Feedback on Malta's Proposed Legislative Changes further to the Venice Commission Report on Malta

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aditus foundation is an independent, voluntary & non-profit organisation (NGO) established by a group of lawyers with a mission to monitor, act & report on access to fundamental human rights in Malta. We believe in the universality, interdependence and indivisibility of all human rights.

aditus foundation
Rhea Building
1A, Triq is-Santissima Trinitá,
Ħamrun,
Malta
Telephone: +356 2010 6295
Fax: +356 2010 6296
E-mail: info@aditus.org.mt
Web: www.aditus.org.mt

aditus
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This document contains aditus foundation's feedback on *Malta's Proposed Legislative Changes* contained in document CDL-REF(2020)024 dated 14t May 2020. Whilst we recognise the importance of rolling out the much-needed reform, we wish to highlight that any changes need to be part of a broader reform which takes into account the context of Malta's political, media and civil society landscape that has shaped the reality that we live in today.

The continuing two-party dichotomy, loopholes in party financing rules and an electoral system that results in the impossibility of smaller parties making it to Parliament creates an environment in which successive governments have perpetuated the culture of winner-take-all-ism. The control of the Broadcasting Authority and the ownership of newspapers, television and radio stations by the two main political parties only serve to stifle and form of real dialogue and critique by civil society and dissenting voices. The existence of strong media houses owned by political parties suffocate independent media and journalists, whilst at the same time draining the limited available financial resources and advertising revenue. Furthermore, we see an increased use of publically funded social media for political advertising and a substantial increase in trolling activities against political opponents, activists and NGOs that show disagreement with government policy.

Lastly, an increasingly complicated relationship with the Government has also been a key challenge voiced by many NGOs and civil society activists. This results in difficulties with engaging in constructive dialogue with Government on matters of legal and policy reform. We firmly believe that only through dialogue based on mutual trust can the nation move forward and realise its potential.

We sincerely thank the Venice Commission for this opportunity to present our views on Malta's progress, and look forward to further engagement on this and other matters.

Proposal by Government	aditus comments
Methodology of Reform Venice Commission recommended broad civil society consultation**.**	We wish to highlight that there was no broad civil society involvement in the formulating any of the proposed changes, except for discussion with the Chamber of Advocates which is the only bar association in Malta. The head of the Chamber of Advocates also sits on the current Judicial Appointments Committee and on the Commission for the Administration of Justice. We believe that talks behind closed doors with the Leader of the Opposition are not conducive to transparency nor inclusion. We also note that these broad changes are being presented during a time when inclusive consultation is made even more difficult due to the COVID pandemic. We would also like to point out that several Acts of Parliament grant individual Ministers the authority to appoint members of quasi-judicial bodies, committees, commissions and similar entities having the mandate to decide on appeals or applications presented to them by any person. Although, this paper relates to the reform of members of the judiciary, no reform will be complete without a thorough overall of the method of **appointment and removal** of the members of these quasi-judicial bodies and the application of strict **rules of procedure**, specifically those that are linked to human rights sensitive fields, such as asylum and immigration, and social security.
(a) Judicial Appointments Section A of Part III the Opinion focuses on Judicial Appointments and for ease of reference, we are reproducing the recommendations	**1. Open call and transparent criteria** The system of a rolling-call does not ensure transparency. Furthermore, the criteria adopted for the appointment of judges and magistrates is that found in the

made by the Venice Commission for the improvement of judicial appointments: "1. Judicial vacancies should be published and candidates from inside and from outside the judiciary should apply to the JAC for a specific vacancy. 2. The JAC should have a composition of at least half of judges elected by their peers from all levels of the judiciary. 3. The JAC should rank the candidates, upon merit on pre-existing, clear and transparent criteria for appointment, taking also into account the goal of achieving a gender balance. 4. The JAC should propose a candidate or candidates directly to the President of Malta for appointment. Its proposals should be binding on the President. 5. There should be no exceptions from this procedure for the appointment of the Chief Justice.". In order to implement the recommendations made by the Commission as faithfully as possible, whilst respecting the particularities of the Maltese system, the Maltese authorities are of the view that a system of a rolling public call, which has consistently proven to be the most effective method for attracting the most suitable candidates to the post of judge or magistrate locally, should be retained. In line with the Commission's recommendations, such a system ensures publication of judicial vacancies and will be open for candidates both from inside as well from outside the judiciary. In so far as the composition of the Judicial Appointments Committee is concerned, the Maltese authorities shall likewise implement the recommendation of the Commission. The composition of the Judicial Appointments Committee will be revised so that two additional	Constitution, which are vague and focus on the number of years an individual has been practising law. In most common-law systems, constitutions lay down explicit personal and professional qualifications required from anyone aspiring to become a judge. These selection criteria narrow down the pool of potential appointees not only with regard to the number of years they have spent practising law, but also in relation to the recognition of their achievements, legal qualifications and expertise. According to the International Institute for Democracy and Electoral Assistance, in common-law countries, judges are predominantly appointed by means of peer support, since this is a great indicator of the appointee's merits achieved throughout his or her legal career. A rolling call also does not specify in which court the appointed magistrate or judge will sit and, therefore, there cannot be a concrete skills-set matching to a particular vacancy within a particular Court. It should also be noted that in order to retain one's warrant as advocate there is no requirement for any continuous professional development training. Furthermore, there is no mandatory training for magistrates or judges in order to progress in rank. There is no published list of pre-existing, clear and transparent criteria other than that of having practised law for a number of years. In this way, applicants and the public have no further way of knowing how or why a certain person, that satisfies such a basic requirement, was chosen as opposed to others who could have qualified. A clear list of criteria should be published, which requirements could (and should) include post-graduate qualifications, extensive experience in specific fields and other skills. The law should outline what specific criteria need to be included in any calls for appointment of the judiciary and it should not be left to the JAC to draw up criteria and method of procedures. The law should not be vague enough to allow the JAC to act in a non-transparent fashion. In other frameworks, the laws allow for tribunals and boards to establish their own procedures, and this has resulted in

judges and a magistrate, elected by their peers, will be added to the Committee. This will effectively address the recommendation of the Commission directed at the composition of the Committee, given that as a result of this change, half of the members of the Committee will be members of the judiciary, with all levels of the judiciary being thus represented and with the two judges and the magistrate elected by their peers.

Another change in the composition will be that the public prosecutor will no longer be involved in the appointment of members of the judiciary and will be substituted by the State Advocate with the latter having no prosecutorial functions. Moreover, the Chief Justice will be given a casting vote in addition to his original vote. The Maltese authorities are of the view that the fact that the Chief Justice presides over the Committee is essential and meaningful given that the Chief Justice presides over all appellate courts, whether these are civil, constitutional or criminal courts.

Thus, the Chief Justice is in practice aware of the standard, integrity and compliance with ethical rules of all legal professionals who appear before these courts and who are most likely to be potential candidates for the post of judge or magistrate. This visibility on the part of the Chief Justice will certainly be an asset to the Committee. The Maltese authorities are also of the view that having the Chief Justice presiding over the Committee is likely to inspire greater public confidence in the said Committee. It is therefore of great importance that the Chief Justice will continue to preside over the Committee in order to boost confidence in, and overall effectiveness of, the system.

Under the new system, when a judicial vacancy arises the Judicial Appointments Committee will propose the three most suitable

either no procedures being adopted at all or in unclear procedures that change without notice or at will. This is even more crucial if a potential candidate that was not chosen for the appointment wishes to challenge such decision.

For example, the public does not know what particular criteria are used to appoint the Chief Justice and members of the judiciary: did they achieve any post-graduate degree since graduating as a lawyer, did they undergo any training further to accession of Malta into the European Union, any training on human rights or GDPR? This is of extreme importance for all members of the judiciary and specifically to the role of the Chief Justice who presides over all appellate courts, whether these are civil, constitutional or criminal courts.

2. Composition of the JAC

The current Judicial Appointments Committee is made up of the Chief Justice (appointed by the Prime Minister), the Attorney General (appointed by the Prime Minister), the Auditor General (appointed by 2/3 of the House of Representatives), the Ombudsman (appointed by 2/3 of the House of Representatives) and the President of the Chamber of Advocates (elected by the members of the bar).

The changes include two additional judges and one magistrate (elected by their peers to sit on the committee), which is a step forward in ensuring peer to peer recognition. There is no explanation why the State Advocate, who essentially acts as legal advisor to the executive, remains on the Committee. Changes to the appointment of the Chief Justice are being proposed, although reservations as to the method remain. It is not known if the other members Auditor General, Ombudsman and the President of the Chamber of Advocates remain on the Committee.

candidates for appointment to the judiciary directly to the President of Malta. The President will make the selection from amongst those candidates. The proposal of the Judicial Appointments Committee will be accompanied with a detailed report expressing the Committee's views on the suitability of each of the proposed candidates. The final choice will rest with the President. The decision to propose this amendment was taken by the Cabinet of Ministers in its meetings dated 12th May 2020 after the Minister undersigned explained the outcome of the video-conference with the Commission on the 5th May 2020. The Maltese authorities are of the view that ranking candidates would have an undesired and demeaning effect not only vis-à-vis the candidates between them, but also in so far as their individual professional reputation is concerned, possibly discouraging potential candidates from applying. Nonetheless, the scope behind the recommended ranking of candidates will still be attained, by means of the afore-mentioned accompanying report in respect of each individual eligible candidate, which will be sent to the President. The said report, as the Commission recommends, would examine the eligibility of each respective candidate on the basis of pre-existing, clear and transparent criteria for appointment. The Maltese authorities submit that the Committee enjoys full and unrestricted discretion, without being subject to any external influence or direction, to establish its own procedure and draw up objective and clear eligibility requirements. This proposed system will ensure that the decision of the Committee will be respected at all times given that there is no possibility of referral of candidates back to the Committee, nor is there the possibility not to abide by the decision of the Committee.	According to a comparative analysis regarding the appointment of judges under Commonwealth principles, published by the British Institute of International and Comparative Law (BIICL), 81% of Commonwealth jurisdictions have a judicial appointments commission. It is essential in all these cases that such a body is assuredly independent, has transparent procedural rules and that its members have sufficient expertise that enables the commission to assess judicial candidates competently. In order to ensure transparency, an open application process is advised, alongside an interview of the candidates that is also open for the public. **3. Appointment by President** When a vacancy arises, the JAC will propose to the President three suitable candidates from a presumable pool of names that have shown their willingness to be appointed as member of the judiciary within the last years. This method is inadequate as per point 1(a) above. Furthermore, there is no mention of any specific criteria to match with any specific vacancy, nor of the evaluation process. The final decision should rest in the hands of the JAC without any influence of the President. The President is the Head of State, appointed to the role by a simple resolution of Parliament, which in a two-party democracy means appointment by the ruling party. There is no legal or logical reason why the President should have the final decision to choose members of the judiciary if not to exert political influence. Furthermore, it ought to be underlined that, historically and as a matter of Constitutional practice, Malta's President almost always acts on the advice of the Prime Minister. Should the President be given such a remit, despite our concerns that it is contrary to the principle of separation of powers, then he/she must be required to provide well-founded reasons for his/her decision. Any legal framework adopted in this manner must clearly set out the relationship between the selection process conducted by the commission and role of the executive at the final stage. Best

The new system will eliminate the possibility of having candidates appointed directly by the Government or of the Government vetoing a proposed candidate.	practice would require that the commission be empowered to present the executive (or in the present case, the President) with a single, binding recommendation for each vacancy.
(b) The Chief Justice As regards the appointment of the Chief Justice, the Maltese Authorities insist that procedure must differ from the rest. Malta is a small nation where the Judiciary complement is of 44 members (Judges and Magistrates). Therefore, the Chief Justice enjoys wide powers. In such a context, the proposal is that the appointment to this position will be made through the support of two-thirds of the members of Parliament. This would result in basically the support of the main political parties and would enable a high level of authority. On this point there is already agreement between Government and the Opposition, always subject to the approval by the Commission. Such alignment was the result of bi-partisan discussions including within the Constitution Convention led by the President of the Republic of Malta H.E. Dr George Vella. This agreement on the method of appointment was further enabled through a unanimous Parliamentary Resolution passed on Wednesday, 1st April 2020 in favour of the appointment of the new Chief Justice. … Finally, we wish to clarify that, with respect to judicial discipline, the same method explained hereunder will apply to the Chief Justice. Therefore, given the above, Malta requests the Commission's approval for this methodology of appointment as explained.	In the British system the Chief Justice is chosen by a specially appointed committee of the JAC which is composed of judges, lay people, professionals – 12 members of the committee are appointed through a competitive process and the other 3 are appointed by the Judges Council. This method ensures peer-to-peer evaluation without political interference. It also ensures that in the interests of a functioning and respected judiciary, the better qualified senior judge would be appointed. Candidates in the UK system are assessed against a competency framework where they have to demonstrate how their knowledge and experience meets the required competencies. The committee determines the process for selection. The Lord Chief Justice is customarily appointed from among Court of Appeal judges, but the appointments can also be made from among Supreme Court judges. There is a need for exact and stringent provisions related to the selection and appointment process not only because of the constitutional role of the Chief Justice but also because of the large degree of responsibility he/she has for the administration of the judiciary and the court system. Having a 2/3 Parliamentary approval is a more transparent method but it still leaves the highest judicial appointment in the hands of politicians who might not necessarily wish to appoint the better candidate. Furthermore, the method proposed by the Government does not give any indication as to the criteria to be applied in the appointment process (i.e. would there be a shortlist and/or a call for applications?) or for the criteria for appointment, such as qualifications, experience, training.

	While parliamentary confirmation proceedings could possibly strengthen the legitimacy of filling the position of Chief Justice, good practice nevertheless requires that the dangers of politicisation be eliminated from the process.
(c) Judicial Discipline Section B of Part III the Opinion focuses on Judicial Discipline, and for ease of reference we are again reproducing the recommendations made by the Venice Commission for the improvement of judicial discipline: 1. "The removal of a judge or magistrate from office should not be imposed by a political body; 2. There should be an appeal to a court against disciplinary decisions directly imposed by the Commission for the Administration of Justice". In order to fully implement these recommendations, the Maltese authorities will remove the public prosecutor from the composition of the Commission for the Administration of Justice so that the prosecutor will not be involved in the removal of any member of the judiciary. As a result, the Attorney General will be substituted by the State Advocate. Moreover, Judicial discipline, short of removal of a member of the judiciary, will be the prerogative of the Commission for the Administration of Justice and the decision of the Commission of the Administration of Justice will be subject to appeal before the Constitutional Court. Thus, in this respect, the Maltese Authorities will be implementing fully the Commission's Opinion.	The Government's proposals do not remove the final say of Parliament to remove members of the judiciary. The added layer giving the member of the judiciary the right to appeal to the Constitutional Court but retaining the need of Parliamentary approval for removal, makes the disciplinary proceeding more cumbersome. We agree that any removal proceeding should include appropriate safeguards to ensure fairness. However, it is necessary that the removal proceedings are also free from political interference. As mentioned above, there is no reason why the State Advocate, who essentially acts as legal advisor to the executive, should have any role in the removal of a member of the judiciary. It is a long-established principle that judges should not serve at the pleasure of the executive, or be subject to loss of office as a result of changes of government. The removal process can by no means be used to penalise or intimidate judges. For this purpose, the Commonwealth Latimer House Principles declare that judges *"should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties"*. As far as the public bodies responsible for removal decisions are concerned, a variety of models exist. In 42% of Commonwealth jurisdictions, once an initial investigation establishes that a question of removal has arisen, an ad hoc tribunal is formed to determine the issue. In another 21% of jurisdictions a permanent disciplinary council is established for that purpose. A parliamentary removal mechanism is found in 34% of jurisdictions. Removal methods could include:

The Maltese Authorities acknowledges that there may be room for change in the sphere of the removal of judges or magistrates, but such change should not extend to the impeachment proceedings. The proposal of the Maltese Authorities is to the effect that were the Commission for the Administration of Justice recommends that a member of the judiciary be removed by Parliament, the said member of the judiciary will have the right of an appeal from such recommendation to the Constitutional Court. This mechanism will respect the principle that a member of the judiciary is judged by his own peers given that the adoption of this model will give the last word by way of review to the Judicial Organ.	1) *ad hoc tribunals*: Investigation proceedings conducted by the Chief Justice or/and a judicial service commission. If the investigation results in a recommendation that an ad hoc tribunal be formed, then the investigating body would advise the PM that a tribunal be formed, and also proposes its members. Tribunal members must usually be serving or retired judges, either from the jurisdiction itself or from other Commonwealth states, which helps ensure the manifest impartiality of the tribunal by making it possible to avoid local conflicts of interest. 2) *Disciplinary bodies*: Removal by the Commission for the Administration of Justice directly, with the right of appeal to the Courts. Pertaining to the composition of such bodies, the Special Rapporteur of the UN has set out rather precise standards in its Report on the Independence of Judges and Lawyers in 2014. According to the Special Rapporteur, authorities deciding on disciplinary accountability of judges shall have no political representatives among the members (that is, representatives of executive and legislative branches of government). Instead, they shall be exclusively composed of judges (active or retired), with a recommendation that the membership shall include representatives of other legal professions or academics. In Malta's practice, it is extremely rare that judges are removed from their post even after suspicions of wrong-doing, and this had led to a lack of trust in the courts.
(d) Prosecution Section C of Part III of the Opinion focuses on Prosecution where the following recommendations were made in paragraph 73:	We welcome the introduction of the role of the State Advocate. However, we also note that the criteria in order to be appointed as State Advocate are that one simply has to have 12 years' experience working as an advocate. The state advocate is appointed by the Prime Minister.

"1. An office of an independent Director of Public Prosecutions or Prosecutor General or Public Prosecutor should be established in Malta. 2. The office of the independent DPP would be responsible for all public prosecutions (institution, suspension or termination of criminal proceedings, including corruption). 3. The powers of the new DPP should be subject to judicial review, notably as concerns non-prosecution, upon request by the victims. 4. The AG would [not] remain the legal advisor to the Government. 5. The Police remain responsible for investigative work". With a view of implementing the above recommendations, on the 18th December 2019 the Office of the State Advocate was established in terms of article 91A of the Constitution as the principal advisor to Government in matters of law and legal opinion. The State Advocate is tasked to act in the public interest and to safeguard the legality of State action and also performs such other duties and functions as may be conferred by the Constitution or by any law. The State Advocate enjoys constitutional independence and is not subject to the direction or control of any other person or authority in the performance of the functions conferred. Following the establishment of the office of the State Advocate, the functions of the public prosecutor remained vested with the Attorney General whose office already enjoys constitutional independence in terms of Article 91 of the Constitution. The offices of the State Advocate and of the Attorney General are separate offices which operate from different premises. Amendments have been introduced in the Attorney General Ordinance (Chapter 90 of the Laws of Malta), which amendments have not yet come into force, in order to provide for the taking over by the office of the Attorney General of prosecutions of those	**1. Appointment of Public Prosecutor** The Attorney General (AG) remains appointed by the President acting in accordance with the advice of the Prime Minister. The AG's term is indefinite up until retirement age and he may be removed by 2/3 resolution in Parliament. This is in conflict with the recommendation that the prosecutor is independent and free from political interference. Given his/her exceedingly influential role, it is crucial that the AG enjoys the confidence and respect of both the public and the judiciary. The method of selection, should support him/her in gaining such respect and confidence. Therefore professional, non-political expertise must be involved in the selection process. Again, we also note that the criteria in order to be appointed AG are limited to a minimum 12 years of experience working as an advocate, without any further criteria laid down at law. This arrangement completely ignores the fact that it has been underlined several times in international documents that the qualities required of a prosecutor are similar to those of a judge – as stressed by the European Network of Councils for the Judiciary (ENCJ). -According to ENCJ, the appointment of the AG should be based entirely on objective criteria of professional competence, leadership, integrity and experience, but equally importantly, it should lack all political interference, whether formal or informal. The criteria for the recruitment of prosecutors should be established, transparent and open to public scrutiny. **2. Role of Public Prosecutor** We contend that the retention of a prosecutorial role by the police, even for minor crimes carrying less than two years imprisonment, remains conflictual. The role of the police to bring all evidence that results from its investigative work directly

offences that carry a punishment of more than two years (therefore including corruption related offences) whilst the police will remain responsible for investigative work. A public call was issued by the Office of the Attorney General in order to recruit legal officers to act as prosecutors before the inferior and superior courts. It is envisaged that not later than the end of 2020 the office of the Attorney General will be responsible for the public prosecutions of the most serious offences. With the coming into force of the amendments to the Attorney General Ordinance, recommendations 2 and 5 of the Commission will be fully implemented whilst recommendations 1 and 4 have already been implemented by the Maltese authorities.

In so far as recommendation 3 is concerned, Maltese authorities propose the introduction of legal amendments that allow for the possibility of (a) judicial review of decisions not to prosecute and other decisions taken by the Attorney General on the grounds of illegality or unreasonableness; and (b) judicial review of decisions to prosecute before a particular court.

In practice, the proposed amendments would provide for the possibility of review of the decision not to prosecute, whereby the injured party would have the right to request the Attorney General to reconsider the decision taken. This request must be made by the injured party within a period of one month from when the injured party knew or could have known of the decision, whichever is the earlier. In the event that the Attorney General informs the injured party that the request was not acceded to or if no reply is issued by the Attorney General within one month, then the injured party may institute an action for judicial review before the civil courts. Such an action shall be filed by the injured party within two months from the date when the injured party becomes aware or could have become

conflicts with that of the role of prosecutor whose role is to prosecute and secure convictions of the suspect. This seriously prejudices the rights of the suspect during criminal trials.

The police should only have a role in the investigative work of a criminal judicial process and not act as prosecutor. The situation is even more bizarre when police officers who obtain a law degree are allowed to practice privately, which may give some officers a role in investigation, prosecution and also private practice.

When it comes to police forces, regulating conflict of interest effectively is of utmost importance: it is fundamental for both maintaining a high standard of ethical conduct and for the efficiency of police work. Any divergence from the principle of absolute impartiality, either actual or apparent, adversely affects levels of public confidence and trust, upon which the police are mightily dependant. The socially and politically sensitive nature of public law enforcement requires officers to be impartial, honest and trustworthy – and for police officers to appear as such. Secondary employment, however, especially within the field of criminal law, constitutes the paradigm of conflict of interest as well as that of conflict of commitment. In Malta, given the particularly small size of the country and the notably small number of people who serve as police personnel, this conflict of interest would undoubtedly occur.

3. Judicial Review not to prosecute

Judicial review should cover concerns of non-prosecution, even those of minor crimes, upon request of the victim. This should replace the current *sfida* (challenge) that may be filed against the police for non-prosecution under Article 541 of the Criminal Code, whilst retain the right to file a *sfida* for non-investigation of a report by the police.

aware of the decision, whichever is the earlier. The civil courts would have the authority and jurisdiction to annul the decision of the Attorney General not to prosecute.	It is unclear what the judicial review courts can decide besides annulling the decision. There is no further detail on what can be provided for in cases that the court decides for the person filing the judicial review.
(e) The Permanent Commission Against Corruption (PCAC) In addition, the Commission identifies, in paragraph 72 of its Opinion, two structural shortcomings in the set up and operation of the Permanent Commission Against Corruption (PCAC) being: 1. the appointment of the members by the Prime Minister and 2. the reports with the findings of the PCAC are sent to the Minister responsible for justice. In order to address these shortcomings, legal amendments are being proposed which provide for the chairperson of the PCAC to be appointed by the President acting in accordance with a resolution of the House of Representatives supported by the votes of not less than two-thirds of all the members of the House; whilst the two remaining members of the PCAC will be appointed by the President acting in accordance with the advice of the Cabinet given after consulting the Leader of the Opposition. An amendment is also being proposed for those reports which contain a finding of corrupt conduct in the opinion of the PCAC, to be transmitted directly to the public prosecutor.	Any Commission or body that has as its aim to fight corruption is welcome, however, the real and underlying problem lies in the lack of prosecution and conviction of persons guilty of corruption. The existence of the PCAC is an act of whitewashing and in effect is another toothless body, funded by the public, whose members are appointed by members of Parliament and therefore not free from political influence. In fact, it was reported by Greco that the PAC has not produced concrete results after 30 years of existence. This is shocking in the lights of reports of corruption in recent and not so recent years. In order to strengthen the fight against corruption the focus should be on ensuring the independence of the police and the judiciary, and on reforming both institutions to ensure resources, professionalism and integrity. Any amendments to the PAC Act should also seek to amend the power of the Attorney General to exempt witnesses from criminal proceedings in connection with such corrupt practice or any connected offence. Public guidelines should be issued in relation to how and when the Attorney General can allow for immunity, with specific focus given to criteria to be considered, primarily if any such immunity is in the interests of justice.
(f) The Ombudsman	

Section B of Part IV of the Opinion deals with the office of the Ombudsman wherein at paragraph 101 the Commission recommends the raising of the rules on appointment and dismissal of the Ombudsman as well as the powers of the Ombudsman to the constitutional level, and that Parliament should be obliged to debate reports addressed to it by the Ombudsman. In order to implement these recommendations, legal amendments are being proposed whereby the provisions dealing with the appointment, removal and suspension of the Ombudsman will be included in the Constitution. The proposed amendments also provide for the mandatory obligation for Parliament to debate the annual report prepared by the Ombudsman.	Our main concern relates to the level of non-compliance by the Executive with decisions and recommendations of the Ombudsman. The Office does not enjoy the necessary support and cooperation from Government bodies, as recently stated in the Ombudsman's forward address when addressing Parliament in 2019, reported here: https://timesofmalta.com/articles/view/ombudsman-tells-speaker-to-stop-ignoring-his-investigations.706997. We also see that the conclusion of complaints filed by individuals on take a number of years and a lack of cooperation of public authorities in responding to requests by the Ombudsman's staff. With regards to the former, many of the times it is due to the lack of responsiveness by the public authorities to the requests of the Ombudsman. We suggest that amendments to the Ombudsman Act would include widening the scope in relation to fines imposed on the refusal of witnesses to attend meetings or give evidence when summoned to also include refusal of public officers, heads of department or Ministers give the information requested. Even though it is a traditional and fundamental feature of the Ombudsman that he/she does not possess the power to enforce his/her findings, it has been noted that some Ombudsmen, that are national human rights institutions, have been given stronger powers of enforcement, such as the power to make decisions, prosecute and refer or take cases to court or other tribunals for a judicial determination. Furthermore, a growing number of ombudsmen have been given powers to apply to constitutional and other courts to bring protective actions or ask for clarification of constitutional and human rights issues.
(g) The Prime Minister	

Section B of Part V of the Opinion focuses on the powers vested in the Prime Minister where the Commission recommends that the power of the Prime Minister to appoint members to independent commissions should be shifted from the Prime Minister to the Cabinet of Ministers. In order to implement this recommendation, legal amendments are being proposed in order to ensure that the appointment of other high-ranking officials; including (i) the members of the Employment Commission; (ii) the Governor, Deputy Governor and the directors of the Central Bank of Malta; (iii) the Chairman of the Malta Financial Services Authority; and (iv) the members of the Board of the Arbitration Centre; is effected by the Cabinet of Ministers and not the Prime Minister. An amendment is also being proposed to provide for the appointment of the Information and Data Protection Commissioner by the Cabinet of Ministers after consulting the Leader of the Opposition.	The Prime Minister is the centre of political power and with wide-ranging powers of his cabinet ministers and their portfolios. Therefore, although these proposed amendments somewhat dilute the power that the Prime Minister has in the appointment system, if the other institutions of the state are not strengthened, then in practice the situation will remain as is. Appointment to State institutions needs to be done in accordance with strict rules of publicity, merit, transparency and the possibility of effective investigation and removal in cases of wrong-doing.
(h) Permanent Secretaries Section 1 of Part C of the Opinion deals with Permanent Secretaries and the recommendation provides that Permanent Secretaries should be selected upon merit by an independent Civil Service Commission and not by the Prime Minister. In order to implement this recommendation, legal amendments are being proposed in order to ensure that the Public Service Commission, which is an independent constitutional body, will make recommendations to the President of the Republic for the appointment of Permanent Secretaries on the basis of clear and pre-established requirements and after giving due	It should be noted that members of the Public Service Commission are appointed by the Prime Minister and as such lack the qualities of an independent civil service commission. The provisions in the Constitution do not provide for any specific qualifications to be appointed as a member of the PSC. Appointments to high level positions within the civil service should be based on merit with transparent criteria that focus on qualifications, experience and expertise. The power to remove Permanent Secretaries is also vested with the Prime Minister, and this may lead to undue influence on the Permanent Secretary to follow instructions or directions unquestionably. The removal of the power to appoint and remove Permanent Secretaries at will reduces the possibility of abuse of power.

consideration to any recommendation that the Principal Permanent Secretary may make. The proposed amendments will provide that the appointment of the Principal Permanent Secretary shall be made by the President acting on the advice of the Cabinet of Ministers after having consulted with the Public Service Commission.	Furthermore, the procedure to file complaints with the PSC against the conduct or possible conflicts of interest of Permanent Secretaries by members of the public should be clarified and made more transparent. Currently the PSC can discipline public employees / servants on reference by the employees Head of Department. We reiterate that the President should **not** have any power to make any choices from short-listed candidates (see above comments on the President). This is explained in detail by the Commissioner for Standards "*Towards Higher Standards in Public Life Proposals to Modernise the Provisions of the Constitution on Parliament, the Judiciary and Public Administration*": https://standardscommissioner.com/wp-content/uploads/constitutional-reform-proposals.pdf
(i) Persons of Trust Section 2 of Part C of the Opinion deals with Positions and Persons of Trust. The thrust of the recommendation is to introduce a real and clear legal basis which strictly limits the appointments of persons of trust. In order to address this recommendation, amendments will be introduced in the Public Administration Act (Chapter 595 of the Laws of Malta) establishing a clear legal basis for the appointment of persons of trust. These provisions will limit these engagements to consultants to Ministers or Parliamentary Secretaries, staff in the Secretariats of Ministers or Parliamentary Secretaries and appointments of a temporary nature whenever a post remains vacant after repeated public calls are issued.	We would like to highlight in addition to persons of trust being employed within Ministers' secretariats or as consultants to the Ministers, there are a number of persons appointed to head government agencies and bodies that are also outside the purvey of the PSC and the Public Administration Act. Persons who head agencies and bodies set up by specific Acts or statutes have wide ranging powers and are in most cases not appointed through public calls but by the Minister responsible for that specific sector. Their method of removal is also not clear. Furthermore, whilst the Constitution prohibits members of Parliament from accepting government contracts for works or the supply of merchandise to be used in the public service, it does not cover contracts for the provision of services. In addition, such prohibition applies only to contracts with the government. Public entities – bodies in the wider public sector, such as statutory authorities,

The amendment will also establish the maximum number of persons that may be engaged as persons of trust in the Secretariats of Ministers and Parliamentary Secretaries as well as the conditions and duration of such engagements. A consequential amendment will also be introduced in the Standards in Public Life Act (Chapter 570 of the Laws of Malta) to reflect the changes made in the Public Administration Act in so far as the definition of persons of trust is concerned.	government agencies, and government-owned companies and foundations – are legally distinct from the government. While staffing in the Public Service is overseen by the PSC no such mechanism exists to oversee the appointment of persons of trust or staffing in the wider public sector. The Public Administration Act of 2019 established the Merit Protection Commission, however, the relevant provisions of the Act were never brought into force. It should be noted that the remit of the Commissioner for Standards is limited to ministers, parliamentary secretaries, members of Parliament, and persons of trust as defined by the Act It was proposed by the Commissioner for Standards that the Constitution should recast the Public Service Commission as the guardian of merit throughout the entire public administration, that is to say including public entities, disciplined forces, the Parliamentary Service and the new Judicial Service (see link to report referred to above in point h). It is hoped that the Commissioner for Standards continues to be allocated the necessary resources. (https://timesofmalta.com/articles/view/clerical-error-slashes-2019-planned-budget-for-standards-commissioner.789482)
(j) The President of Malta The Commission stresses on the importance of a qualified majority in the House of Representatives for the appointment and removal of the President and the granting of more powers to the President in order to serve as a player for more checks and balances on the power of the Executive.	Any changes in the appointment system by simply shifting the deciding power from the Prime Minister to a President appointed by the Prime Minister and governing party are only cosmetic changes. In order for the President to be an effective actor within the checks and balances system the appointment to such a role must either be by qualified majority in Parliament with a number of candidates proposed for the role or through direct

First of all, it must be noted that for recent appointments, although the nomination was always put forward by the Prime Minister, there was agreement with the Leader of the Opposition. Therefore, given this, to a certain extent there was already a degree of agreement between both sides of Parliament in place. Secondly, there is already alignment for such proposals from the Commission's side to be discussed within the parameters of the Constitutional Convention, where such discussion will be open to ensure public participation by the President of Malta and, solely after this process, will the required decisions be taken.	suffrage. The role of the President, as it currently stands is similar to that of a monarch, and should not have any executive deciding powers specifically in the appointment of the judiciary or other persons to government posts. We remain concerned with the Constitutional Convention and the lack of effective participation by civil society and citizens as a whole.
(k) 'Erga Omnes' Obligations The Government has taken note of the Venice Commission opinion on the effects of judgments of the Constitutional Court and in particular of paragraphs 78 and 79 of the Commission's opinion of December 2018. The Government however considers that enshrining the principle of 'erga omnes' application of judgments of the Constitutional Court in the Constitution of Malta would go against established principles of the Maltese legal system and would itself give rise to undue complications which have hitherto been avoided. It is relevant in this regard to note that the principles of 'binding judicial precedent' and 'stare decisis' are not part of the Maltese judicial system which allows the Courts to treat every case on its own merits. In this context it is considered that the introduction of a system whereby a judgment of the Constitutional Court, given on particular facts, claims and defences, would be applicable 'erga	The Commission for the Holistic Reform in the Field of Justice, a Commission set up in 2013 by a newly elected Labour Government, recommended that with regards to judgments of constitutional and conventional nature the principle must be that these judgments apply *erga omnes* and not between the parties to that Court case. With regards to the State, the sentence shall bind irrespective of who is the other party. The Commission, which was headed by Justice Giovanni Bonello recognised that local civil procedure is based on the principle that judgments have no power on parties not in dispute. However, the Commission highlighted that what is not being recognised by the Courts of constitutional jurisdiction is that the government is the respondent and, therefore, the government is also bound by the judgment of the Court when the Court declares that the law goes against the Constitution or the European Convention. (Measure 408 and 410 of the Final Report, The Commission for the Holistic Reform in the Field of Justice, 2013)

omnes' insofar as it finds a law to be incompatible with the Constitution would itself give rise to further legal contestation and to possible legal uncertainty as to the precise meaning of such 'erga omnes' application. Every endeavor is being made to conform our legislation with the decisions and teachings of our Constitutional Courts, where these have consistently ruled on the constitutional inconsistency of particular legislation and this is proving effective. For instance, in the field of rent and housing laws, owners of residential properties subject to protected leases are seeking recourse to the newly introduced remedies before the Rent Regulation Boards which are now available under the newly amended rent laws [Vide Act XXVII of 2018 – An Act to Amend The Housing (Decontrol) Ordinance]. Thus, the aggrieved party sustaining the undesired effects of previous legislation is himself or herself recognising and benefitting from the effectiveness of the newly introduced ordinary domestic remedies.	We are also of the belief that in order to ensure the supremacy of the Constitution and the European Convention of Human Rights, and to strengthen the certainty of right, there is need to introduce legislative provisions to that effect. Such provisions need to provide that judgments of the Court of constitutional jurisdiction which determine that a law or a provision of the law are inconsistent with the Constitution or the European Convention of Human Rights are void and that law, or that provision of the law, will be null and of no *erga omnes* effect in force of that judgement. The principle that seems to have been enshrined by our Constitutional Courts go against the principle of Article 6 of the Constitution, which proclaims the supremacy of the Constitution and that any law to the extent of its inconsistency with the Constitution, is null and void. Nowhere in the Constitution does it say that a declaration of inconsistency with the Constitution should only be effective between the parties to the suit. This is also linked to the legal standing of the parties and the Courts' strict notion of juridical interest even in cases involving breaches of fundamental rights or provisions of the Constitution. This has resulted in a situation were in order to challenge an executive action or law on human rights grounds requires one to prove direct, immediate and juridical interest. This has extremely serious consequences for individuals and also for civil society organisations that work in the field.