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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

MALTA

OPINION

ON TEN ACTS AND BILLS IMPLEMENTING LEGISLATIVE PROPOSALS SUBJECT OF OPINION CDL-AD(2020)006

Adopted by the Venice Commission
at its 124th Plenary Session
(Online, 8-9 October 2020)

on the basis of comments by

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Mr Martin Kuijer (Substitute Member, Netherlands)
Mr Myron M. Nicolatos (Member, Cyprus)
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I. Introduction

1. By letter of 23 June 2020, the Minister for Justice, Equality and Governance of Malta, Mr Edward Zammit Lewis, transmitted ten bills to the Venice Commission and requested an urgent opinion of the Venice Commission on these bills by no later than 30 June 2020 since the Government intended to submit these bills to Parliament at its earliest. The letter insisted that the bills were to be considered as restricted Government of Malta documents.[1] Therefore, circulation beyond the Venice Commission and its rapporteurs needed to be notified and approved beforehand by the Government, since these were not yet published at that stage.

2. According to the Government, these Bills intended to faithfully transform the proposals for legislative changes[2] , which were the subject of opinion CDL-AD(2020)006, adopted on 19 June 2020 (hereinafter, "the June 2020 Opinion")[3] into concrete legislative texts.

3. On 25 June 2020, the Commission informed the Minister that the Commission's Bureau had discussed this issue and that while the Commission was ready to prepare an opinion on these bills, it would not do so by way of urgency. The Commission pointed out that in its June 2020 Opinion it had insisted that the authorities should have a meaningful exchange with all stakeholders on the basis of texts that are public. The need for such a dialogue had been set out in paragraph 99 of Opinion CDL-AD(2020)006, where the Venice Commission *"calls for wide consultations and a structured dialogue with civil society, parliamentary parties, academia, the media and other institutions, in order to open a free and unhampered debate of the current and future reforms, including for constitutional revision, to make them holistic."* The Commission offered to prepare the opinion for the plenary session of the Venice Commission on 8-9 October 2020. The bills would be made public by the Venice Commission before any exchanges with the stakeholders. Pending the preparation of the opinion, the Maltese Government would of course be free to submit the bills to Parliament. The Government notified the Venice Commission of its intention to submit these Bills to Parliament. The Venice Commission informed the Minister that it is *"welcome that the draft bills will be submitted to parliament pending the preparation of an opinion"* and that *"the parliamentary procedure will trigger a structured dialogue with all stakeholders, which was recommended by the Commission".*

4. On 4 August 2020, the Government notified the Venice Commission that on 29 July 2020 the House of Representatives had unanimously adopted six of the ten bills and sent copies of the Acts as regards:

1. ACT No. XLI of 2020 to continue implementing reforms in the Justice Sector by providing for the **judicial review of decisions not to prosecute** and other decisions of the Attorney General [former Bill No. 154] (CDL-REF(2020)060).
2. ACT No. XLII of 2020 to amend laws which regulate the **Office of the Ombudsman** [former Bill No. 155] (CDL-REF(2020)055)
3. ACT No. XLIII of 2020, to amend the Constitution of Malta relative to the **appointment of judges and magistrates** [former Bill No. 140] (CDL-REF(2020)051)
4. ACT No. XLIV of 2020 to further amend the Constitution of Malta relative to the **appointment of the President of Malta** [former Bill No. 141] (CDL-REF(2020)052)
5. ACT No. XLV of 2020 - An Act to provide for the amendment of the Constitution of Malta and to the Commission for the Administration of Justice Act, Cap. 369, relative to the **removal from office of judges and magistrates** [former Bill No. 142] (CDL-REF(2020)053)

[1] All Bills are now online via https://parlament.mt/13th-leg/bills/.
[2] CDL-REF(2020)024 and further proposals reflected in the June 2020 Opinion.
[3] Venice Commission, CDL-AD(2020)006, Malta - Opinion on proposed legislative changes.

6. ACT No. XLVI of 2020 to amend various laws aimed at reforming the procedure by which appointments to the **Permanent Commission Against Corruption** are made [former Bill No. 143] (CDL-REF(2020)054)

5. Four of the ten bills are still pending in Parliament:
1. BILL No. 156 entitled an Act to provide for the amendment of the **Auditor General and National Audit Office** Act (CDL-REF(2020)058)
2. BILL 157 entitled An Act to amend various laws with the aim of reforming the procedure by which the appointments of the **Principal Permanent Secretary and Permanent Secretaries** are made (CDL-REF(2020)056)
3. BILL No. 158 entitled an Act to provide for the amendment of various laws for the purpose of reforming the procedure for the **making of various appointments** (CDL-REF(2020)059)
4. BILL No. 159 entitled an Act to provide for the amendment of laws relative to the appointment of **persons of trust** (CDL-REF(2020)057)

6. Ms Herdis Kjerulf Thorgeirsdottir, Mr Martin Kuijer, Mr Myron Nicolatos and Mr Kaarlo Tuori acted as rapporteurs for this opinion.

7. The rapporteurs had video-meetings with the Minister on 1 September 2020, with civil society on 3 September, with the majority and with the opposition on 4 September 2020. The President of Malta, the Office of the Attorney General, the acting State Attorney, the Ombudsman and civil society provided written comments. The Association of Judges and Magistrates informed the Commission that they are duty-bound not to express their opinion with regard to legislation that has been adopted by the Maltese Government unless this is done in the exercise of their role as members of the judiciary. On 28 September, the Minister for Justice, Equality and Governance submitted observations and drafting suggestions to the draft opinion (hereinafter, "the Observations").

8. This opinion was drafted on the basis of comments by the rapporteurs and the results of the video-meetings with and written comments from stakeholders. It was submitted to the written procedure replacing sub-Commissions. Following an exchange of views with the Minister for Justice, Equality and Governance of Malta it was adopted by the Venice Commission at its 124th online Plenary Session on 8-9 October 2020.

II. The procedure of the reforms

A. Adoption of six Bills

9. In December 2018, the Venice Commission adopted an Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement in Malta (hereinafter, "the 2018 Opinion" - CDL-AD(2018)028). This Opinion came to the conclusion that in the present Maltese Constitution, the Prime Minister is clearly the centre of political power. Other actors such as the President, Parliament, the Cabinet of Ministers, the judiciary or the Ombudsman have too weak an institutional position to provide sufficient checks and balances. The Opinion therefore made various recommendations aimed to strengthen those other actors. The Opinion insisted that holistic constitutional changes should be adopted as the result of a process of wide consultation in society to give citizens a chance to take ownership of these amendments.

10. In April 2020, the Minister for Justice, Equality and Governance of Malta requested an opinion of the Venice Commission on Proposals for Legislative Changes (hereinafter "the Proposals") engaging with many of the recommendations made in the 2018 Opinion. These Proposals outlined the core elements of an envisaged reform package. This resulted in an opinion adopted by the Venice Commission on 19 June 2020 (CDL-AD(2020)006). In its Opinion, the Venice

Commission reiterated: *"99. The Venice Commission calls for wide consultations and a structured dialogue with civil society, parliamentary parties, academia, the media and other institutions, in order to open a free and unhampered debate of the current and future reforms, including for constitutional revision, to make them holistic. The process of the reforms should be transparent and open to public scrutiny not least through the media."*

11. While the Commission welcomes the efforts of the Maltese authorities to implement various recommendations of its opinions and while it recognises that the Maltese authorities may feel pressured to rush through the reforms, the Commission cannot but regret that most of the Bills have been adopted before the requested opinion could be finalised (and even before the Commission's rapporteurs could engage with the national stakeholders). In its Observations, the Government insists that the reforms were implemented not because the Authorities were pressured into them, but because they strongly believed in them.

12. The Commission indeed expressed the hope that the parliamentary procedure would trigger a structured dialogue with all stakeholders as recommended by the Commission. Submission to Parliament could only be the starting point of a structured dialogue within society. On 1 July 2020 the bills were presented to Parliament for a first reading but on 2 July 2020, the authorities informed the Commission that the ten Bills were not yet in the public domain. On 17 July, the authorities informed the Commission that four of them had been published (Bills No. 140, 141, 142 and 143). The adoption of six Acts (including Bills No. 154 and 155) already on 29 July 2020 cut short any meaningful dialogue, even if these Acts were adopted unanimously.

13. Therefore, the Commission is critical of the procedure followed by the Maltese Government, which it regrets. The June 2020 Opinion stressed the need for wide consultations and a structured dialogue with civil society, parliamentary parties, academia, the media and other institutions. Only four days later, ten concrete Bills were presented (which were at that time restricted documents). And little more than a month later, six out of ten Bills were adopted. It seems that at no stage of the process there was any serious consultation of civil society or possibility for wider public debate.

14. The Government points out that the committee stage is open for participation by all members of the public and that the procedure was agreed with the opposition. According to the Government, a discussion on these constitutional and institutional reforms has been ongoing at least since 2010, including in public fora under the auspices of the President of the Republic through the President's Forum, which included contributions by members of academia, experts – foreign and local, and civil society. However, the Commission insists that discussions on reforms in general cannot replace dialogue on the basis of concrete texts. A parliamentary procedure and its live broadcasting does not meet the requirement of wide public consultation.

15. The current constitutional amendments are meant to have a profound and long-term impact in Malta and hence require wide consultations within Maltese society. Thus, the rushed process through Parliament comes not only as a surprise but also a disappointment, despite the Government's assertions that the dialogue in Parliament was structured and broadcast in television. Confining the discourse to political parties in parliament without meaningful public consultation is akin to denying citizens their democratic entitlement to have a say in the shaping of the constitutional order.

16. Such a process runs counter to the literal text and the overall thrust of the previous opinions. The six bills were adopted unanimously but unanimity in Parliament is an ambivalent matter. It could also be interpreted as proving the closedness of the political system and the fact that common vested interests bind the majority and the opposition together. During the video meeting, the Majority insisted on the urgency of the adoption of the reform, and the Opposition pointed out that they had had no influence on the timing of the adoption of the bills.

17. The Venice Commission emphasizes the importance of a transparent, inclusive and deliberative legislative process, especially because the current legal reforms are meant to have a profound and long-term impact in Malta. The rushed parliamentary process runs counter to the literal text and the overall thrust of the previous opinions. The Venice Commission therefore recommends that the remaining four bills and any future amendments be discussed in a wider framework also with civil society.

B. Constitutional Convention

18. In his written comments, the President of Malta sets out his concept for the constitutional convention, pointing out that a first phase of collecting material from society is already terminated and the submissions are available on a website. A report analysing the proposals is to be published soon. According to the President, the Convention should not be precluded from criticising or improving current changes, made on the basis of recommendations of the Venice Commission.

19. The Constitutional Convention would not have executive powers; it would make recommendations only. Ultimately, constitutional amendments would be adopted by Parliament or directly by the people through a referendum.

20. The Convention would have a tentative size of 120 members. Some 40 per cent of delegates would represent institutional bodies and organs, educational organisations, work related organisations and academia, whereas some 60 per cent of the delegates would represent civil society. A process to select representatives among the 1700 civil society organisations in Malta would be necessary.

21. Parliament would call the Convention through a resolution. An organising committee or an individual could be asked to appoint a CEO of the Convention. Alternatively, a suitable person could be tasked with the organising of the event. The time frame would be difficult to assess in view of the current public health crisis.

22. Without being able to comment on these proposals at this stage, the Venice Commission expresses its readiness to assist the Maltese authorities in the establishment of the Convention and in the fulfilment of its tasks.

23. In its Observations, the Government takes the point of view that the recommendation of the present Opinion could be taken up by the (future) Constitutional Convention. However, the Venice Commission insists that these recommendations mostly concern corrections or adjustments. These technical points should be dealt with right away, rather than be left to the Constitutional Convention, which is called to examine wider constitutional issues.

III. Adopted Acts

C. ACT No. XLIII of 2020 [former Act No. XLIII (former Bill No. 140)] Constitution of Malta (Amendment) Act relative to the appointment of judges and magistrates

1. Composition of the Judicial Appointments Committee (JAC)

24. In the process of drafting the June 2020 Opinion, the Maltese authorities proposed that the JAC would be composed of (1) the Chief Justice as the chair, (2) the Auditor General, (3) the Ombudsman, (4) the President of the Chamber of Advocates, (5-6) two judges elected by their peers, (7) a magistrate elected by his/her peers. In this composition the judges would have a

majority and the Chief Justice would therefore not have a casting vote. In its June 2020 Opinion, the Commission welcomed that proposal (see paragraph 23).

25. In Act No. XLIII (former Bill No. 140) the composition of the Judicial Appointments Committee is changed accordingly by amending Article 96A (1) of the Constitution.

26. A cooling off period (Article 96A (1) (f) of the Constitution) of two years before the President of the Chamber of Advocates can be appointed judge/magistrate is a positive step with a view to secure the independence of the Judiciary.

2. Permanent roll call v. call for individual vacancies

27. This issue covers two related elements, the publicity of the vacancy as such and the publicity of the candidates.

28. In the process of drafting the June 2020 Opinion, the Government accepted that there should be advertisements of calls for specific vacancies, in addition to the existing public rolling call for candidates for judicial office, in order to provide timely information about judicial vacancies and to give opportunity to all interested lawyers to apply. Act No. XLIII (former Bill No. 140) has implemented this idea by introducing a new Article 96B in the Constitution: "Whenever a vacancy occurs in the office of judge or magistrate, the Minister responsible for justice shall issue a public call for applications (…)". This is welcome.

29. As for the publicity of the candidates, the Commission considered (see paragraph 29 of the June 2020 Opinion) that if full transparency is precluded, at least the names of the three candidates presented to the President by the JAC should be made public. In a letter of 17 June 2020, the Government accepted this recommendation. However, Act No XLIII (former Bill No. 140) amends Article 96A of the Constitution to the effect that the list of three candidates presented by the JAC to the President "shall be made public in the President's decision", i.e. *after* the President has chosen one of the three judicial candidates.

30. In his written comments, the President of Malta pointed out that in deciding on the candidate to be appointed, he will be guided by their *curricula vitae*, qualifications, professional history and the actual recommendations on each of the chosen three by the Judicial Appointments Committee. In a small country like Malta, such contestants would also be known by the community at large, thus enabling the President to have a more holistic view of each candidate, thus making the final choice somewhat easier. The President prefers that the names of the three recommended candidates be published only with the publication of the name of the chosen candidate and not before. A publication of the names before the President's decision is announced might lead to uncontrolled speculation, possibly also 'lobbying' especially on the social media. The President should have the serenity to choose and decide, away from 'opinion polls', lobbying and unnecessary comparisons in public assessments.

31. While appreciating the President's concerns, the Venice Commission notes that the announcement of the names of the three candidates together with the name of the candidate appointed does not meet the recommendation of paragraph 29 of the June 2020 Opinion. The Commission had pointed out that the qualities of all three candidates proposed to the President had already received the approval of the JAC. Publishing their names before the President takes his/her decision is an important element of transparency of the procedure, which cannot be achieved with a publication *ex post* facto. Therefore, the Commission maintains its recommendation that the names of the three candidates should be published when the JAC transmits them to the President.

3. Direct proposal to the President

32. In the 2018 Opinion, the Commission recommended that the JAC should propose judicial candidates directly to the President of Malta for appointment (see paragraph 145). Law XLIII (former Bill No. 140) implements this recommendation by:

- amending Article 96(1) and Article 100(1) of the Constitution to the effect that the President of Malta shall appoint judges and magistrates in accordance with the recommendation made by the JAC;
- amending Article 96A (6) (d): the JAC sends to the President *"the names of three candidates that the Committee considers to be most suitable along with a detailed report on the suitability and merit of these three candidates who, in the opinion of the Committee, are deemed to be the most suitable for the appointment of these offices".* The President shall then be entitled *"to elect a judge or a magistrate exclusively from the names of the three candidates transmitted by the Committee".* The amended Articles 78 and 85 ensure that the President can act autonomously when making such a judicial appointment. As the method of appointment of the President of Malta has also been amended, the situation described in paragraph 35 of the June 2020 Opinion no longer seems relevant.
- deleting Article 96(4) of the Constitution, according to which the Prime Minister may overrule the JAC by appointing a person who has not passed the vetting;
- replacing the Prime Minister with the President in Article 96A (6) (e) on the advice on the eligibility and merit of judicial candidates.

33. The recommendations under this subheading therefore seem to be implemented in a satisfactory manner with the exception that Act No. XLIII (former Bill No. 140) leaves intact the power of the Minister of Justice to request the JAC for advice *"on appointment to any other judicial office or office in the courts".* As the Minister of Justice has no powers in respect of judicial appointments, reference to the Minister in item (e) of Article 96A (6) of the Constitution should be deleted.

4. Criteria and ranking of candidates

a. Criteria

34. In its June 2020 Opinion, the Commission stated that the core criteria for eligibility to be appointed to a judicial office should be formulated on the legislative level as the *"validation of such criteria and their adoption in the form of law would provide sufficient legitimacy for such an important feature of a vital state institution as is the Judiciary"* (see paragraph 38). The Maltese Government then proposed to raise the criteria to the constitutional level.

35. Act No. XLIII (former Bill No. 140) introduces these criteria in Article 96B of the Constitution: (a) a minimum number of years of practice of the profession of advocate, (b) a valid warrant to practice as an advocate in Malta, (c) the ability to express oneself in the Maltese and English language, (d) integrity, correctness and honesty in public and private life, (e) knowledge of the law, court procedures and professional experience, (f) being diligent, industrious and analytical, being able to work under pressure and make decisions, (g) being impartial and independent, (h) not being involved in any commercial or business activity and not having any financial situation which raises doubt about the ability to perform judicial duties, (i) being able to work in a collegial environment, and (j) possessing knowledge of the Code of Ethics and being willing to undertake continuing professional development.

36. The Venice Commission had recommended to raise the criteria to the legislative level but the Act No. XLIII raised them to the constitutional level. This may make it hard to adapt them in the light of practice.

37. In substance, these criteria seem to meet European and international standards which demand that judicial appointments need to be based on objective, transparent and non-discriminatory selection criteria, which can relate to formal requirements (nationality, minimum age, qualifications, professional experience, et cetera), judicial skills and human skills.[4]

38. These criteria therefore seem to form a solid basis for the JAC when further regulating its "policy in the appointment of members of the judiciary" (see the amendment to Article 96A (8) of the Constitution). It is welcome that the constitutional provision highlights that the JAC will make such further regulations *"without being subject to any direction"* and while giving proper consideration to *"maintaining gender balance".* In view of the fact that under the new amendments vacancies will be announced for specific judicial posts, it will be important to take into account specialised knowledge in specific fields of law (civil, criminal, administrative, etc.) under criterion (e) above.

39. Finally, it is important that the JAC be given the human resources and the competences to check whether a candidate meets these criteria, notably criterion (h) on incompatibility.[5] In its Observations, the Government pointed out that it will consider any requests for additional resources by the JAC to fulfil these duties. This is welcome.

b. Ranking

40. In the June 2020 Opinion, the Commission stated that the combined effect of (a) the JAC submitting detailed reports on the candidates and (b) the JAC presenting the three 'most suitable' candidates, would amount to a de facto ranking and would enable the President to make an informed choice (see paragraph 40). As mentioned under the previous sub-heading, Act No. XLIII (former Bill No. 140) implements these elements.

5. Appointment of the Chief Justice

41. The Commission has previously clarified that its aim is to depoliticise the appointment of the Chief Justice as much as possible (see paragraph 43 of the June 2020 Opinion).

42. Act No. XLIII (former Bill No. 140) amends Article 96(3) of the Constitution and provides that the Chief Justice is appointed by the President in accordance with a resolution of the Parliament supported by a two-thirds majority. The requirement of a two-thirds majority in Parliament would lead to such depoliticization, *"because both the parties would have to seek agreement on a 'neutral' candidate, acceptable to a wide majority in Parliament. Cross-party consensus does not guarantee judicial independence, but strengthens the credibility of the choice made for such an important constitutional post. There is however a danger that this could lead to a lobbying by candidates among politicians. Another issue arises in this context. Any requirement of a qualified majority for an election to high office risks ending in deadlock. Even if the political parties in Malta*

[4] M. Kuijer, *The Blindfold of Lady Justice*, Wolf Legal Publishers 2004, p. 222. See, *inter alia:*
- CM/Rec(2010)12, para. 44: appointments "should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity."
- A similar provision is included in the European Charter on the Statute for Judges in sections 2.1 and 2.2. In doing so it mentions criteria related to legal knowledge (i.e. qualifications and professional experience), judicial skills (i.e. independent thinking and the ability to show impartiality) and human skills (i.e. the candidate's capacity to respect human dignity and put the law into practice).

[5] Cf. Venice Commission, CDL-AD(2019)024, Armenia - Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights, and rule of law (DGI) of the Council of Europe, on the amendments to the Judicial Code and some other laws, paragraphs 27-29.

should be commended that they seem able to reach agreement on such elections, it cannot be excluded that such a deadlock could arise in the future. The Chief Justice has such an important position that this situation must be avoided. An extension of the mandate of the incumbent Chief Justice can be envisaged, but this cannot be a solution if s/he can no longer exercise the office due to health reasons. A suitable anti-deadlock mechanism might be that the Chief Justice be elected by the judges of the Supreme Court if there is a prolonged stalemate in Parliament for the election by a qualified majority in Parliament" (see paragraphs 43-44 of the June 2020 Opinion).

43. The Venice Commission regrets that no such anti-deadlock mechanism has been included in Act No. XLIII (former Bill No. 140) for the election of the Chief Justice and urges the Maltese authorities to introduce such a constitutional amendment. In its Observations, the Government pointed out that no agreement on an anti-deadlock mechanism could be reached with the opposition. The Commission hopes that its proposal of an election of the Chief Justice by the Supreme Court judges would be more acceptable to the opposition than decreasing majorities.

D. ACT No. XLIV of 2020 [former Bill No. 141] to further amend the Constitution of Malta relative to the appointment of the President of Malta

44. The Venice Commission argued in its 2018 Opinion that strengthening the Presidency and increasing the distance of the President from the political majority of the day could be a way to improve checks and balances. In the process of drafting the June 2020 Opinion, the Maltese Government proposed that the President be elected and removed by a qualified majority of two thirds in the House of Representatives. As regards an anti-deadlock mechanism, it was suggested to have another vote requiring a two-thirds majority, not earlier than seven days from a failed first vote. Ahead of the vote, it would be possible for new candidates to be proposed. Failing the second vote, the House of Representative would take a third vote, not earlier than seven days from the second vote, where a ['simple'] majority of all members of the House would suffice. In its June 2020 Opinion, the Commission assessed this to be an improvement of the procedure of election of the President. This anti-deadlock mechanism was however removed from the Bill before its adoption. Short of direct presidential elections, a mechanism acceptable to all sides should be found.

45. Removal of a President can only be effectuated by a two-thirds parliamentary majority and only on the grounds of proved inability to perform functions of his office (whether arising from infirmity of body or mind or any other cause) or "proved misbehaviour". The Commission welcomes this amendment. Not only because it requires a two-thirds majority, but also because of the limited scope of the grounds allowing for such a removal. However, as "proved misbehaviour" by the President of Malta can be assimilated to a criminal act, the President should a have a right of appeal to the Constitutional Court against a finding of such misbehaviour, ideally before the final vote in Parliament.

46. Amending Articles 78 and 85 of the Constitution Act XLIV (former Bill No. 141) ensures that the President can act autonomously when making a (judicial) appointment. This amendment realises a pledge by the Government to change Article 85 of the Constitution in order to give the President his/her own deliberative judgment for the choice among the three most suitable candidates recommended by the JAC (see paragraph 33 of the June 2020 Opinion).

E. ACT No. XLV of 2020 [former Bill No. 142] to provide for the amendment of the Constitution of Malta and to the Commission for the Administration of Justice Act, Cap. 369, relative to the removal from office of judges and magistrates

47. In the June 2020 Opinion, the Venice Commission warmly welcomed that the Maltese Government pledged to remove Parliament from the procedure of dismissal of judges and magistrates. This in effect means that the Commission for the Administration of Justice would be

in charge of judicial discipline including the removal of judges and magistrates. The composition of this body would be altered to the effect that the Attorney General no longer sits on the Commission for the Administration of Justice (see paragraph 52). Following a decision of the Commission, the member of the judiciary (judge or magistrate) concerned would have the right of appeal against dismissal to the Constitutional Court which would have full jurisdiction over the dispute (i.e. facts and legal issues) and could offer full reparation (see paragraph 46).

48. Act No. XLV (former Bill No. 142) implements these changes by amending Articles 97 and 100 of the Constitution, by amending Article 101A (1) changing the composition of the Commission for the Administration of Justice with a consequential change to Article 101A (2), by amending Article 101B (10) (c), by introducing a new Article 101C on access to the Constitutional Court, and by making the consequential changes to other Acts. These consequential changes essentially deal with the procedure to be followed (Article 9 as amended). Generally speaking, this seems to be in line with existing standards.[6]

49. By amending Article 91(5) and (6) of the Constitution the Act regulates the removal of the Attorney-General (AG) by the President following a resolution adopted by a two thirds majority in Parliament. The same changes have been made for the State Advocate (by amending Article 91A (5) and (6) of the Constitution). Removal of the AG and the State Advocate can only be effectuated in case of "proved inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour".

50. The Commission did not make recommendations in this regard. Removal of the AG and the State Attorney is only permissible on limited (and reasonable) grounds and a qualified majority is required. Even if there is a requirement for "grounds", in the end Parliament is a political organ and decides taking into account political considerations.[7] An expert body should decide on such grounds[8] or an appeal should to the Constitutional Court should lie against a decision of a parliamentary committee, before the plenary of Parliament takes the final decision with a two thirds majority.

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[6] The 2013 Volkov judgment (para. 184) refers to the importance of an appropriate framework for independent and impartial review.
In substance, the European Charter on the Statute for Judges is the most elaborate document with regard to the manner in which disciplinary proceedings against judges should be conducted. The Charter requires inter alia that disciplinary proceedings should be of an adversarial character involving full participation of the judge concerned. See also Principle 3 of the Conclusions of the meeting "The guarantees of the independence of judges – evaluation of judicial reform", held in Budapest on 13-15 May 1998, organised by various Associations of Judges (to be found in: Council of Europe, *Independence, impartiality and competence of judges – Achievements of the Council of Europe* (doc. no. MJU-22 (99) 5), p. 49), which refers to "procedures which ensure sufficient guarantees for the protection of individual rights and freedoms of the judge, following the rules laid down in Article 6 of the European Convention of Human Rights".
Principle 17 of the United Nations Basic Principles on the independence of the judiciary adds an additional element: "The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge". This element can also be found in Principle 28 of the International Bar Association Code of minimum standards of judicial independence (New Delhi, 1982) and in Principle 2.32 of the Universal Declaration on the Independence of Justice (Montréal, 1983), but not in its European counterparts.
See also Principle 3 of the Conclusions of the meeting "The guarantees of the independence of judges – evaluation of judicial reform", held in Budapest on 13-15 May 1998, organised by various Associations of Judges (to be found in: Council of Europe, Independence, impartiality and competence of judges – Achievements of the Council of Europe (doc. no. MJU-22 (99) 5), p. 49).
[7] June 2020 Opinion, para 50.
[8] Venice Commission, CDL-AD(2006)029, Opinion on the Draft Law of Ukraine amending the Constitutional Provisions on the Procuracy, para. 34.

51. Article 101A (13) provides that the President acts upon recommendation of the Chief Justice with regard to the subrogation of judges and magistrates and to the assignment of duties of judges and magistrates. However, the same item provides that where the Chief Justice fails to make a recommendation to the President, the President shall exercise this power on the advice of the Minister responsible for Justice who shall publish in the Gazette the reasons for doing do and s/he shall make a statement in the House on this matter. While such subrogation does not seem to be frequent,[9] this seems problematic from the viewpoint of the separation of powers. The power to advise the President on subrogation in case the Chief Justice fails to do so, should be removed from the Minister of Justice and revolve to the next senior judge or, if necessary, the Commission for the Administration of Justice.

F. ACT No. XLVI of 2020 [former Bill No. 143] to amend various laws aimed at reforming the procedure by which appointments to the Permanent Commission Against Corruption are made

52. The 2018 Opinion found two structural problems in the current set-up of the Permanent Commission against Corruption (PCAC): (a) its membership depends on the Prime Minister, even if s/he has to consult with the opposition; (b) the Commission reports its findings on corruption to the Minister of Justice who has no powers of investigation.

53. In the June 2020 Opinion, the Commission welcomed the thrust of the Government's proposals. The first problem which was identified in the 2018 Opinion would be addressed by introducing a change in the manner of appointment of the chairperson and the members of the PCAC.

54. ACT No. XLVI (former Bill No. 143), introduces a change in the manner of appointment of the chairperson and the two other members of the PCAC. All three members are appointed by the President, (a) following a resolution passed by at least a two-thirds majority in Parliament in respect of the chairperson, (b) in accordance with the advice of the Prime Minister for one member and (c) in accordance with the advice of the Leader of the Opposition for another member. Before the adoption of ACT No. XLVI, the membership of the PCAC depended on the Prime Minister only, even if s/he had to consult with the opposition.

55. According to the Proposals, which were the subject of the June 2020 Opinion, the other two members of the PCAC would have been appointed by the President acting in accordance with the advice of the Cabinet given after consulting the Leader of the Opposition. The adopted Act No. XLVI is an improvement since it offers the possibility for the Opposition to choose one member of the PCAC and not only to be consulted. The inclusion of outside expertise into such appointments could be a further improvement.

56. The second problem identified in the 2018 Opinion would be addressed by ensuring that the PCAC is able to transmit a finding of corrupt conduct directly to the public prosecutor (i.e. the Attorney General - AG). In this latter respect the Commission recommended that even reports that express doubts as to corruption or are indicative of corruption, not only a finding of corruption should be transmitted to the prosecution. In addition, the PCAC should be obliged to do so.

57. The Bill introduces an amendment to Article 11 of the Permanent Commission Against Corruption Act to the effect that the PCAC is obliged to transmit *("shall be transmitted")* the report of the results of an investigation directly to the Attorney General if *"the conduct investigated is corrupt or connected with or conducive to corrupt practices".* The wording chosen ('connected with or conducive to') seems to address the concern previously expressed in the June 2020

[9] https://timesofmalta.com/articles/view/call-for-independence-of-judiciary-to-be-more-institutionalised.41511.

Opinion. An alternative would have been to use similar wording to that used in Article 22 of the Standards in Public Life Act.[10]

58. Finally, the clarification that also the offences in Articles 121A and 121B of the Criminal Code (trading in influence and accounting offences respectively) constitute corrupt practices within the meaning of the Permanent Commission Against Corruption Act is welcome.

59. The Bill therefore addresses the two problems identified in the 2018 Opinion. Obviously, the Commission is unable to comment on the implementation of the recommendations made by GRECO in its Fifth Evaluation Round or the proposals by the Commissioner for Standards in Public Life "Towards Higher Standards in Public Life Proposals to Modernise the Provisions of the Constitution on Parliament, the Judiciary and Public Administration" of 30 October 2019.

G. ACT No. XLI of 2020 [former Bill No. 154] to continue implementing reforms in the Justice Sector by providing for the judicial review of decisions not to prosecute and other decisions of the Attorney General

60. The 2018 Opinion recommended that prosecutorial decisions, notably not to prosecute, should be subject to judicial review (see paragraph 145 sub 2). While an appeal against non-prosecution by the police exists already (the somewhat vague Article 541 of the Criminal Code, which should be made more readable for victims[11]), the Commission deemed a new provision necessary allowing such appeals also against non-prosecution by the Attorney General (see paragraph 58 of the June 2020 Opinion).

61. ACT No. XLI (former Bill No. 154) aims to implement this particular recommendation by making the necessary amendments to Article 91(3) of the Constitution, Article 541(4) of the Criminal Code, and Article 469B of the Code of Organization and Civil Procedure.

62. Overall, the Bill seems to implement this particular recommendation in a satisfactory manner. However, both Article 541 (1) relating to the police and Article 541 (4) relating to the Attorney General should enable a complaint by the injured party also if there is no explicit "refusal" or "decision" not to prosecute within a reasonable time.

63. The new Article 469B (1) of the Code of Organization and Civil Procedure provides that the courts of justice of civil jurisdiction, giving due account to the constitutional independence of the

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[10] 22.(1) The provisions of this article shall apply in every case where, after making any investigation under this Act, the Commissioner is of the opinion that the allegation forming the subject-matter of the investigation -(a) appears prima facie to have been contrary to law; or (b) was prima facie in breach of any statutory or any ethical duty as provided under this or any other law. […].

[11] Article 541 only refers to an explicit "refusal" by the police and not to a simple absence of any action: *"541. (1) If, in cases where the exercise of the criminal action is vested in the Executive Police, the Executive Police shall, upon any information, report or complaint in regard to the commission of a crime, refuse to institute proceedings, it shall be lawful for the person who laid the information, or made the report or complaint, to make an application to the Court of Magistrates for an order to the Police to institute proceedings; and if, after hearing, where necessary, the evidence tendered by the applicant, and the Commissioner of Police, the court is satisfied that the information, report or complaint is prima facie justified, it shall allow the application and shall , through the registrar, notify the Commissioner of Police of the order given thereon: Provided that, before any action is taken on any such application, the applicant shall confirm on oath the information, report or complaint, and shall enter into a recognizance in a sum to be fixed by the court, to give his evidence at the trial, if so required, or to furnish any such evidence at his disposal as may lead to the conviction of the party accused: Provided further that where the Attorney General by a note declares that agreement has been reached with the competent authorities of another country that the courts of that country shall exercise jurisdiction over the crime the Court of Magistrates shall consider such declaration conclusive and shall forthwith dismiss the application."*

AG, may enquire into the validity of the said decision and declare such decision null, invalid or without effect and consequently send back the matter to the AG for review. Instead of seeking review of the AG's decision, the courts of justice of civil jurisdiction should order the AG to prosecute in such cases.

64. In its paragraph 60, the June 2018 Opinion had recommended to attribute the Ombudsman, the Commissioner for Standards in Public Life and the Auditor General the status of "injured party" The Commission welcomes in particular that the Bill attributes the Ombudsman, the Commissioner for Standards in Public Life, the Auditor General and the PCAC the status of injured party which enables them to directly report corruption cases to the Attorney General and to appeal against non-prosecution.

65. This is a cardinal reform of the justice sector of Malta, which is very positive and bridges a gap in the rule of law. The amended Article 541 (4) however limits the status of injured party for the Ombudsman, the Commissioner for Standards in Public Life and the Auditor General to cases when they reported the crime. Representing society, they should be given this status independently of whether they themselves reported to the Attorney General or not.

H. ACT No. XLII of 2020 [former Bill No. 155] to amend laws which regulate the Office of the Ombudsman

66. The previous opinions of the Commission recommended to raise the rules on appointment and dismissal of the Ombudsman and insisted that the main provisions on the Ombudsman's powers – most notably the right to information – be included in the Constitution as well. It was further recommended that the Ombudsman should have the possibility in urgent cases to trigger a parliamentary debate on important reports (and not only annual reports).

67. ACT No. XLII (former Bill No. 155) amends Article 64A of the Constitution. The rules on appointment, suspension and dismissal of the Ombudsman are now regulated at the constitutional level. The Ombudsman shall be appointed by the President acting in accordance with a resolution of Parliament supported by a two-thirds majority. A similar parliamentary majority may request the President to remove or suspend the Ombudsman on the ground of proved inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour.[12] This is welcome in the light of Principles 6 and 11 of the Venice Principles.[13] However, in view of its criminal connotation, an appeal to court should be open against a finding of "proved misbehaviour".

68. The Bill also contains some provisions on the Ombudsman's power to initiate and conduct investigations (the new paragraph 4 of Article 64A of the Constitution raising in essence Article 13 of the Ombudsman Act to the constitutional level) in an independent manner ("not be subject to the discretion or control of any other person or authority") which seems to be in line with Principle 14 of the Venice Principles.[14]

69. The Commission equally welcomes the fact that the Bill stipulates that the Ombudsman is empowered to refer potential evidence of any corrupt practice directly to the Attorney General (see above). However, the Commission notes that the threshold is too high ('evidence of any corrupt practice'). The Commission recommends using similar wording to that used in Act No. XLVI (former Bill No. 143) - 'connected with or conducive to' - or Article 22 of the Standards in

[12] If Parliament is not in session, an Ombudsman may be suspended from his office by the President, but such a suspension shall not continue in force beyond two months after the beginning of the next parliamentary session.

[13] Venice Commission, CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles").

[14] "The Ombudsman shall not be given nor follow any instruction from any authorities."

Public Life Act. Furthermore, the Ombudsman should not only be empowered but be obliged to report corrupt practices to the Attorney General.

70. The Commission welcomes the amendment to Article 29 of the Ombudsman Act which reads: *"The Ombudsman shall annually or as frequently as he may deem expedient report to the House of Representatives on the performance of his functions under this Act to the Speaker who shall instruct the Leader of the House to lay a copy on the Table of the House at the first available opportunity. The said report shall, as soon as possible, be discussed during a dedicated parliamentary sitting."* This seems to adequately address the recommendation that the Ombudsman should have the possibility in urgent cases to trigger a parliamentary debate on important reports (and not only annual reports).

71. Having said that, the Bill does raise doubts as to the scope of the Ombudsman's power to conduct an investigation following a complaint. The Bill states that the Ombudsman *"may conduct any such investigation (…) on the written complaint of any person having an interest who claims to have been aggrieved by any action".* The Venice Principles seem to be wider in this respect. Principle 15 states: *"Any individual or legal person, including NGOs, shall have the right to free, unhindered and free of charge access to the Ombudsman, and to file a complaint".* I.e. the right to file a complaint should not be limited to (legal) persons who claim to have been a victim themselves of any wrongdoing. This lacuna in the Act, if interpreted narrowly, could hinder NGOs from filing complaints to the Ombudsman on issues of general concern.

72. Furthermore, the Bill does not raise the power of the Ombudsman's right to information to the constitutional level as recommended in the previous opinions of the Commission. The Ombudsman himself identifies the lack of enforcement as problematic. In his Annual Report 2019, the Ombudsman states:

> "The analysis conducted by the Ombudsman showed that his institution generally conforms to the Venice Principles. It scores highly on the requisites of administrative independence and financial autonomy, with the Ombudsman and his Commissioners being recognised as Officers of Parliament enjoying security of tenure. In this respect, as well as regards the powers given to them to exercise their functions, the founding legislation of the Office fully satisfies the Venice Principles.
>
> While there is room for improving and fine tuning, the Ombudsman Act as amended remains a progressive one that enables the Office to properly exercise its functions. Of course, issues of lack of effective enforcement of those provisions in the Act regulating the proper conduct of investigations, *including when persons fail to comply with orders given to provide information*, as well as the reluctance of public authorities to take proper account of the final opinions of the Ombudsman and Commissioners and to implement their recommendations, especially when these are not in line with government policies, persist and need to be addressed."

73. The Ombudsman must enjoy the necessary support and co-operation from Government bodies and there is much at stake that the current amendments should not ignore vital issues essential for the proper functioning and independence of the Ombudsman as this institution has to be able to take action independently against maladministration and alleged violations of fundamental rights affecting individuals and legal persons. Point 17 of the Venice Principles provides that *"The Ombudsman shall have the power to address individual recommendations to any bodies or institutions within the competence of the Institution. The Ombudsman shall have the legally enforceable right to demand that officials and authorities respond within a reasonable time set by the Ombudsman."* The Venice Commission reiterates its recommendation to provide for the Ombudsman's right to information on the constitutional level.

IV. Remaining Bills

A. Bill No. 156. Auditor General and National Audit Office (Amendment) Act

74. The Auditor General and the National Audit Office are in a pivotal position to detect corrupt financial practices, i.e. lack of proper and effective use of public funds and sound financial management. The role of the Auditor General and the National Audit Office in ensuring accountability in government finances must be firmly guaranteed.

75. In the June 2020 Opinion, the Commission welcomed the intention of the Maltese Government to ensure that the Ombudsman, the Commissioner for Standards in Public Life and the Auditor General are able to directly report cases of corruption to the Attorney General (see paragraphs 60 and 106).

76. Bill No. 156, which has not yet been adopted, introduces such a power in respect of the Auditor General by amending Article 5 of the Auditor General and National Audit Office Act empowering the Auditor General to refer his findings directly to the Attorney General if "during or after any investigation, the Auditor General is of the opinion that there is evidence of any corrupt practice as defined in the Permanent Commission Against Corruption Act".[15]

77. While the amendment Bill No. 156 aims to introduce is a welcome step, the Commission notes that the threshold is too high ('evidence of any corrupt practice'). The Commission strongly recommends using similar wording to that used in Bill No. 143 ('connected with or conducive to') or Article 22 of the Standards in Public Life Act. Furthermore, there can be no scope for discretion, the Auditor General should not only be empowered but be obliged to refer corrupt practices to the AG. In its Observations, the Government takes note of this recommendation and expresses its willingness to introduce an amendment to this effect. This is welcome.

B. Bill No. 157. Act to amend various laws with the aim of reforming the procedure by which the appointments of the Principal Permanent Secretary and Permanent Secretaries are made (CDL-REF(2020)056)

78. The amendment of Article 92 of the Constitution is in principle constructive and it is conducive to good administration, the merit principle in appointments of civil servants must prevail.[16] The Principal Permanent Secretary has the role of head of the public service and the Public Administration Act empowers the Principal Permanent Secretary to issue directives and guidelines to ministries and departments.[17] The Venice Commission did not consult the Principal Permanent Secretary.

79. According to the amended Article 92 (5) (i), for the appointment of the Principal Permanent Secretary the advice of the Cabinet of Ministers is required. During the video-meeting, the Minister explained the need to have a special appointment procedure for the Principal Permanent Secretary as the Cabinet Secretary. According to the Government's Observations, the Principal Permanent Secretary is not a political appointee and is appointed by the President of the Republic. The Government also notes that the Principal Permanent Secretary only makes recommendations to the Public Service Commission as regards the appointment of Permanent Secretaries.

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[15] See Bill No. 155 for a similar power as regards the Ombudsman and Bill No. 159 as regards the Commissioner for Standards in Public Life.
[16] See report of the Commissioner for Public Standards as well: https://standardscommissioner.com/wp-content/uploads/constitutional-reform-proposals.pdf
[17] https://publicservice.gov.mt/en/Pages/The%20Public%20Service/RegulatoryFramework.aspx.

80. The Commission notes the following: (a) according to Article 14 (3) of the Public Administration Act "[t]he Principal Permanent Secretary shall take instructions from the Prime Minister", and (b) according to Article 92(3) of the Constitution the Principal Permanent Secretary has to provide advice on the appointment of other permanent secretaries. The combination of these two facts entails the risk that the independence of the Public Service Commission is encroached. This risk may be averted in various ways, for instance by amending Article 92(3) of the Constitution to enable the Public Service Commission to seek advice from permanent secretaries, including the Principle Permanent Secretary.

C. Bill No. 158. Reform of Powers of Appointment Act

81. The 2018 Opinion established that the Prime Minister is clearly the centre of political power in Malta as s/he has very wide powers *inter alia* as regards appointments and constitutional commissions. The Prime Minister is predominant, while other actors are not sufficiently strong to contribute significantly to the system of checks and balances. The 2018 Opinion therefore recommended that it should be the Cabinet of Ministers, and not the Prime Minister alone, which acts as the appointing authority vis-à-vis various senior positions.

82. Bill No. 158, which has not yet been adopted, addresses this recommendation as regards the appointment of (i) the Governor, the deputy Governor and the directors of the Central Bank of Malta, (ii) the Chairman of the Malta Financial Services Authority, (iii) the members of the Board of the Arbitration Centre, and (iv) the Information and Data Protection Commissioner. In addition, the Bill amends Article 86 of the Constitution to the effect that the powers of the Prime Minister as regards the (temporary) appointment and removal of members of the Employment Commission can only be performed *"giving due consideration to such advice as might have been given in that respect by the Cabinet".*

83. These are positive steps in line with the previous recommendations of the Commission and the commitments expressed by the Maltese authorities. It is true that the Ministers in the Cabinet depend on the Prime Minister but even in such a setting a collegial decision is always more transparent and more likely to avoid abuse.

84. However, the wording in Article 86 of the Constitution used in the Bill remains weak ('giving due consideration'). This should be replaced with the formulation that is used elsewhere in the Bill: 'acting on the advice of the Cabinet of Ministers' or 'after obtaining the approval of the Cabinet of Ministers'.

85. In addition, the Commission reiterates its recommendation (see paragraph 68 of the June 2020 Opinion) that the new paragraph 4 of Article 86 of the Constitution should also include a reference to Article 60 of the Constitution (the Electoral Commission), Article 109 of the Constitution (the Public Service Commission), and Article 118 of the Constitution (the Broadcasting Authority). In its Observations, the Government points out that this issue should be discussed in the framework of the President-led Constitutional Convention.

D. Bill No. 159. Appointment (Persons of Trust) Act

86. The 2018 Opinion criticised the lack of a legal basis for the practice of employing civil servants bypassing the requirement of Article 110 of the Constitution. The concern was that appointments on trust could be used to avoid issuing calls for applications for vacancies that should be filled on the basis of merit. The 2018 Opinion recommended "introducing a constitutional amendment and legislation that admit, but at the same time limit, the possibility to appoint persons to positions of trust quantitatively, but also as concerns the type of activities" (paragraph 128).

87. The June 2020 Opinion welcomed, in principle, the government's proposals to limit the employment of persons of trust *"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." Bill No. 159, which has not yet been adopted, aims to amend Article 2 of the Standards in Public Life Act which defines a 'person of trust' to that effect: *" 'person of trust' means any employee or person engaged directly from outside the public service and the public sector to act as consultants and staff in the private secretariat of a Minister or Parliamentary Secretary or in the event that following repetitive public calls for engagement a post remains vacant if such engagement is for a period of less than one year and where the person has been engaged according to the procedure established under Article 6A of the Public Administration Act".* The Commissioner for Standards in Public Life points out that serving public employees who are given appointments on trust are known as holders of "positions of trust".[18] They should be included in the overall count.

88. Similar amendments are introduced in the Public Administration Act by introducing Article 6A. These amendments are in line with the Proposals examined by the Commission in its June 2020 Opinion. However, two issues need to be regulated directly in the law: the maximum number and the duration of such engagements.

89. Bill No. 159 does not specify the number of persons that may be engaged in this manner. Instead the Bill refers to a manual published by the Cabinet Office. In the Venice Commission's opinion, this key element of the regulation cannot simply be left to a government manual but it should be the core element of the legislative text. In its Observations, the Government noted that it is currently in the process of drawing its report on the Greco Recommendations and is considering transforming the manual published by the Cabinet Office into a legislative instrument.

90. In the June 2020 Opinion the Commission already highlighted the need to specify a maximum number, *inter alia* by referring to the Fifth Evaluation Round on "Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies", published on 3 April 2019 by the Council of Europe Group of States against Corruption (GRECO): *"GRECO recommends that measures be taken to solve the legal situation of persons of trust and to limit the number of such discretionarily appointed officials to an absolute minimum".* In order to avoid any impression of cronyism, each Minister should adhere to the 'absolute minimum' paradigm on the basis of what the Venice Commission highlighted in its June 2020 Opinion (it seems that there was a practice of four such positions in the past, including the driver/bodyguard).

91. The Bill does not specify the duration of such engagements, which again should be a core element of the legislative text. While an act of parliament cannot be expected to regulate *all* conditions of employment, it should contain at the minimum these core parameters. The Bill should also settle the issue of the constitutionality of persons / positions of trust by providing for an exception to Article 110 of the Constitution.

92. Finally, the Bill aims to introduce a power for the Commissioner for Standards in Public Life to directly report cases of corruption to the Attorney General by amending Article 22 of the Standards in Public Life Act: *"Where from the investigation it appears prima facie that a criminal offence or a corrupt practice has been committed, the Commissioner shall refer his findings to the Commissioner of Police or directly to the Attorney General, as the case may be, and shall immediately inform the Chairman of the Committee."*

93. In the June 2020 Opinion, the Commission welcomed this amendment (see paragraphs 60 and 106). The wording in Article 22 ('appears prima facie') does not unnecessarily limit the power of the Commissioner to report cases to the AG (however, see above concerns as regards a

[18] Commissioner for Standards in Public Life, Who are Persons of Trust? A Guidance Note (https://standardscommissioner.com/wp-content/uploads/persons-of-trust-guidance-note.pdf).

similar power in respect of the Ombudsman and the Auditor General) and therefore seems to meet the Commission's previous recommendation in this field.

V. Conclusion

94. The Venice Commission warmly welcomes the implementation of the proposals for legislative reform as an important step in the right direction. In general, the ten implementation acts faithfully translate the proposals made by the Maltese Government.

95. While the submission of the ten bills to Parliament could have triggered a structured dialogue with all stakeholders, which was recommended by the Commission, the rushed adoption of these important constitutional changes cut short wider consultations in society. Therefore, the Venice Commission cannot but regret that six out of ten Bills have been adopted before the requested opinion could be finalised. The constitutional amendments are meant to have a profound and long-term impact in Malta and hence required wide consultations within Maltese society. The Commission emphasizes the importance of a transparent, inclusive and deliberative legislative process and recommends that the remaining four bills and any further amendments be discussed in a wider framework also with civil society. In the June 2020 Opinion, the Venice Commission reiterated the importance of involving citizens in this process, with the aid of the media, non-governmental associations, academia etc. The citizens are the beneficiaries of these changes are they have to be consulted if there are to be real reforms.

96. As concerns the six Acts already adopted unanimously by the House of Representatives, the Venice Commission recommends the following amendments:

1. the names of the three candidates should be published when the Judicial Appointments Committee (JAC) transmits them to the President.
2. the Minister of Justice should no longer be able to request the JAC for advice on appointments to other judicial offices or offices in the courts (Article 96A (6) of the Constitution)
3. the power to advise the President of Malta on the subrogation of judges when the Chief Justice fails to provide such advice should be assigned to the next senior judge or, if necessary, the Commission for the Administration of Justice.
4. An anti-deadlock mechanism should be included at the very least for the Chief Justice (for example, election by the judges of the Supreme Court) and, furthermore, for the election of the President of Malta.
5. As "proved misbehaviour" can be assimilated to a criminal act, officials who can be dismissed for such acts (President of Malta, Attorney General, State Advocate, Ombudsman) should have a right of appeal to the Constitutional Court against a finding of such misbehaviour, before the final vote in Parliament.
6. The Permanent Commission against Corruption and the Ombudsman should not only be enabled but be obliged to refer to the Attorney General doubts (not only 'findings') as to corruption
7. An appeal against non-prosecution by the Attorney General or the police should not only be possible when there is an explicit decision or refusal to prosecute but also when there is no prosecution within a reasonable time (to be determined by court).
8. As "injured party" in cases of corruption, the Ombudsman, the Commissioner for Standards in Public Life and the Auditor General should be able to appeal against non-prosecution in all cases, not only when they reported these acts to the Attorney General.
9. The Ombudsman's right to information should be raised to the constitutional level.

97. As concerns the four Bills still pending in Parliament:

1. The Auditor General should not be only empowered but should be obliged to report doubts as to corrupt practices to the Attorney General (not only 'evidence' of corrupt practices).

2. The Public Service Commission should be able to seek advice from permanent secretaries, including the Principal Permanent Secretary, on the appointment of other Permanent Secretaries.
3. Rather than only "giving due consideration" to advice from the Cabinet on appointments to the Employment Commission, the Prime Minister should be bound by that advice. This should also apply to the Electoral Commission, the Public Service Commission and the Broadcasting Authority.
4. The (low) maximum number and the duration of such engagements of persons of trust / on positions of trust should be fixed explicitly in the law and cannot be left to a government manual. In addition, such engagements need a specific constitutional basis.

98. Furthermore, the Venice Commission reminds the Maltese authorities of previous recommendations that have not yet been taken up;

- the need to transfer *all* prosecution, including for summary offences, to the Attorney General as soon as possible;
- the recommendations in respect of *erga omnes* effect of Constitutional Court judgments, obliging the Parliament to repeal / amend provisions found unconstitutional within a limited time-frame;
- the recommendations in respect of Parliament, notably providing sufficient research capacity for individual MPs, independent legal advice for MPs and ensuring that backbench MPs are made less dependent from government posts;
- the recommendations in respect of specialised tribunals to provide for access to court.

99. Finally, the Commission recalls paragraph 105 of its June 2020 Opinion: *"For the Venice Commission, it is crucial to point out that the current Proposals are only part of a wider reform envisaged, that will also be driven by the Constitutional Convention. With a guided and structured dialogue opened between all stakeholders, not least civil society, the Convention should look into the overall constitutional design of the country".* Noting the President of the Republic's intentions on the Constitutional Convention and the Government's public commitment that these are only the first set of reforms,

100. The Venice Commission welcomes that the Government is ready to propose some amendments to the Bills that were not yet adopted. As concerns the six adopted Acts, the recommendations made in this opinion, notably relating to constitutional amendments made in these adopted Acts, have the character of corrections or adjustments. The Commission recommends dealing with them without delay, rather than them being left to the future Constitutional Convention, which is called to look into wider constitutional issues.

101. The Venice Commission is convinced that international assistance, including from GRECO, represents constructive support to Malta in strengthening its system of separation of powers. The Venice Commission is grateful for the trust of the Maltese authorities and remains at their disposal for further assistance, notably for the establishment of the Constitutional Convention and in the fulfilment of its tasks.