services and are subject to legal obligations concerning those services, however their private activities remain outside this scope.<sup>150</sup>

While the UK's definition encompasses both 'pure' and 'hybrid' public authorities, the Maltese definition only incorporates the former. However, certain court judgments appear to support a broader interpretation. For instance, in *Paul Licari vs Malta Industrial Parks Limited*,<sup>151</sup> the Court of Appeal ruled that the defendant company, tasked with managing government-owned industrial areas, effectively carries out public functions. Accordingly, despite its status as a private limited company, it should be regarded as a public authority, particularly given its government ownership.<sup>152</sup> In *Kaptan Mario Grech vs Gozo Channel Company Limited*,<sup>153</sup> the Civil Court, First Hall, took a more assertive approach, emphasising that the Government's decision to operate through a company rather than a statutory body does not exempt that company from oversight under Article 469A of the COCP when performing an 'administrative act'.<sup>154</sup> These rulings highlight that the defining characteristic of public power lies in its nature rather than its source.

The rise of privatisation has prompted several jurisdictions to extend the Ombudsman's oversight to private entities delivering public services.<sup>155</sup> The central reasoning is that the nature of the function, not the identity of the service provider, determines whether it remains public. Hence, a power carried out in the public interest still retains its public nature even if it is delivered by a private entity.<sup>156</sup> Accordingly, administrative accountability must be upheld irrespective of the service provider. Since privatisation reduces citizens' public law protections, public services must adhere to established standards, regardless of whether they are managed by the public or private sector.<sup>157</sup>

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<sup>150</sup> *ibid.*

<sup>151</sup> 25/2010 *Paul Licari vs Malta Industrial Parks Limited*, CA 25 November 2016.

<sup>152</sup> *ibid* 7.

<sup>153</sup> 90/2009 *Kaptan Mario Grech vs Gozo Channel Company Limited*, FH 27 April 2010.

<sup>154</sup> *ibid* 7.

<sup>155</sup> Text to n 89.

<sup>156</sup> Malik (n 75) 2.

<sup>157</sup> *ibid.*

In April 2023, GħSL proposed amending Article 469A(2) of the COCP to cover ‘hybrid’ entities in addition to purely public bodies established by law.<sup>158</sup> This proposal reflects increased privatisation, calling for a broader definition of ‘public authority’ to guarantee effective oversight.<sup>159</sup> The proposed definition includes ‘Any body corporate which performs a public function’.<sup>160</sup> This author supports incorporating either the HRA’s definition, or GħSL’s proposed definition into Maltese law, through amendments to the COCP and the Ombudsman Act, to ensure proper oversight of administrative decisions ‘for the benefit, ... of the general public who have little to no choice in making use of those quasi-monopolistic services’.<sup>161</sup>

## **2.6 Challenges in Expanding the Parliamentary Ombudsman’s Jurisdiction**

While this author supports extending the Ombudsman’s jurisdiction to private entities delivering essential public services, it is important to consider the challenges that such a reform may bring.

### **2.6.1 Existing Quasi-Judicial Bodies that Address Issues regarding Essential Public Services**

Advocating for broader oversight does not imply that privatisation denies access to redress.<sup>162</sup> Several quasi-judicial bodies already handle disputes relating to essential public services. For example, complaints regarding television services go to the Consumer Affairs Authority, and financial disputes go to the Financial Services Arbiter.<sup>163</sup> The Ombudsman often redirects such complaints to the appropriate regulatory bodies,<sup>164</sup> demonstrating that mechanisms already exist to resolve these issues, potentially limiting the necessity for Ombudsman intervention. Additionally, individuals may at any time seek recourse through the Courts of Justice.<sup>165</sup>

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<sup>158</sup> GħSL (n 30) 50.

<sup>159</sup> *ibid* 51.

<sup>160</sup> *ibid*.

<sup>161</sup> Mifsud, *The Ombudsman Remedy* (n 7) 27.

<sup>162</sup> *ibid*.

<sup>163</sup> Interview, Zammit McKeon (n 58).

<sup>164</sup> *ibid*.

<sup>165</sup> Mifsud, *The Ombudsman Remedy* (n 7) 27.

Nevertheless, access to the Ombudsman remains valuable, especially when there are private entities delivering essential public services. This is particularly significant given the Ombudsman's unique role in issuing recommendations rather than binding decisions. As Mifsud observes, 'the fact remains, that the individual aggrieved person is poorer and less protected, with the Ombudsman disabled via privatization; given the time and expenses involved, the Courts of Justice should be a remedy of last, not of first, resort.'<sup>166</sup>

#### **2.6.2 Main Considerations and Implications of Expanding the Parliamentary Ombudsman's Jurisdiction to Private Entities Providing Essential Public Services**

The obvious solution would be to extend administrative law to private entities performing essential public services. Although many jurisdictions have done so, this issue is rather complex and cannot be generalised.<sup>167</sup> Malik outlines the main implications in expanding the Ombudsman's jurisdiction.<sup>168</sup> Firstly, such expansion must respect free-market initiatives and not hinder commercial competitiveness.<sup>169</sup> Secondly, oversight systems must be designed carefully to avoid interfering with purely private activities.<sup>170</sup> Thirdly, national priorities, as determined by its economic and social policies, would also play an important role in determining the scope of this expansion.<sup>171</sup>

In discussions with the current Ombudsman, he acknowledged GħSL's bill<sup>172</sup> and commended its proposal, however he expressed reservations about extending his jurisdiction to cover private entities,<sup>173</sup> believing that Malta is not yet ready for such a change.<sup>174</sup> He emphasised the need to assess Malta's readiness before aligning the institution with evolving social needs.<sup>175</sup> While he agrees that reform is necessary, he believes that extending the Ombudsman's jurisdiction to private entities would require

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<sup>166</sup> *ibid.*

<sup>167</sup> Malik (n 75) 2.

<sup>168</sup> *ibid.*

<sup>169</sup> *ibid.*

<sup>170</sup> *ibid.*

<sup>171</sup> Malik (n 75) 2.

<sup>172</sup> GħSL (n 30).

<sup>173</sup> Interview, Zammit McKeon (n 58).

<sup>174</sup> *ibid.*

<sup>175</sup> *ibid.*

significant legal reform due to practical and conceptual challenges.<sup>176</sup> Currently, the law only addresses actions and omissions of Government, and lacks a clear definition of 'essential public service'.<sup>177</sup> A precise legal definition is needed to set proper limits and prevent overreach. Thus, there is no universal model;<sup>178</sup> each country, including Malta, must tailor its approach.<sup>179</sup> Implementing this reform will require detailed planning, legislative changes, and time.

## 2.7 Conclusion

Extending the Ombudsman's oversight to private entities delivering essential public services is not an intrusion on autonomy, but a safeguard against potential abuse. Jurisdictions like France have adopted this model successfully. Hence, strengthening the Ombudsman's remit would offer more accessible redress and reinforce its role in ensuring accountability in a privatised era. While legal and practical challenges remain, these should not deter institutional reform. It is time to adapt the Ombudsman's jurisdiction to reflect current realities and to further promote good governance and administrative justice.

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<sup>176</sup> *ibid.*

<sup>177</sup> *ibid.*

<sup>178</sup> Malik (n 75) 2.

<sup>179</sup> *ibid.*

## **CHAPTER III: Expanding the Parliamentary Ombudsman’s Jurisdiction to Include an Explicit Human Rights Mandate and Advocating for the Setting up of a National Human Rights Institution in Malta**

### **3.1 Introduction**

In Malta, although the Ombudsman may investigate complaints involving human rights issues, his role lacks an explicit human rights mandate. Over the years, the Ombudsman has consistently called for an extension of his jurisdiction and has also advocated for the establishment of an NHRI to be managed by his office. Hence, this chapter explores the human rights aspect of broadening the Ombudsman’s remit, starting with an international overview of the Ombudsman’s transition towards incorporating human rights responsibilities, followed by an analysis of Malta’s current human rights framework and related advocacy initiatives, and concluding with a discussion on appointing the Ombudsman as Malta’s NHRI.

### **3.2 An International Perspective on Human Rights and the Ombudsman**

Understanding the international human rights landscape is crucial for appreciating the Ombudsman’s evolving role and the need for NRHIs. This section therefore begins with an international overview before addressing national calls to expand the Maltese Ombudsman’s mandate to include an explicit human rights role and serve as Malta’s NHRI.

#### **3.2.1 The Evolution of the Ombudsman’s Role in Serving as a Human Rights Protector**

The Ombudsman institution exists in many forms, with no universal model.<sup>180</sup> Its role in human rights protection is often discussed by distinguishing between classical Ombudsmen, focused on overseeing government action, and those acting as human rights defenders.<sup>181</sup> Countries like Belize, Canada, and Malta follow the classical

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<sup>180</sup> Paunio (n 5) 2.

<sup>181</sup> *ibid.*

model,<sup>182</sup> while many Eastern European countries have Human Rights Ombudsmen.<sup>183</sup> A third, hybrid model, common in newer democracies, combines oversight of maladministration with broad human rights mandates.<sup>184</sup> Victor Ayeni argues that even without an explicit human rights mandate, Ombudsmen still play a significant role in addressing such concerns,<sup>185</sup> rendering the distinction between classical and hybrid Ombudsmen as irrelevant.<sup>186</sup>

Over time, the Ombudsman has assumed a greater role in human rights protection alongside its traditional functions.<sup>187</sup> Barbara von Tigerstrom described this shift as the Ombudsman's 'new face',<sup>188</sup> noting that 'a role in the protection of human rights comes naturally to the ombudsman'.<sup>189</sup> This is because it aligns with the institution's principles of justice, human dignity, and ensuring fair treatment for all individuals and rebalancing power between citizens and public authorities, offering individuals a channel to challenge misconduct or neglect by public authorities.<sup>190</sup> These objectives closely mirror the core values underpinning human rights.

The Ombudsman is also uniquely positioned to address economic, social, and cultural rights.<sup>191</sup> These rights are closely linked to many public services and responsibilities that fall under the Ombudsman's oversight.<sup>192</sup> Whether responding to individual complaints or carrying out broader investigations, the Ombudsman frequently tackles issues involving *inter alia* access to healthcare, education, employment, social support, or housing.<sup>193</sup>

Classical Ombudsman institutions, although primarily focused on administrative justice, often apply criteria that align with core human rights principles such as the right to non-

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<sup>182</sup> Ayeni (n 1) 5.

<sup>183</sup> *ibid* 6.

<sup>184</sup> *ibid.*

<sup>185</sup> *ibid* 2.

<sup>186</sup> *ibid* 6.

<sup>187</sup> *ibid* 10.

<sup>188</sup> Barbara von Tigerstrom, 'The Role of the Ombudsman in Protecting Economic, Social and Cultural Rights' [1998] 2 *The International Ombudsman Yearbook*.

<sup>189</sup> Ayeni (n 1) 10.

<sup>190</sup> *ibid* 10-11.

<sup>191</sup> *ibid* 11.

<sup>192</sup> *ibid.*

<sup>193</sup> *ibid.*

discrimination.<sup>194</sup> This reflects a significant overlap between classical Ombudsmen and specialised human rights bodies, both grounded in shared values such as justice and non-discrimination, although they often operate under different legal frameworks.<sup>195</sup> While human rights provide the benchmark for evaluating States, administrative justice is crucial for meeting these obligations.<sup>196</sup>

This evolution supports the concept of a human right to good administration.<sup>197</sup> Article 41 of the Charter of Fundamental Rights of the European Union (Charter) enshrines this right, stating that everyone is entitled to have their affairs handled ‘impartially, fairly and within a reasonable time by the institutions and bodies of the Union.’. Former UK Parliamentary and Health Service Ombudsman Ann Abraham emphasised the Ombudsman’s proactive role in human rights, noting that the institution not only addresses maladministration but also fosters an ‘ethos of good governance’ to prevent such issues from arising,<sup>198</sup> thereby advancing human rights.<sup>199</sup>

In conclusion, contemporary Ombudsman institutions are main actors in human rights protection ‘who cannot succeed otherwise in the face of the issues and challenges that confront it in the 21<sup>st</sup>-century environment.’<sup>200</sup> Their role is now integral and not incidental, regardless of whether it is formally embedded in their mandate.<sup>201</sup> This highlights the importance of formalising this role, especially in Malta, where the Ombudsman has long engaged with human rights matters despite lacking a formal mandate.

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<sup>194</sup> *ibid.*

<sup>195</sup> *ibid* 11-12.

<sup>196</sup> *ibid* 12.

<sup>197</sup> *ibid*

<sup>198</sup> Ombudsman for Bermuda, ‘Third Annual Report 2008’ [2009] 40 <<https://ombudsman.bm/wp-content/uploads/2022/06/OmbudsmanReport08.pdf>> accessed 5 March 2025.

<sup>199</sup> Ayeni (n 1) 14.

<sup>200</sup> *ibid* 18.

<sup>201</sup> *ibid.*

### 3.2.2 The Establishment and Role of National Human Rights Institutions

NHRIs were mainly established in newly emerging democracies to help restore democratic freedoms.<sup>202</sup> They are autonomous entities established under domestic law, tasked with safeguarding and advancing human rights.<sup>203</sup> Their mandates typically cover civil, political, economic, social, and cultural rights.<sup>204</sup> The foundational framework for NHRIs is outlined in the Principles Relating to the Status of National Human Rights Institutions (Paris Principles) developed in 1991,<sup>205</sup> and endorsed by the Vienna World Conference on Human Rights and the United Nations (UN) General Assembly in 1993.<sup>206</sup> These principles affirm that each country may adopt an NHRI model most suited to its domestic context.<sup>207</sup>

The Paris Principles establish the basic requirements for effective and reputable NHRIs.<sup>208</sup> These include: a broad human rights mandate and functions such as advising, monitoring, handling complaints, and conducting education.<sup>209</sup> NHRIs must be legally independent from Government; have a pluralistic composition that reflects civil society; and possess sufficient powers to investigate, access evidence, consult stakeholders, and publish their findings.<sup>210</sup> They also need adequate resources and infrastructure to fulfil their responsibilities.<sup>211</sup> Furthermore, NHRIs are expected to collaborate with state bodies and civil society; and actively engage with international and regional human rights mechanisms.<sup>212</sup>

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<sup>202</sup> Parliamentary Ombudsman, 'The Setting Up of a National Human Rights Institution' [2013] 9.

<sup>203</sup> *ibid* 6.

<sup>204</sup> *ibid.*

<sup>205</sup> *ibid.*

<sup>206</sup> GANHRI, 'Paris Principles', (GANHRI) <<https://ganhri.org/paris-principles/>> accessed 5 March 2025.

<sup>207</sup> Parliamentary Ombudsman, 'The Setting Up of an NHRI' (n 202) 6.

<sup>208</sup> GANHRI (n 206).

<sup>209</sup> *ibid.*

<sup>210</sup> *ibid.*

<sup>211</sup> *ibid.*

<sup>212</sup> *ibid.*

### 3.3 A National Perspective on Human Rights and the Ombudsman

The discussion now turns to the national context, examining how human rights are promoted and protected domestically, assessing the Ombudsman's human rights function under current law, and laying the foundation for evaluating potential reforms in light of evolving international and regional standards.

#### 3.3.1 The Human Rights Landscape in Malta: Developments and Challenges

The former Ombudsman attributes Malta's reluctance to establish a formal NHRI to its unique constitutional evolution.<sup>213</sup> Unlike other countries that experienced oppressive authoritarian regimes, Malta did not experience the same events, reducing the need to create a dedicated human rights institution.<sup>214</sup>

Nonetheless, Malta has consistently demonstrated a commitment to fundamental human rights.<sup>215</sup> As early as 1802, it enacted the Declaration of the Rights of the Inhabitants of Malta.<sup>216</sup> Subsequent constitutional developments continued to entrench these protections:<sup>217</sup> the 1959 Constitution introduced freedom of religion and protection against deprivation of property without compensation; the 1961 Constitution introduced the first formal Bill of Rights,<sup>218</sup> while the 1964 Independence Constitution enabled court petitions for violations of fundamental rights.<sup>219</sup> These protections were significantly reinforced when Malta ratified the European Convention on Human Rights (ECHR) in 1987, allowing individuals to appeal to the European Court of Human Rights, and later to the judicial institutions of the EU following Malta's accession in 2004.<sup>220</sup>

Against this backdrop, the former Ombudsman observed that past administrations maintained that safeguarding human rights in Malta is best achieved through robust

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<sup>213</sup> Parliamentary Ombudsman, 'The Setting Up of an NHRI' (n 202) 9.

<sup>214</sup> *ibid.*

<sup>215</sup> *ibid* 9-10.

<sup>216</sup> Tino Borg, *A Commentary on the Constitution of Malta* (Kite Group 2016) 52.

<sup>217</sup> Parliamentary Ombudsman, 'The Setting Up of an NHRI' (n 202) 10.

<sup>218</sup> Borg, *A Commentary on the Constitution* (n 216) 52.

<sup>219</sup> Parliamentary Ombudsman, 'The Setting Up of an NHRI' (n 202) 10.

<sup>220</sup> *ibid.*

judicial mechanisms that are directly accessible to individuals, rather than through non-judicial institutions like NHRIs.<sup>221</sup> Furthermore, sensitive matters concerning fundamental rights were viewed as belonging within the judiciary's remit.<sup>222</sup> This approach persists today, ensuring consistency in the interpretation of human rights conventions and statutes, such that other judicial bodies are required to refer breaches to the competent Constitutional Court for a definitive ruling in accordance with the Maltese Constitution.<sup>223</sup>

While this model has served Malta reasonably well, the former Ombudsman argues that the evolving standards demand a broader, more proactive human rights framework.<sup>224</sup> Courts, by nature, intervene only after human rights breaches are reported; therefore, the executive must also play a role in preventing infringements.<sup>225</sup> Ultimately, the goal should be to prevent circumstances that may hinder the enjoyment of these rights.<sup>226</sup> Hence, NHRIs can contribute significantly in States like Malta, where judicial protections are already robust.<sup>227</sup> Although Malta has made notable progress in this area, the absence of an NHRI remains a significant institutional shortcoming.

### **3.3.2 The Mandate of the Parliamentary Ombudsman of Malta in relation to Human Rights**

The Ombudsman was not originally intended to act as a human rights defender, because the Maltese legislator envisioned the Ombudsman to be 'a critical collaborator of the public administration and a promotor of standards for good administration'.<sup>228</sup> Nevertheless, this does not preclude the Ombudsman from addressing human rights concerns; in fact, the Ombudsman does engage with such issues.<sup>229</sup>

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<sup>221</sup> *ibid.*

<sup>222</sup> *ibid.*

<sup>223</sup> *ibid.*

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid.*

<sup>226</sup> *ibid.*

<sup>227</sup> *ibid* 10-11.

<sup>228</sup> The Office of the Ombudsman, 'Quarterly Law Seminar' (n 2).

<sup>229</sup> *ibid.*

Under Article 22(1) of the Ombudsman Act, the Ombudsman is empowered to investigate maladministration.<sup>230</sup> Interestingly, the law specifically refers to ‘improper discrimination’, not simply discrimination, thereby excluding actions that do not fall within its scope.<sup>231</sup> The present Ombudsman defines this as unequal treatment of individuals belonging to the same group without valid justification.<sup>232</sup> However, while the Ombudsman has authority to investigate maladministration, Maltese legislation does not expressly empower him to investigate alleged violations of human rights under Chapter IV of the Maltese Constitution, the ECHR or the Charter.<sup>233</sup>

### **3.4 Advocacy for Reform**

For several years, the Ombudsman institution has played a leading role in advocating for the establishment of an NHRI in Malta.<sup>234</sup> To support effective reform, it is important to examine the evolution of advocacy efforts over time. This helps contextualise the current situation, namely, the absence of a specific human rights mandate for the Ombudsman and Malta’s continued status as one of the few EU Member States without an NHRI.

#### **3.4.1 Early Developments**

##### **3.4.1.1 The 2013 Ombudsman Proposal: ‘On the Setting Up of an NHRI in Malta’**

In October 2013, the Ombudsman issued a comprehensive proposal advocating for the establishment of an NHRI in Malta.<sup>235</sup> He argued that his office was well-placed to serve as the body responsible for overseeing human rights compliance, investigating alleged breaches, and advising public authorities on strengthening human rights protections.<sup>236</sup> Although no official feedback was received, it later emerged that the Government was considering an alternative approach.<sup>237</sup> Nonetheless, the proposal gained attention,

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<sup>230</sup> For more detail refer to Chapter 1.4.1.

<sup>231</sup> Interview, Zammit McKeon (n 58).

<sup>232</sup> *ibid.*

<sup>233</sup> *ibid.*

<sup>234</sup> Parliamentary Ombudsman, ‘Strengthening the Ombudsman Institution’ (n 17) 38.

<sup>235</sup> *ibid.*

<sup>236</sup> *ibid.*

<sup>237</sup> *ibid.*

especially given the Government's stated plans to establish a Human Rights and Equality Commission (HREC).<sup>238</sup>

#### **3.4.1.2 The 2014 Ombudsman Proposal: 'On the Strengthening of the Ombudsman Institution'**

In the same proposal discussed in Chapter 2,<sup>239</sup> the former Ombudsman also proposed granting the Ombudsman an explicit and formal mandate to investigate alleged violations of fundamental human rights.<sup>240</sup>

#### **3.4.1.3 The White Paper on Human Rights and Equality (2014), the Ombudsman's Reflections (2015) and Parliamentary Bills 96 and 97 of 2019**

In 2014, the Government published a White Paper proposing a legal framework for creating a HREC compliant with the Paris Principles and EU equality law.<sup>241</sup> In 2015, the Ombudsman's office released a paper,<sup>242</sup> expressing support while offering concrete suggestions to enhance its concepts and practical implementation, without undermining existing human rights bodies.<sup>243</sup> This White Paper laid the foundation for two Bills introduced in Parliament in 2019: the Equality Bill (Bill 96 of 2019)<sup>244</sup> and the Human Rights and Equality Commission Bill (Bill 97 of 2019),<sup>245</sup> both aimed at establishing an NHRI aligned with the Paris Principles.<sup>246</sup> Bill 97 of 2019 was last debated in November 2019, whereas Bill 96 of 2019 was last debated in November 2020.<sup>247</sup> Following the dissolution of the Thirteenth Legislature on 20<sup>th</sup> February 2022, all pending legislative

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<sup>238</sup> The Office of the Ombudsman, 'Annual Report 2014' (n 73) 28.

<sup>239</sup> Text to (n 128).

<sup>240</sup> Parliamentary Ombudsman, 'Strengthening the Ombudsman Institution' (n 17) 38.

<sup>241</sup> Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, *Towards the Establishment of the Human Rights and Equality Commission* (2014) 7.

<sup>242</sup> Parliamentary Ombudsman, 'Reflections on the White Paper: Towards the Establishment of the Human Rights and Equality Commission' [2015].

<sup>243</sup> The Office of the Ombudsman, 'Annual Report 2014' (n 73) 28.

<sup>244</sup> Equality Bill HR (XIII 2019) [96].

<sup>245</sup> Human Rights and Equality Commission Bill HR (XIII 2019) [97].

<sup>246</sup> European Commission, '2024 Rule of Law Report: Country Chapter on the Rule of Law Situation in Malta' (2024) 23 <[https://commission.europa.eu/document/download/a70d46f1-1967-4bc3-8f75-c7f434237bf3\\_en?filename=42\\_1\\_58072\\_coun\\_chap\\_malta\\_en.pdf](https://commission.europa.eu/document/download/a70d46f1-1967-4bc3-8f75-c7f434237bf3_en?filename=42_1_58072_coun_chap_malta_en.pdf)> accessed 20 March 2025.

<sup>247</sup> ibid.

items, including these Bills, lapsed.<sup>248</sup> Notably, the subject matter of these Bills was not reintroduced thereafter.<sup>249</sup>

### **3.4.2 Current Developments**

Although legislative progress came to a halt, advocacy efforts remained vigorous following the appointment of the fourth Parliamentary Ombudsman of Malta, Judge Emeritus Joseph Zammit McKeon in 2023.

#### **3.4.2.1 Malta becomes an Associate Member of the European Network of National Human Rights Institutions**

The European Network of National Human Rights Institutions (ENNHR) brings together forty-nine NHRIs across Europe, each with varying mandates, to promote and protect human rights.<sup>250</sup> In 2024, as part of its efforts to expand its mandate and establish a Maltese NHRI, the Ombudsman's office officially applied for associate membership of the ENNHR,<sup>251</sup> marking a significant milestone.<sup>252</sup> A few weeks later, the application was accepted,<sup>253</sup> and the office began actively participating in the ENNHR's initiatives.<sup>254</sup> While associate status allows participation in all activities, it does not grant voting rights.<sup>255</sup> This status was granted based on the current Ombudsman Act, which confers constitutional protection and ensures its institutional independence.<sup>256</sup>

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<sup>248</sup> The Office of the Ombudsman, 'Annual Report 2023' [2024] 21

<https://ombudsman.org.mt/media/fr1ndd4u/annual-report-2023-en.pdf> accessed 20 March 2025.

<sup>249</sup> ibid.

<sup>250</sup> The Office of the Ombudsman, 'The Office of the Ombudsman has all the credentials to become the NHRI for Malta - Factsheet 3', (*Parliamentary Ombudsman Malta*, 10 December 2024).

<https://ombudsman.org.mt/en/human-rights-factsheets/the-office-of-the-ombudsman-has-all-the-credentials-to-become-the-national-human-rights-institution-nhri-for-malta-factsheet-3/> accessed 20 March 2025.

<sup>251</sup> The Office of the Ombudsman, 'Annual Report 2023' (n 248) 21.

<sup>252</sup> Parliamentary Ombudsman, 'Establishing the Ombudsman as the NHRI' (n 23) 3.

<sup>253</sup> ibid.

<sup>254</sup> The Office of the Ombudsman, 'Annual Report 2023' (n 248) 21.

<sup>255</sup> The Office of the Ombudsman, 'Factsheet 3' (n 250).

<sup>256</sup> ibid.

### **3.4.2.2 The 2024 Ombudsman Proposal: ‘Towards Establishing the Ombudsman as the National Human Rights Institution in Malta’**

After becoming an ENNHRI Associate Member, the Ombudsman invited the network to assess the Ombudsman Act’s compatibility with the Paris Principles.<sup>257</sup> The ENNHRI’s 2024 review highlighted major gaps, notably the absence of a human rights mandate.<sup>258</sup> In response, the Ombudsman engaged legal experts to propose reforms and opted to draft a new Ombudsman Bill.<sup>259</sup> This draft was resubmitted to the ENNHRI in October 2024 and discussed at the General Assembly, where the Ombudsman’s commitment was praised.<sup>260</sup> In November 2024, the Ombudsman submitted the new Bill to Government, proposing an efficient model building on the current structure and expanding the Ombudsman’s mandate to explicitly promote and protect human rights, in line with the Paris Principles.<sup>261</sup>

### **3.4.2.3 International Calls for Reform**

International bodies have also emphasised the need for Malta to strengthen its Ombudsman Institution in line with human rights standards. The European Commission for Democracy through Law (Venice Commission) adopted the Principles on the Protection and Promotion of the Ombudsman Institution (Venice Principles) in March 2019<sup>262</sup> to strengthen Ombudsman institutions.<sup>263</sup> Principle 12 is particularly relevant, because it states that an Ombudsman’s mandate ‘shall cover prevention and correction of maladministration, and the protection and promotion of human rights and

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<sup>257</sup> Parliamentary Ombudsman, ‘Establishing the Ombudsman as the NHRI’ (n 23) 3.

<sup>258</sup> *ibid.*

<sup>259</sup> *ibid.*

<sup>260</sup> *ibid* 3-4.

<sup>261</sup> The Office of the Ombudsman, ‘The Civil Liberties Union for Europe in Favour that the Ombudsman in Malta becomes NHRI’, (*Parliamentary Ombudsman Malta*, 17 March 2025) [<https://ombudsman.org.mt/en/news-and-events/the-civil-liberties-union-for-europe-in-favour-that-the-ombudsman-in-malta-becomes-nhri/>](https://ombudsman.org.mt/en/news-and-events/the-civil-liberties-union-for-europe-in-favour-that-the-ombudsman-in-malta-becomes-nhri/) accessed 20 March 2025.

<sup>262</sup> Venice Commission, ‘Ombudsman Institutions’ (*Council of Europe*, 2014)

[<https://www.venice.coe.int/WebForms/pages/?p=02\\_Ombudsmen&lang=EN>](https://www.venice.coe.int/WebForms/pages/?p=02_Ombudsmen&lang=EN) accessed 20 March 2025.

<sup>263</sup> Venice Commission, *Principles on the Protection and Promotion of the Ombudsman Institution* (Venice Principles) (*Council of Europe*, 2019) 7  
 [<https://www.venice.coe.int/files/Publications/Venice\\_Principles\\_eng.pdf>](https://www.venice.coe.int/files/Publications/Venice_Principles_eng.pdf) accessed 20 March 2025.

fundamental freedoms.’<sup>264</sup> Although not legally binding, States are encouraged to adhere to the Venice Principles to enhance their Ombudsman institutions. Accordingly, Malta should follow other Member States and formally extend the Ombudsman’s mandate to include fundamental human rights.

More recently, the 2024 Rule of Law Report of the European Commission evaluates developments pertaining to rule of law across all Member States.<sup>265</sup> It observed that Malta failed to set up an NHRI in accordance with the Paris Principles, as suggested in the 2023 Rule of Law Report.<sup>266</sup> Consequently, it strongly urges Malta to take concrete steps towards establishing an NHRI.<sup>267</sup>

### **3.5 Expanding the Parliamentary Ombudsman’s Jurisdiction to serve as the National Human Rights Institution of Malta**

An analysis of the proposals made by former and present Ombudsmen advocating for an NHRI under their authority will be carried out. The associated benefits of expanding the Ombudsman’s jurisdiction to include a human rights mandate will be discussed, alongside the implications of such an expansion.

#### **3.5.1 Proposals to Expand the Parliamentary Ombudsman’s Jurisdiction to serve as the National Human Rights Institution of Malta**

##### **3.5.1.1 The 2013 Ombudsman Proposal: ‘On the Setting Up of an NHRI in Malta’**

In 2013, the Ombudsman’s office proposed identifying the Ombudsman’s office as the Maltese NHRI, operating in line with the Paris Principles to secure GANHRI accreditation.<sup>268</sup> This proposal envisioned creating an autonomous Commission, chaired

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<sup>264</sup> *ibid* 9.

<sup>265</sup> European Commission, ‘2024 Rule of Law Report’, (*European Commission*, 2024) <[https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/annual-rule-law-cycle/2024-rule-law-report\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/annual-rule-law-cycle/2024-rule-law-report_en)> accessed 20 March 2025.

<sup>266</sup> European Commission, ‘Country Chapter on the Rule of Law Situation in Malta’ (n 246) 2.

<sup>267</sup> *ibid*.

<sup>268</sup> Parliamentary Ombudsman, ‘The Setting Up of an NHRI’ (n 202) 26.

by the Ombudsman<sup>269</sup> and composed of national bodies and Non-Governmental Organisation (NGO) representatives specialising in human rights protection.<sup>270</sup> This Commission would be independent from Government, answerable to Parliament, and would operate within the existing infrastructure of the Ombudsman's office, while maintaining a separate legal personality.<sup>271</sup>

This hybrid model would enhance Malta's human rights framework, with the Ombudsman's office focusing on promoting administrative justice, while the Commission would have a specific mandate to promote and protect human rights.<sup>272</sup> The Commission would handle complaints, conduct investigations, make recommendations, and engage in educational and training activities.<sup>273</sup>

Thus, the principal duties of the Maltese NHRI, including advancing and safeguarding human rights; providing advice to individuals on their rights, guaranteeing fair application of human rights legislation in sectors like work, education, and healthcare; working together with the Government to uphold human rights in legislation and policy; investigating human rights violations,<sup>274</sup> and releasing routine reports on the human rights situation in Malta.<sup>275</sup>

The significant advantages that such an institution would offer include: ensuring a consistent legal and service framework, promoting institutional efficiency through shared resources, strengthening accessibility for vulnerable groups.<sup>276</sup> Additionally, acting as an umbrella body, it would improve coordination with specialised institutions while providing clearer public visibility and a stronger relationship with government authorities.<sup>277</sup>

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<sup>269</sup> *ibid* 30.

<sup>270</sup> *ibid.*

<sup>271</sup> *ibid.*

<sup>272</sup> *ibid.*

<sup>273</sup> *ibid.*

<sup>274</sup> *ibid* 26.

<sup>275</sup> *ibid* 27.

<sup>276</sup> *ibid* 32.

<sup>277</sup> *ibid* 33.

### **3.5.1.2 The 2024 Ombudsman Proposal: ‘Towards Establishing the Ombudsman as the National Human Rights Institution in Malta’**

The present Ombudsman maintains that the institution’s existing framework is already well-equipped to serve as Malta’s NHRI, provided that the Ombudsman Act is revised to incorporate a human rights mandate.<sup>278</sup> In November 2024, the Ombudsman proposed that the office itself be designated as the NHRI, highlighting the advantages of building on the institution’s established infrastructure, skilled staff, and existing processes to extend its role efficiently to encompass a wider human rights mandate.<sup>279</sup>

The proposal amends the Ombudsman Act by introducing three new provisions – Articles 12, 13, and 14 – addressing the Ombudsman’s role as a human rights defender.<sup>280</sup> Article 12 extensively describes the Ombudsman’s human rights functions;<sup>281</sup> Article 13 mandates consultation with human rights experts;<sup>282</sup> and Article 14 grants individuals the right to lodge complaints about human rights violations, empowering the Ombudsman to investigate, access information, summon witnesses, and issue recommendations.<sup>283</sup> Moreover, investigations are conducted in confidence,<sup>284</sup> and the Ombudsman can escalate unresolved matters to the Prime Minister or Parliament.<sup>285</sup> Hence, the Bill aligns with the Paris Principles by addressing both the protection and promotion of human rights.<sup>286</sup>

Proposed principal reforms include: establishing a wide-ranging human rights mandate, incorporating human rights responsibilities through public awareness initiatives, educational activities, legislative advisory roles, and monitoring the national human

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<sup>278</sup> The Office of the Ombudsman, ‘The Office of the Ombudsman has all the credentials to become the NHRI for Malta - Factsheet 4’, (*Parliamentary Ombudsman Malta*, 17 December 2024).

<https://ombudsman.org.mt/en/human-rights-factsheets/the-office-of-the-ombudsman-has-all-the-credentials-to-become-the-national-human-rights-institution-nhri-for-malta-factsheet-4/> accessed 20 March 2025.

<sup>279</sup> Parliamentary Ombudsman, ‘Establishing the Ombudsman as the NHRI’ (n 23) 2-3

<sup>280</sup> *ibid* 12.

<sup>281</sup> *ibid* 12-14.

<sup>282</sup> *ibid* 14.

<sup>283</sup> *ibid* 14-16.

<sup>284</sup> *ibid* 15.

<sup>285</sup> *ibid* 17.

<sup>286</sup> Interview, Zammit McKeon (n 58).

rights landscape; adopting an inclusive definition of human rights, covering international, regional, and domestic legal instruments; enhancing the Ombudsman's authority to ensure follow-up on recommendations issued to state authorities; and affirming the Ombudsman's autonomy through an explicit provision stating that the office shall operate independently free from external influences.<sup>287</sup>

This proposal offers several advantages:<sup>288</sup> firstly, compliance with the Paris Principles, as the existing Ombudsman Act already meets the essential requirements of independence, mandate, and authority, allowing a seamless transition to NHRI status without requiring significant legal revisions;<sup>289</sup> secondly, the current institutional framework strengthens this approach, as the Ombudsman's existing infrastructure, experienced staff, and established procedures ensure continuity in handling human rights issues, thus strengthening public confidence and legitimacy;<sup>290</sup> thirdly, utilising the current Ombudsman office enhances resource efficiency, enabling a swift transition to NHRI status while ensuring continued human rights services;<sup>291</sup> the Ombudsman's well-known public presence facilitates greater public awareness and accessibility, fostering increased engagement with the institution;<sup>292</sup> and finally, as an NHRI, the Ombudsman would gain international recognition, enhancing Malta's collaboration with global human rights bodies and participation in international human rights discussions.<sup>293</sup>

### **3.5.1.3    Similarities and Differences between the 2013 and 2024 Ombudsman Proposals**

Both proposals aim to designate the Ombudsman as Malta's NHRI in line with the Paris Principles, focusing on strengthening human rights protection and leveraging the existing Ombudsman structure. However, they differ in approach. The 2013 proposal envisaged a hybrid model with a separate Commission led by the Ombudsman, distinguishing administrative justice from human rights protection. Contrastingly, the

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<sup>287</sup> Parliamentary Ombudsman, 'Establishing the Ombudsman as the NHRI' (n 23) 4.

<sup>288</sup> The Office of the Ombudsman, 'Annual Report 2023' (n 248) 21.

<sup>289</sup> *ibid* 22.

<sup>290</sup> *ibid*.

<sup>291</sup> *ibid*.

<sup>292</sup> *ibid*.

<sup>293</sup> *ibid*.

2024 proposal integrates the NHRI mandate directly into the Ombudsman institution through amendments to the Ombudsman Act, thereby enhancing its authority and independence. Thus, while both align in principle, they differ in structure.

### **3.5.2 Parliamentary Ombudsman of Malta Acting as National Human Rights Institution**

Various NHRI models exist in Europe and beyond, and the Government must choose the suitable model for Malta, prioritising human rights protection, avoiding unnecessary costs, and ensuring the model earns an ‘A status’ accreditation from GANHRI.<sup>294</sup> Both past and present Ombudsmen agree that the Ombudsman should have a specific human rights mandate.<sup>295</sup> Complaints against the Government often involve human rights violations.<sup>296</sup> The Ombudsman has initiated inquiries and, on occasion, identified actual violations, successfully advising corrective action.<sup>297</sup> Regardless of whether he is formally designated as an NHRI, the Ombudsman will persist in fulfilling these responsibilities.<sup>298</sup> Additionally, the Ombudsman regularly receives requests from the EU Commissioner for Human Rights, the Council of Europe, and the UN to report on Malta’s human rights situation.<sup>299</sup> They consistently regard the Ombudsman as a credible and reliable source of information that informs their reporting.<sup>300</sup> During discussions with the Ombudsman, they have repeatedly stressed the importance of conferring a clear mandate upon the Ombudsman to investigate human rights violations.<sup>301</sup> Considering these factors, this author maintains that the Ombudsman is best suited to serve as Malta’s NHRI.

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<sup>294</sup> Parliamentary Ombudsman, ‘Strengthening the Ombudsman Institution’ (n 17) 38.

<sup>295</sup> *ibid.*

<sup>296</sup> *ibid* 39.

<sup>297</sup> *ibid.*

<sup>298</sup> *ibid.*

<sup>299</sup> *ibid.*

<sup>300</sup> *ibid.*

<sup>301</sup> *ibid.*

### 3.5.3 Assessing Malta's Compliance with International Standards for National Human Rights Institutions

Currently in the EU, there are thirty-seven NHRIs, with twenty-eight Member States holding an 'A status' and the remaining nine holding a 'B status'.<sup>302</sup> NHRIs are assessed by GANHRI through a peer-review process, overseen by the Sub-Committee on Accreditation, which evaluates compliance with the Paris Principles typically every five years.<sup>303</sup> This process encourages States to amend legislation to align with these principles, as accreditation grants international legitimacy, enabling participation in global human rights mechanisms, and enhances domestic impact.<sup>304</sup> GANHRI accreditation has two levels: 'A status' and 'B status'.<sup>305</sup> Institutions with 'A status' fully adhere to the Paris Principles and can vote in international and regional meetings and they may engage in sessions of the UN Human Rights Council.<sup>306</sup> Contrastingly, 'B status' institutions do not fully adhere to said principles and so, are observer members, who cannot hold office or actively participate in UN meetings.<sup>307</sup> The present Ombudsman asserts that his office could meet the criteria for NHRI status with amendments to the Ombudsman Act.<sup>308</sup> However, he cautions that even if the Bill becomes law, GANHRI's accreditation process remains a hurdle.<sup>309</sup> If the institution fails to meet the Paris Principles, it will receive a 'B status' and require further review, illustrating the challenges of establishing a fully compliant NHRI in Malta.<sup>310</sup>

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<sup>302</sup> GANHRI, *Chart of the Status of National Institutions* (GANHRI, 31 December 2024) <[https://ganhri.org/wp-content/uploads/2025/01/Status-Accreditation-Chart-NHRIs\\_Dec2024.pdf](https://ganhri.org/wp-content/uploads/2025/01/Status-Accreditation-Chart-NHRIs_Dec2024.pdf)> accessed 20 March 2025.

<sup>303</sup> The Office of the Ombudsman, 'The Office of the Ombudsman has all the credentials to become the NHRI for Malta - Factsheet 2', (*Parliamentary Ombudsman Malta*, 3 December 2024). <<https://ombudsman.org.mt/en/human-rights-factsheets/the-office-of-the-ombudsman-has-all-the-credentials-to-become-the-national-human-rights-institution-nhri-for-malta-factsheet-2/>> accessed 20 March 2025.

<sup>304</sup> *ibid.*

<sup>305</sup> *ibid.*

<sup>306</sup> *ibid.*

<sup>307</sup> *ibid.*

<sup>308</sup> The Office of the Ombudsman, 'Factsheet 4' (n 278).

<sup>309</sup> Interview, Zammit McKeon (n 58).

<sup>310</sup> *ibid.*

### 3.6 Conclusion

The Ombudsman has long played a vital role in advancing and safeguarding human rights, thereby strengthening good governance and the rule of law.<sup>311</sup> This chapter advocated for expanding the Ombudsman's jurisdiction to include an explicit human rights mandate and establish a Maltese NHRI under the Ombudsman's leadership. While recognising that European NRIs take various forms and that selecting the appropriate framework is ultimately the Government's prerogative,<sup>312</sup> this author maintains that the Ombudsman is best suited to assume this role due to the many advantages it offers, including the Ombudsman's existing involvement in the protection of fundamental human rights. This view is reinforced by the 2024 proposal, which introduces amendments to the Ombudsman Act that closely mirror the Paris Principles. As stated by the former Ombudsman, '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.'.<sup>313</sup>

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<sup>311</sup> The Office of the Ombudsman, 'UN General Assembly recognises the role of Ombudsman institutions in promoting Human Rights, Good Governance, and the Rule of Law', (*Parliamentary Ombudsman Malta*, 15 January 2025) <<https://ombudsman.org.mt/news-and-events/un-general-assembly-recognises-the-role-of-ombudsman-institutions-in-promoting-human-rights-good-governance-and-the-rule-of-law/>> accessed 20 March 2025.

<sup>312</sup> Parliamentary Ombudsman, 'The Setting Up of an NHRI' (n 202) 38.

<sup>313</sup> *ibid.*

## Chapter IV: CONCLUSION

### 4.1 Reconsideration of Research Questions

This dissertation was written in light of the approaching 30<sup>th</sup> anniversary of the establishment of the Ombudsman institution in Malta. It began by examining the Ombudsman's role, focusing on his functions and jurisdiction. Within this framework, the study undertook an in-depth analysis of the current jurisdiction of the Ombudsman, ultimately leading to the central research question:

1. Should the jurisdiction of the Parliamentary Ombudsman in Malta be expanded, and if so, how can this be achieved effectively, and to what purpose?

### 4.2 Evaluation of Dissertation

In reply to the above, this dissertation explored the potential expansion of the Ombudsman's jurisdiction from two key perspectives. First, it advocates for extending the Ombudsman's remit to protect citizens receiving essential services from private entities. Second, it argues for granting the Ombudsman a formal mandate to investigate human rights complaints, alongside the establishment of a Maltese NHRI under the Ombudsman's management. This proposed expansion stems from the Ombudsman's significant role in safeguarding democracy, upholding the rule of law, ensuring good governance, and protecting fundamental human rights and freedoms.<sup>314</sup> Expanding its jurisdiction would further empower the institution to carry out its mandate more effectively.

With regard to the first aspect, this dissertation examined privatisation and its implications for the Ombudsman's jurisdiction. The analysis demonstrated that services falling outside his remit due to privatisation lack essential oversight, leaving room for potential abuse by the State or public authorities.<sup>315</sup> Therefore, expanding the

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<sup>314</sup> Venice Commission, 'Venice Principles' (n 263) 7.

<sup>315</sup> H.W.R. Wade and C.F. Forsyth, *Administrative Law* (10<sup>th</sup> edn, Oxford University Press 2009) 541.

Ombudsman's jurisdiction would enhance access to redress and strengthen his role as a safeguard against injustice, especially amid increasing privatisation.

The main argument for expanding the Ombudsman's jurisdiction is the need to amend the definition of 'public authority' under Maltese law, drawing inspiration from the broader interpretation found in the UK's HRA 1998. Article 469A(2) of the COCP narrowly confines the definition to public entities, excluding private bodies delivering essential public services. Contrastingly, Section 6(3) of the HRA 1998 recognises 'hybrid' public authorities. This author referenced Maltese case law to highlight how the Maltese Courts seem to support this broader approach, acknowledging that the defining feature lies in the nature of the function performed, rather than the identity of the entity performing it. Certain jurisdictions have already responded to the realities of privatisation by extending the Ombudsman's jurisdiction to include such entities. In advocating for similar reform in Malta, this dissertation also referenced GhSL's proposed definition of 'public authority'. It is therefore argued that amending the COCP and the Ombudsman Act to incorporate either the HRA's interpretation or GhSL's more tailored proposal would ensure that administrative decisions affecting the public are subject to proper oversight. This dissertation also explored adopting the French notion of 'public service' to address this issue whereby French law recognises private entities tasked with delivering essential public services as falling within the scope of public oversight.

With regard to the second aspect, although many Ombudsman institutions worldwide have gradually expanded their mandate to include the protection and promotion of fundamental human rights, the Maltese Ombudsman does not currently operate under an explicit human rights mandate. While he may investigate complaints that involve human rights issues, this authority is implicit rather than formalised. Consequently, the institution has consistently advocated for broader jurisdiction in this field, including the formal recognition of the Ombudsman as Malta's NHRI.

This dissertation has outlined several advocacy efforts in support of this expansion, including Parliamentary Bills 96 and 97 of 2019, which indicated the Government's

intent to establish an NHRI in Malta but ultimately lapsed in 2022.<sup>316</sup> Most notably, the Ombudsman's office had issued two formal proposals, one in 2013 and another in 2024, both aiming to designate the Ombudsman as Malta's NHRI in accordance with the Paris Principles. While both proposals share the overarching goal of enhancing human rights protection and building upon the current Ombudsman framework, they differ in structural approach. The 2013 proposal suggested establishing an independent Commission, led by the Ombudsman and incorporating members from national institutions and NGOs, which would function autonomously while still operating within the existing framework of the Ombudsman's office. The reason being for the Ombudsman to remain focused on administrative justice, while the Commission would assume responsibility for promoting and safeguarding human rights. In contrast, the 2024 proposal integrates a comprehensive human rights mandate directly into the Ombudsman's role through specific legislative amendments to the Ombudsman Act, without the need to establish a separate entity.

Despite their institutional differences, both models share similar objectives and practical benefits, as detailed in this dissertation. The author has further argued that the Ombudsman is uniquely positioned to take on the role of NHRI, not only due to his ongoing engagement with human rights matters but also because of the advantages outlined in the 2024 proposal. If implemented, this proposal would enrich the current legal framework by expressly recognising the Ombudsman as a human rights defender, therefore significantly enhancing the institution's capacity to protect and advance the fundamental rights and freedoms of all individuals in Malta.

### **4.3 Areas for Further Analysis**

Even at this stage, it is evident that several key areas warrant further exploration. Due to word count constraints, a number of relevant themes could not be addressed within the scope of this dissertation. Nonetheless, the issues examined in this study will require further analysis in light of anticipated legal, political, and social developments.

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<sup>316</sup> The Office of the Ombudsman, 'Annual Report 2023' (n 248) 21.

The following list outlines several topics that may warrant further research:

- The existing legal gap surrounding the term ‘essential public service’ within the Maltese legal context;
- The design of hybrid models, similar to Malta’s broadcasting model, in which private entities are subject to regulatory oversight due to their public service responsibilities;
- A comparison of quasi-judicial bodies and the Ombudsman institution in terms of accessibility, efficiency, cost, and outcomes for complainants, considering the differences between quasi-judicial and non-judicial bodies;
- A broader comparative analysis of how different legal systems define and apply the concept of ‘public authority’ and ‘public function’ in the context of Ombudsman oversight;
- The implications of privatisation for the protection of citizens’ fundamental human rights;
- The design of oversight mechanisms that ensure accountability while respecting business autonomy and competition, balancing transparency with economic freedom;
- A comparative analysis of existing NHRIs across Europe, particularly in countries with similar legal and political traditions, to identify beneficial features that could guide the establishment of Malta’s own NHRI;
- A comparison between the proposed human rights mandate of the Maltese Ombudsman in the Ombudsman Bill and the mandates of Ombudsmen in EU Member States with an ‘A status’ from GANHRI.

#### **4.4 Expected Future Developments in this Field**

Since the inception of the Maltese Ombudsman institution, it is clear that the office has experienced considerable evolution and has encountered various challenges over time. It is equally apparent that the institution will continue to develop and face future obstacles, including those relating to the scope of its jurisdiction. This dissertation maintains that the Ombudsman's ability to serve the public effectively is inherently tied to the powers vested in the office. The time has come for the Maltese legislator to consider forward-looking reforms to address the issues relating to its jurisdiction in a meaningful way.

Regarding the issue of privatisation, while addressing this matter will undoubtedly present complexities, especially given the broad legal and economic implications, it is a discussion that must be brought to the forefront in today's context. With respect to the human rights dimension, the critical importance of fundamental rights, the international recognition of the Ombudsman's role in safeguarding them, and the notable progress made locally, particularly with the submission of the 2024 proposal, strongly support the need to broaden the Ombudsman's mandate. This mandate should be formally extended to include the protection and promotion of fundamental human rights and freedoms. Hence, this dissertation calls on Parliament to equip the Ombudsman with the appropriate legal framework, in line with the recommendations outlined above, to ensure the institution is fully empowered to meet its evolving responsibilities.

## APPENDIX

### **Interview with Parliamentary Ombudsman Judge Emeritus Joseph Zammit McKeon**

#### **1. Could you briefly outline the principal functions of the Parliamentary Ombudsman and the current scope of the Ombudsman's jurisdiction?**

The law states exactly what it is. As far as jurisdiction is concerned, it is laid out in the law itself – namely, for interpretation purposes, Article 2(2) of the Ombudsman Act. Further on in the Act, you will find what it regulates – Article 12 covers the public service, as described in that provision, the companies, corporations, foundations, agencies, and local councils. One must be careful to take note of the exclusions, which are listed in Schedules A and B to the Ombudsman Act.

The Ombudsman investigates acts and omissions of the Government. That is very broad, but over time it has branched out into issues of good governance and the rule of law, due to the elements of redress and justice involved.

#### **2. In your opinion, what are the most significant limitations of the Parliamentary Ombudsman's existing jurisdiction in Malta?**

If you ask me, the limitation lies in not being able to investigate issues of human rights. In Article 22, you will not find a definition of maladministration, but you will find the term 'maladministration' written down in Article 22 of the Ombudsman Act. When the Ombudsman or the Commissioners (because this applies to them as well) make a recommendation based on a government decision or provision, is it just based on gut feeling? No. There are four criteria: the action appears to be against the law; it involves a mistake of law or fact; it is unreasonable, unjust, oppressive, or improperly discriminatory; or simply that it was wrong.

Now imagine a legal provision stating that something was wrong. It was not illegal, but it was wrong. Can you imagine the level of responsibility that carries? This responsibility escalates, because if the recommendation is not implemented, Article 22(4) of the Ombudsman Act provides that the matter may be referred to the Prime Minister, and then to Parliament (the House of Representatives).

This model was taken directly from New Zealand's Ombudsmen Act of 1975. It opens up there, but it does not quite fit here. For example, if someone comes to me and says, "My freedom of expression has been breached," and that complaint is not tied to an act or omission of Government, then under the current structure, it cannot proceed. That's why, if you look at the Bill that I proposed, the aim is not just the protection of human rights, but also their promotion. Promotion and protection—that's what the Paris Principles are about. If you go through that part of the Bill, it reproduces, almost word for word, the Paris Principles concerning human rights.

You could ask me again: "But isn't promoting good practice already part of your job?" Yes, even though the law doesn't explicitly say so, promotion is inherently part of it. Because if I can promote a culture of good administrative practice, then at least on paper, I can reduce the number of complaints.

There was once an Ombudsman, I believe from New Zealand, who said that an Ombudsman should be satisfied when complaints stop coming in. That would mean that his recommendations are being implemented. But that will never make the function redundant, because the mechanics of government administration are so complex that the role of the Ombudsman will always be needed. Maybe, over time, it can reshape itself.

### **3. Under the current mandate, can the Parliamentary Ombudsman investigate human rights complaints?**

The Ombudsman cannot investigate human rights issues directly. There must be an act of administration that is improperly discriminatory. This is a term that has developed

over time. Let me give you an example. Let's say civil servants approach the administration claiming they have a right to something. The administration looks into it and, although it recognises that the individual does not actually have that right, it still grants it. Then others, who are in the same or a very similar situation, come forward but are not treated in the same way – they do not get it. That is what we mean by improper discrimination. Discrimination is not necessarily about offering a job to a woman or a man. That, in itself, may not amount to discrimination. But if the opportunity is open to men, and some men are treated differently from others within that same category, then that is improper discrimination. It is important to use the term 'improper discrimination' and not just 'discrimination', because the latter is too broad. Improper discrimination refers to when people in the same category or situation are treated differently. That is what it means.

So, to answer your question: yes, I can investigate in such situations. But human rights as you're interpreting them – such as Chapter IV of our Constitution, or the human rights provisions in the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union – those we cannot investigate. That is precisely why the Bill went into that aspect.

**4. How would the introduction of a formal mandate to investigate human rights complaints affect the Parliamentary Ombudsman's role, scope, and overall effectiveness?**

It is a big step forward. This is important, and I have mentioned it in the programme. When you go through the literature on human rights, one of the key issues that constantly arises is access to a court. But I have not limited it to access to a court, I have framed it more broadly – access to justice.

This is a democratic state, and in a democracy, that means you must bring the individual closer to the institution. This means that today, if one has exhausted all of his or her ordinary remedies, and that individual is alleging a breach of human rights, specifically those set out in Chapter IV of the Constitution or in the European Convention on Human

Rights, then that individual's only option is to go to Court. I am a strong believer that you can still have a system where investigations into such breaches can take place outside the Courts—through specific legislation like the one we have proposed. In doing so, people are given another avenue, an opportunity to have an investigation into their alleged breach, and to receive recommendations.

One might ask: but those are just recommendations, while a Court gives a binding judgment. Yes, that is true. But I do not want executive powers – neither under the current remit nor under an extended remit. What matters is that the Ombudsman's report would provide evidence. So if one has a report from an Ombudsman with a human rights mandate, and that report is presented in Court, showing that there are grounds for a breach, the Court will take notice of it. There have already been cases under the existing remit where the Court has upheld what the Ombudsman said. In fact, I believe there have been two judgments that reached the Court of Appeal where the Court practically adopted the Ombudsman's findings as their own.

So, that is how this should be viewed at the moment. Of course, it would require a significant shift in mentality – it is easier said than done. This would be a radical change. The Office of the Ombudsman has made its position clear on this matter, and it remains focused on advancing these reforms.

##### **5. What do you consider to be the main implications of Malta not having a formally established National Human Rights Institution?**

Today National Human Rights Institutions are very serious institutions. Keep in mind that even if the proposed law is passed, it does not automatically mean that the proposed institutional structure will be accepted by the international community as a National Human Rights Institution with full status. The law can include whatever provisions are deemed necessary, but the final word rests with the Global Alliance of National Human Rights Institutions. The Bill could pass through Parliament, but once Malta have a law, it would need to apply to GANHRI and ask if it can be accepted. Then, Malta would subject you to a rigorous review and if it does not meet the Paris Principles, then Malta will not

receive an A status. Instead, it will be given B status, which means that Malta is in a 'waiting' category and must undergo scrutiny every five years. It is already difficult to establish a National Human Rights Institution in Malta because of different political ideologies because not everyone agrees with the idea. But even if Malta manages to get past that, there is still another stage to navigate. Some countries have had significant challenges in passing this stage because the scrutiny is tough. So, to answer your question: it is not ideal, internationally speaking, for a country not to have this institution. That does not mean human rights are being violated, but having the institution, alongside others of integrity, is very important.

**6. What potential advantages could arise from designating the Parliamentary Ombudsman as Malta's National Human Rights Institution?**

To me, the main advantage is that it widens access to justice. In a democratic state, a fundamental principle is ensuring that justice is accessible – not necessarily by requiring individuals to go to Court, but by bringing institutions closer to the people.

**7. Should the role of leading Malta's National Human Rights Institution, if and when established, necessarily be assigned to the Ombudsman?**

I would say no, obviously not. You could have a National Human Rights Institution that is standalone, or one that is part of the Ombudsman system. Many countries have adopted the second approach. We favour this model because the structure, personnel, and proposed legislation are already in place, and most importantly, independence is guaranteed. There must be assurance that no one can interfere in investigations.

**8. In your view, should private entities that provide essential public services fall within the jurisdiction of the Parliamentary Ombudsman? If so, how might this jurisdiction be effectively expanded to include them?**

This is a very pertinent question, and in fact, it was raised intelligently by a group of law students who asked whether private companies rendering essential services. For

example, those providing telephony or television, should they fall under the remit of the Ombudsman? Now, in these situations, I do not think we are prepared for such a move, because it would require a radical overhaul of the law itself.

The current structure of the Ombudsman in Malta was never conceived to include private entities. It was always framed around acts or omissions of Government. Even institutions like the Armed Forces of Malta were, for a long time, outside the scope of investigation, although today we can investigate specific matters like pensions. So, to extend the jurisdiction to include essential services provided by private bodies, we would need to rethink and redesign the legal framework substantially.

It is also not as simple as just adding a definition. The term 'essential service' itself is not defined in our legislation. So before pushing forward and trying to bring the structure more in line with current societal realities, we must ask whether we are truly prepared for this shift, not only legally, but also conceptually. It is not just a matter of including private entities, but of rethinking the Ombudsman's mandate beyond Government conduct to public service obligations.

There is also a question of overlap. For example, if a complaint arises about television services today, it would be handled by the Consumer Affairs Authority, which already exists for that purpose. Likewise, with entities like the Bank of Valletta, where the Government holds a minority share but appoints the chairman through class shares, should that fall under the Ombudsman? Our approach has been no, because there's already a designated body, the Financial Services Arbiter, to handle such complaints. Unlike the Ombudsman, who makes recommendations, the Arbiter is a quasi-judicial body, and we often refer people there directly.

So, while there is certainly merit in exploring the extension of the Ombudsman's jurisdiction to essential services, this is a complex issue that goes beyond a simple legal amendment. It would require a comprehensive rethinking of the institution's role and legal foundation.

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