AN ANALYSIS OF THE COMMISSIONER FOR STANDARDS IN PUBLIC LIFE'S REPORT K/002

INTRODUCTION

1. On the 5th of July 2019, the Commissioner for Standards in Public Life, Dr George Marius Hyzler, published a report (reference number K002) on an investigation initiated by a complaint submitted on the 14th of January 2019 by the Hon. Godfrey Farrugia MP. The Commissioner was asked to investigate whether the engagement or employment of backbencher parliamentary deputies as consultants or employees of the government or bodies set up by the law represented a conflict of interest or a breach of ethical or statutory duties.

2. On the 8th of July 2019, the Prime Minister tasked me with analysing the Commissioner for Standards in Public Life's report and coordinating this analysis both from a legal and administrative aspect.

3. In order to compile this analysis, government files pertaining to the involvement in politics of public officers and public employees were researched. Research was also conducted by various sources on foreign praxis as employed in countries which, like us,[1] base themselves upon the English model. I also asked for legal advice from both the Attorney General Dr Peter Grech and Professor Ian Refalo.

4. In his conclusions, the Commissioner found that 'the practice of employing members of Parliament within the public sector, or appointing them to provide contractual services to the public sector, is fundamentally wrong, whether this is in order to compensate them for their inadequate salary as MPs or for any other reason.'[2]

5. The Commissioner says that the said appointments and contracts 'are likely to be found to have placed MPs holding such engagements or appointments in a situation of conflict of interest or breach of ethical or statutory duties.'[3] This is because, according to the report, such circumstances weaken Parliament's role of scrutiny, go against the Constitution's principles, breach the ethical code of public employees and governing boards' members, and place parliamentary deputies in a situation of financial dependence upon the government, which consequently reduces their independence, politicizes government entities, and undermines their independence from the government.[4]

6. In his report, the Commissioner for Standards in Public Life directs his main emphasis towards parliamentary deputies who are given their appointments or service

[1] Acknowledgments to Ms Christine Madiona, Mr Philip Massa, and Dr Myrna Azzopardi.
[2] Commissioner for Standards in Public Life's Report (K/002), para 79, p.17.
[3] ibid.
[4] ibid.

contracts with the public sector after they are elected.[5] I understand and agree with the Commissioner who, in his investigation, makes this important and essential distinction between those already elected as deputies when they are given an appointment, and those who were engaged with the public sector before they were elected. In order to arrive to his conclusions, the Commissioner considered the situation of parliamentary deputies who, before they were elected, were public officers (direct employment with the government with the appointment approved by the Public Service Commission) or public employees (employment with a government entity), deputies who are lecturers within the University of Malta, deputies appointed to government boards, and those engaged as persons of trust, with a contract of service or providing legal counsel or otherwise to the government and its entities.[6]

7. From the Commissioner's broad investigation into the diverse contexts highlighted, there came to light several shortcomings which need to be addressed. Therefore, even though in his conclusions the Commissioner for Standards in Public Life noted the most substantial conflict of interest as residing with those engaged as persons of trust or on service contracts, in this analysis I shall be delving into all the circumstances and contexts mentioned in this report. The rationale behind this is so that the shortcomings which came to the fore in the Commissioner's findings are addressed, which I shall do so by placing every respective circumstance into its proper perspective as I see it by providing, as much as I can, a historical, legal, and social background, as well as the experiences of foreign countries in order to allow for an in-depth analysis of all the circumstances touched upon by the Commissioner for Standards in Public Life.

THE CONSTITUTION AND DEPUTIES' REMUNERATION

8. Throughout the entire report, I feel that there are two reasons which come to the fore as having the strongest emphasis placed upon them by the Commissioner. First, that backbencher parliamentary deputies (in practice on the government's side, as clearly stated in a number of paragraphs in the report, such as those enumerated 26 and 29) who are engaged or given appointments which are in conflict with the Constitution because this practice 'eats into the principle of separation of powers that is a fundamental principle of democracy and the rule of law.'[7] Second, the Commissioner considers that these appointments and engagements are made and subsequently accepted by parliamentary deputies because the remuneration which they are entitled to as members of the House of Representatives is not adequate.

9. The Commissioner for Standards in Public Life states that the remuneration for parliamentary deputies is not adequate. In our country this argument is one that has frequently been raised. The Commissioner is not necessarily correct that the

[5] K/002, para 50, p.11.
[6] ibid., para 5, p.2.
[7] ibid, para 26, p.6.

appointments and engagements take place and are accepted consequent to this. Should better remuneration be considered, this should be implemented irrespective of the arguments in question, with the necessity of such amelioration being the only underpinning rationale.

10. In his report, the Commissioner insists that the practice of engaging or giving appointments to parliamentary deputies undermines the role of scrutiny which Parliament should have over the Executive (the government) and undermines the separation of powers that the Commissioner insists the Constitution is built upon. There should not be the slightest of doubts that the Commissioner's report is aimed at anything other than strengthening the autonomy of Parliament. However, the declaration that the Maltese Constitution is strictly built upon the separation of powers raises a number of questions, given that Ministers and Parliamentary Secretaries are also members of Parliament—and this is something required by the same Constitution.

11. In his legal advice, Professor Ian Refalo explains far better the fact that our Constitution is built more upon the rule of law than on the separation of powers. It is here that the importance of the independence of the judiciary comes forth. Prof Refalo explains that in order to understand the Maltese Constitution, one must also understand British and Commonwealth constitutional law as, historically, our Constitution is built upon it. The British and Commonwealth Constitutions are built upon the rule of law and not, strictly speaking, the separation of powers. These two concepts share a lot in common but are distinct from one another.

12. Prof Refalo quotes Sir Arturo Mercieca in the sentence of the case *Cassar Desain vs Forbes*, in which it is clearly stated that Malta is governed by the rule of law. The Constitution given to Malta by the English upon Independence was drafted along English lines and on constitutions built on the Westminster model. This is also confirmed by Judge Maurice Caruana Curran in his sentence of the case *Lowell vs Caruana*.

13. Prof Refalo explains that while the rule of law implies and requires the law to work in a manner which safeguards the rights of the individual through an independent judiciary, the separation of powers altogether sunders state powers into the executive, the legislative, and the judicial. One can see that in Malta the rule of law is amplified by the fact that these rights are written down in the Constitution, and the Courts are given the constitutional function and duty to safeguard these same rights. In the Constitution of the United States of America, where the concept of the separation of powers is employed, the executive strength lies with the President and the Secretaries of State are answerable to him, whereas the legislative strength lies with Congress, and the judicial strength with the Supreme Court of the United States. The President and the Secretaries of State are not members of Congress. In Malta, Ministers are members of Parliament, and this is required by the Constitution itself. The idea that the Courts may treat and decide whether that which the legislative

passes and the executive does as according to law or not is a result of the rule of law, and not the separation of powers.

14. In the advice given by Prof Ian Refalo, several scholars are quoted who affirm the argument which he presents in his advice. William Blackstone states that, 'it is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislature…';[8] and Walter Bagehot writes that 'the efficient secret of the English Constitution may be described by the close union, the nearly complete fusion of the executive and the legislative powers';[9] among others.

15. The lack of a net separation of powers might indeed create problems for the autonomy of Parliament, and here there is concordance with the Commissioner that means to strengthen this autonomy need to be found. However, the solutions are not necessarily found in the conclusions of the Commissioner if, as Prof Refalo says, one is not considering a total revision of our Constitution in such a way as to bring it closer to and build it upon the Presidential model. Prof Refalo is of the view that Parliament's autonomy is strengthened not by upturning the Constitution, but by strengthening the Speaker's role—as has already happened and as could yet happen—with progress in the right direction towards committees chosen by the House, and a revision of the standing orders so that deputies have more control over the processes of the House of Representatives, among others.

16. Prof Refalo explains that in our Constitution one does not find a clear line which separates the executive from the legislative. It is necessary for both to be constitutionally bound as all the power in the British and Maltese constitutions emanates from the House of Representatives and the government of the day, so much so that members of the executive—ministers and parliamentary secretaries—need to be parliamentary members. Therefore, there is no constitutional incompatibility between members of the executive and parliamentary members, so much so that the Constitution itself requires that a Minister be chosen only from amongst parliamentary members.

17. It is also felt in the report that our country's small scale and limited resources have not been taken enough into consideration. Our country is what it is: the smallest among European Union member states and one of the smallest countries anywhere. Nevertheless, it is an independent and sovereign country, and as such it is necessary for it to have and execute every function of state as expected of any other country. While countries larger than ourselves have the necessary resources to carry out these functions, our country needs to carry out these functions and be on a par with larger countries, despite the limitations resulting from a small population, which does not even amount to half a million. As such, it must make the best use of the available human resources.

[8] *Commentaries on the Law of England*, Chapter 10, Document 6, 1:149-151, 259-60.
[9] *The English Constitution* (London: 1867), p.12.

18. This limitation was felt from the start of responsible government where a discussion on whether public employees should take part in politics was initiated, and later by the Malta Constitutional Commission (Blood Commission) which, in its report of the 8th of March 1961, expressed its doubts that, because of the 'the small reservoir from which persons of education and experience can be drawn for public service, the grounds for disqualification for taking an active part in political activity should be reduced to the barest minimum.'[10]

19. Practically, even today this small country has to use all its resources in order to carry out the necessary functions of a state in a manner which is on a par with that found in foreign countries. Besides lots of other criteria to invest in resources and use our resources, the limitations involved in participation in public life and in the necessary functions of the state should be kept to the barest minimum.

PERSONS ENGAGED ON A TRUST BASIS

20. In his report, the Commissioner for Standards in Public Life considers the fact of the engagement of persons on a trust basis within the public administration as something which, in and of itself, 'gives rise to many concerns',[11] as this takes place outside the provisions of our country's Constitution. Further still, when it is a parliamentary deputy who is engaged on a trust basis, the Commissioner clearly believes that it is primarily this context which goes against the principles upon which the Constitution is built, as this, in principle, disqualifies public officers from being members of the House of Representatives.[12] Let me try to put the matter at hand in context and start with the abovementioned engagements themselves.

21. Persons engaged on a trust basis do not only exist in our country, and the discussion which is taking place on these temporary engagements is not limited to our country. Persons engaged on a trust basis are found in lots of countries, both in those which, like us, have their political and administrative systems based upon the Westminster model, and in those which have continental systems. The discussion which took place in other countries on this subject has left its mark, as one would expect a discussion such as this—which periodically resurfaces—would.

22. The European Union itself has been engaging persons of trust since the fifties; in Australia, Sweden, and Ireland persons of trust have been engaged since the start of the seventies; in Denmark, since the nineties; in Holland, since the sixties; in New Zealand, since the mid-eighties; and in England, for the last fifty years. In our country, the engagement of persons of trust was introduced after the 1998 elections.

[10] *Malta Constitutional Commission*, p.22.
[11] K/002, para 44, p.10.
[12] ibid., para 45, p.10-11.

23. In Malta, the engagement of persons of trust is regulated by a specific policy[13] and a manual[14] which clearly specify that the engagement is a temporary[15] one within a Ministry, which engagement ceases once the Minister or Parliamentary Secretary in question finishes his tenure within the said ministry. The rules clearly specify that persons of trust so engaged have their contract renewed yearly, that it cannot be turned into an indefinite contract (the person in question cannot have their position turned into a permanent one), and that they cannot have an executive role[16]—which means that they cannot function as a public official and cannot administer or give directions to public officials: 'such positions will not enjoy executive powers on government matters and personnel.'[17] As such, there is a clear separation between the public service and so-called engagements on a 'trust basis'.

24. Persons of trust are engaged by Ministries and Parliamentary Secretariats, which temporary engagements are regulated, both in terms of the number of such persons who can be engaged, and in terms of the concomitant remuneration for each role, as per the respective manual on the subject issued by the Cabinet Office;[18] as consultants to Ministers, which temporary engagements are also regulated by the Cabinet Office via the respective manual which regulates both their number and remuneration;[19] or by ad hoc appointments on work related to government programmes, which, as in the other abovementioned scenarios, entail their engagement on the basis of a temporary one-year contract which is renewed and terminated once the work on which it rests is concluded.

25. I would also like to note that not all persons engaged on a trust basis are engaged in order to do political work. The system is also employed within the Maltese courts, where one finds dozens of individuals engaged on a temporary renewable one-year basis to assist both from the legal and logistical aspect. It should be stated that such engagements are also regulated by the same Manual on Resourcing Policies and Procedures, as with all other individuals engaged on a trust basis.

26. In this regard, that which takes place in our country is no different to that which takes place in other countries. In Australia, such engagements are regulated by the Members of Parliament (Staff) Act of 1984, which defines engagement on a trust basis as one which is political and separate from the public service. In Canada, those engaged are regulated by the Privy Council Office 'to provide Ministers with advisors and assistants who are not departmental public servants, who share their political commitment, and who can complement the professional, expert and non-partisan advice and support of the public service.'[20] As with the same guidelines of the

[13] Office of the Prime Minister, 'Policy on the Engagement of Persons/Positions on a Trust Basis', 7.7.17.
[14] People & Standards Division, 'Manual on Resourcing Policies and Procedures', Section 4.7, p.81.
[15] ibid.
[16] 'Manual on Resourcing Policies and Procedures', Section 4.7, p.81.
[17] 'Policy on the Engagement of Persons/Positions on a Trust Basis', p.2.
[18] 'Engagement of Staff for Ministers' Secretariats', June 2017.
[19] 'Manwal dwar Konsulenti', June 2017.
[20] Privy Council Office, Canada, 2015, p.89.

Canadian Privy Council Office—as is the case of our country—persons of trust are prohibited from giving direction to or directing public officials.

27. In Ireland, persons of trust are regulated by the Public Service Management Act which exempts them from the political impartiality expected from public officials, this while specifying that persons of trusts can be affiliated with political parties. This act clearly stipulates that these are temporary engagements which cease once the Minister who engaged them no longer retains his/her position.

28. In the United Kingdom, engagements on a trust basis are regulated by the Constitutional Reform and Governance Act 2010 and by Cabinet Office manuals. These engagements, it is stated, are to cease once the government which engaged them or the Minister who appointed them have finished their tenure, and describes their role[21] as one which increases the political dimension to the advice and assistance given to the Minister.[22]

29. There is clearly a difference between countries which, like Malta, employ the Westminster model (and that the impartiality towards the public service and the capacity to work under and with governments of all stripes is an important pillar in the functioning of this model) and others which do not employ the British model regularising engagements on a trust basis emphasising the political impartiality of the permanent public service.

30. We find, for instance, similarities between Holland, Sweden, and Germany which, even though they too have persons of trust, these positions are not regulated. This is clearly because their respective public service does not have a top-to-bottom politically impartial structure. In Holland, Sweden, and Germany the highest appointees in the public service can be affiliated with political parties.

31. There are therefore strong similarities between that which takes place in our country and other countries which operate a Westminster-based model, where a very clear distinction is made between the permanent public service, which has to be impartial and serve under governments of all political complexions, and persons of trust who are temporarily engaged and are not expected to serve under every government, and further still, leave the Ministry which appointed them.

32. In the Commissioner for Standards in Public Life's report, this distinction, which is considered essential, does not come through. Moreover, from paragraphs 44 to 47, the report does not even distinguish between a public official permanently employed with the public service and a person of trust engaged on a temporary basis—as if persons of trust are embedded and integrated within the public service. This is not the case, and the two structures are separate from one another. This not to mention the fact that the report confuses those engaged on a temporary service contract which

[21] Cabinet Office, United Kingdom, 'Code of Conduct for Special Advisors' (2016), para 9.
[22] ibid., para 1.

is sometimes used by the public sector for specific work, with the temporary engagement of persons of trust for political work within Ministries.

33. The report takes no consideration whatsoever of the links and rules present in actuality in Malta: that persons of trust cannot have executive roles nor direct or lead public officials, and that, together with their regulated temporary engagement, have to distinguish in an effective manner between the two structures—the permanent one, and the temporary one which is terminated upon the Minister's departure from office.

34. The Commissioner also links his position that a parliamentary deputy should not have a position of trust appointment with the public sector with the House of Commons (Disqualification) Act of 1975, which disqualifies an individual from being a member of parliament if he is 'employed in the civil service of the Crown whether in an established capacity or not and whether for the whole or part of his time.'[23] But there is more to it than this.

35. English law defines 'civil servant' as a 'person serving in an established capacity in the permanent civil service.'[24] The same law considers a member of the 'permanent civil service' as someone who has his 'appointment directly from the Crown or has been admitted into the civil service with a certificate from the Civil Service Commission.'[25]

36. In Malta, as in England, persons of trust engaged on a temporary basis are neither members of the 'permanent civil service' nor have they been admitted into their present roles by obtaining a certificate or an appointment from the Public Service Commission—the local equivalent of the United Kingdom's Civil Service Commission.

37. As such, in this context, one cannot agree with the Commissioner for Standards in Public Life when he implies irregularity, writing that 'the issue of the appointment of so-called persons of trust gives rise to many concerns' as these are made outside the parameters of Article 110 of the Constitution;[26] and when he furthermore implies illegality, citing 'this evident breach of the Constitution'.[27] At the same time, however, his conclusions refer to the engagement of persons of trust as a 'debatable practice (…) that **possibly goes against** Art 110 of the Constitution'.[28] In this manner, one realises that while in paragraph 64 the Commissioner is adamant that there is a breach of the Constitution, this is not repeated in the remainder of the report, including in his conclusions.

[23] K/002, para 47., p.11.
[24] 'Superannuation Act 1965', United Kingdom, Clause 98 (2).
[25] ibid., 98 (3).
[26] K/002, para 44, p.10.
[27] ibid., para 64, p.14.
[28] ibid., para 80, vi, p.17.

38. Article 110 of the Constitution is concerned with the public service and government entities. Sub-article (1) of Article 110 states that the 'power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices shall vest in the Prime Minister, acting on the recommendation of the Public Service Commission.' This means that for a person to enter the public service, they must have the blessing of the Public Service Commission. A person engaged on a trust basis does not have an engagement which goes through the Public Service Commission and is consequently not a member of the said public service. Therefore, the Constitution is not being tampered with.

39. In Article 110 (6), the Constitution also regulates employment in the public sector: 'Recruitment for employment with any body established by the Constitution or by or under any other law, or with any partnership or other body in which the Government of Malta, or any such body as aforesaid, have a controlling interest or over which they have effective control, shall, unless such recruitment is made after a public examination duly advertised, be made through an employment service as provided in sub-article (2) of this article.' A person engaged on a trust basis does not go through this process and cannot therefore be considered as being part of the wider public sector, which includes within it the government's entities. In this case as well, the Constitution is not being tampered with.

40. Besides these provisions provided for by the Constitution, there are also the Contracts of Service for a Fixed Term Regulations (LS 452.81) wherein there is specified, in Regulation 7 (10): 'Nothing in these regulations shall confer a right to employment on an indefinite contract under these regulations when a person is in an employment relationship in the public service or in the public sector which has not been made in accordance with the Constitution or with any law which applies to employment in the public service or the public sector.' Therefore, engagements within the public service or within the public sector are also covered by Maltese law, which also states that such engagements cannot be changed into indefinite employment contracts within the public sector.

41. In his legal advice, Attorney General Dr Peter Grech states that these provisions are there to safeguard equality of opportunity of access to public employment and are adhered to as constant rules on the basis of which employment within the public service and public sector takes place. He also adds that appointments within the public service are generally ones which are regulated by letters of appointment through which the employee is given a legal and official status as a public officer (or as a public employee in the case of an entity), and which is generally tied with employment on an indefinite basis which terminates upon reaching the retirement age.

42. This does not mean that temporary engagements on a trust basis are not mentioned anywhere. Besides the fact that, administration-wise, there is the Manual on Resourcing Policies and Procedures, the law which itself establishes the office of the Commissioner for Standards in Public Life provides a definition of a person of trust:

'means any employee or person engaged in the private secretariat of a Minister or of a Parliamentary Secretary wherein the person acts as an adviser or consultant to a Minister or to a Parliamentary Secretary or acts in an executive role in the Ministry or Parliamentary Secretariat, and where the person has not been engaged according to the procedure established under article 110 of the Constitution.'

43. The persons engaged on a trust basis are also subject through the same act to the jurisdiction of the same Commissioner for Standards in Public Life.

44. The considerations in the Commissioner for Standards in Public Life's investigation, as well as the doubts delineated therein regarding such engagements, merit due attention. If nothing else, they show that we have not yet looked enough at the experiences of other countries which are based upon the Westminster model.

45. The fact that in our country governments of different political affiliations have engaged persons of trust or political consultants should pave the way for the necessary changes. The existing regulations with regard to the temporary engagement of persons on a trust basis within the entire public sector are already administratively strong and very similar to those adopted and operated by other countries which operate the same systems we do, even with respect to the permissible number of such persons who can be engaged on this basis. These countries, however, besides the administrative links which they have developed, legislated as well in order to further regulate the system.

46. The government has already stated that it agrees with the recommendations of the Venice Commission which also touched upon the engagement of persons on a trust basis. The Venice Commission definitely did not say that such engagements are not necessary. Indeed, it said: 'Admittedly, there can be a legitimate need for Ministers, who have a political mandate, to benefit from the assistance of persons of trust who assist them in implementing their political programme',[29] and continues by recommending that there should be legislation to regulate such engagements so that we no longer have to make recourse solely to administrative tools.

47. Should our country legislate in order to better define the roles of such engagements, what the requirements are, and to clearly delineate what the difference between these structures and those of the public service in toto are, it would be further strengthening the different functions within the public administration and emphasising the political impartiality that is expected from the public sector in the execution of its functions.

PARLIAMENTARY DEPUTIES ENGAGED ON A TRUST BASIS

48. The Commissioner for Standards in Public Life does not agree that parliamentary members be engaged as persons of trust in the public sector, and essentially bases his

[29] European Commission for Democracy Through Law (Venice Commission), Opinion 940/2018, para 125, p.25.

view as he takes it as read, namely that a parliamentary member's appointment on a trust basis 'runs counter to the underlying principles of the Constitution, in that public officers are in principle disqualified from membership of the House'.[30] We have already shown that persons of trust are not public officers according to the Constitution's provisions.

49. In order to substantiate this view, the Commissioner turns to the House of Commons (Disqualification Act) of 1975 which disqualifies an individual 'employed in the civil service of the Crown whether in an established capacity or not and whether for the whole or part of his time.'[31] We have already shown that a person engaged on a trust basis is not a public officer and consequently neither a member of the public service. As such, when a parliamentary deputy is engaged on a trust basis, the appointment is one made outside the ranks of the public service and the appointee should be considered as having been engaged to serve a political function which helps deliver the programme of the government which engaged them. Furthermore, given this argument, I cannot agree with Commissioner's view that when a parliamentary deputy is engaged on a trust basis, this in itself disadvantages and is discriminatory with the Opposition's parliamentary deputies.[32] There is really no need to try to make the case for or substantiate the fact that it is not altogether that practical or indeed realistic for a deputy from the Opposition side to be tasked with delivering the government's programme.

50. We have previously seen that, in his report, the Commissioner for Standards in Public Life mainly concerns himself with appointments or other contractual links that deputies might undertake or get into after they are elected. Despite this, the Attorney General notes that nowhere does the Constitution bar parliamentary deputies from having an appointment within the public administration while they are in Parliament. Not even the Members of Parliament (Public Employment) Act (Cap. 472) does this. Indeed, the Attorney General notes that this act envisions situations where a public officer is elected to Parliament, and nowhere does it refer to situations where a parliamentary member cannot undertake public employment after they are elected.

51. The Attorney General notes that our laws, in contrast to those of the United Kingdom, do not place a limit on the number of parliamentary members who may be appointed as Ministers or Parliamentary Secretaries, and therefore one may see the situation of a parliamentary member who is not appointed as a Parliamentary Secretary but is instead appointed as a person of trust within a Ministry as a question of levels of responsibility and commitment, a question of how much responsibility the government wishes to place upon that member of parliament if it does not consider them for the post of Parliamentary Secretary.

[30] K/002, para 45, p.10.
[31] ibid., para 47, p.11.
[32] ibid., para 29:i, p.7.

52. Here Prof Ian Refalo considers two separate matters: if it is against the constitution or not for persons to be engaged on a trust basis and whether parliamentary deputies should occupy such positions or not. In the considered opinion of Prof Refalo, the concept of persons engaged on a trust basis does not go against the Maltese Constitution, this while noting that this has been the established praxis of engagement since Independence. He also notes that it is only those who are employed in the higher grades of the public service who are excluded from being parliamentary deputies, and that this exclusion should not legitimately be expanded.

DEPUTIES WITH CONSULTANCIES WITH THE GOVERNMENT OR PUBLIC ENTITIES

53. For the purposes of this analysis, I did not delve as to whether there are, and if so, as to which deputies have consultancy contracts with the government or public entities. However, from experience I know that you will find parliamentary deputies from both sides of the House who have—either in a professional capacity or in relation to the professional companies of which they form part—such contractual links. This is most prevalent in legal consultancies.

54. Throughout this analysis I have based myself on the law in order to delve in and explain every circumstance. I cannot therefore but agree with the Commissioner for Public Standards to accept the legal advice given to him, namely that Article 55(1)(c) of the Constitution only prohibits a parliamentary deputy from having a contract with the government or one of its entities for tendering contracts for work or a supply contract for goods.

55. The Commissioner prefers and recommends that this prohibition should be further extended and also cover service contracts—such as the legal consultancies which I previously mentioned.

56. At the same time, I understand the reasoning in the Commissioner's report who argues and questions as to why the law should prohibit deputies from being given public tender contracts when the latter is a process which is relatively well-developed and subject to a number of safeguards and controls, but that at the same time it does not also prohibit contracts 'for legal services and other consultancy contracts' which 'are as a rule granted by direct order.'[33]

57. The Attorney General, while agreeing with the interpretation given by the Commissioner, explains that the purpose of the article as comes through in parliamentary debates is precisely for there to be a restrictive and focused interpretation focused on this article which the Courts had already affirmed in the few rulings which they had pronounced on this provision. Prior to this article which is presently in effect, there was another which stated 'any contract with the Government of Malta for or on account of the public service.' This is very similar to that which the Commissioner for Standards in Public Life is recommending in his

[33] K/002, para 62, p.13.

report. The Attorney General also explains in his advice that the law as it is nowadays aspires to avoid a conflict of interest by the individual in question through their having a foothold on both sides of a contract.

58. On the other hand, I do not see as to why a contract for a legal consultancy should fall within this classification. One receives legal counsel and advice from those whom one trusts with the thought that they will provide such in a manner which puts one's mind at rest. More so today when a lot of government work is either of a legal nature or has legal implications with repercussions that might have consequences that affect rights and claims. In his advice, Prof Refalo explains that there is no incompatibility whatsoever between legal consultancies and our country's Constitution. I understand the conflict in relation to contractual links and the implementation of the contract itself which may arise when a deputy participates in a public tender and enters into contractual bounds with the government or one of its entities. However, I do not agree that this conflict also exists in the case of consultancy services.

59. I would like to express my view that I feel that the Commissioner for Standards in Public Life's report is disproportionate in the argument which it asserts, namely that remuneration from the government places 'MPs in a position of financial dependence on the Executive and hence reduces their independence',[34] and also asks 'how can the members on the Government side of the House of Representatives who are being paid in this manner honestly contemplate voting against the Government…'[35], and furthermore that with 'this practice MPs lose their independence and Parliament is emasculated.'[36] This, however, does not paint a realistic picture of the actual situation. Prof Refalo explains that even though the ideal situation is one where parliamentary deputies state that which they feel, they are in reality bound by the instructions issued to them by their respective party.

60. I genuinely do not believe that such appointments and links influence parliamentary deputies in the manner which the Commissioner asserts they do. Nor does the recent history of our country support the Commissioner's argumentation, as it was indeed parliamentary deputies who had just been given government-paid appointments who defied the instructions of their parliamentary group's whip in the 2008-2013 Gonzi administration.

PARLIAMENTARY DEPUTIES AS CHAIRPERSONS OR DIRECTORS WITH GOVERNMENT ENTITIES

61. In his report, the Commissioner for Standards in Public Life considers appointments of parliamentary deputies as chairpersons or board members of government entities as raising the same concerns in the section of the report that dealt with 'persons

[34] K/002, para 80:iv, p.17.
[35] ibid., para 26, p.6.
[36] ibid.

appointed on a person of trust basis'.[37] This analysis has already dealt with this aspect, and as such it does not bear repeating.

62. Despite this, in his report the Commissioner gives the impression that parliamentary deputies started being appointed to public entity boards from 2013 onwards, writing: 'However, Act X of 2013 changed certain laws to allow for the appointment of local MPs on a number of other statutory bodies by removing the disqualification in the relative laws.'[38] This is not, however, the actual case.

63. Indeed, in his own report the Commissioner mentions two occasions where parliamentary deputies were given such appointments by the 2008-2013 administration.[39]

64. From the examples quoted by the Attorney General, we find that parliamentary deputies were not always excluded from being appointed to governing boards of public entities. For example, since before Independence we find the Electricity Act 1963 which excluded parliamentary deputies from sitting on the Electricity Board, but they were then allowed to be appointed to the Board of Standards, the 1965 act concerning which not prohibiting such appointments. The laws concerning the Central Bank of Malta (1967), Telemalta (1975), the Housing Authority (1976), Enemalta (1977), and the Public Transport Authority (1989) all exclude appointments of parliamentary deputies to their boards. However, the Professional Accountancy Act (1979), the National Organisation of Tourism Act (1983), and the Malta International Business Activities Act (1988) did not have such prohibitions. One also finds such a prohibition in the Work and Training Act (1990) with regard to members of the Corporation Board itself, but not with regard to members of the National Employment Authority.

65. The Commissioner concludes that such appointments are 'fundamentally wrong' as these go against the principles upon which the Constitution is founded.[40]

66. However, I do not see as to how the Constitution itself could be thought of as considering such appointments as 'fundamentally wrong', when it is the Constitution itself which permits that individuals who are simultaneously lecturers with the University of Malta and government employees, and whose work conditions, furthermore, entitle them to have a private practice and that the same individual not be required to give all their time to the government, are allowed to be parliamentary members—this while article 54(1)(b) prohibits public officers from being parliamentary deputies. Neither does the Constitution consider this prohibition as absolute, as it also includes a reservation, in the sense that Parliament might provide otherwise and remove more prohibitions.

[37] K/002, para 71, p.15.
[38] ibid., para 70, p.15.
[39] ibid., para 19 and footnote 10, p.5.
[40] ibid., para 80:ii, p.17.

67. I understand the Attorney General in that a public entity's activity influences the legislator when they are drafting the act—in just the same way that the administrative and political climate in which the said entity was shaped exerts its own influence even with regard to prohibitions or a lack thereof.

68. For example, I do not see as to why entities which are altogether operational in nature should prohibit parliamentary deputies from sitting on their governing boards when these are, more likely than not, going to be delivering the government of the day's programme in some field or other.

69. When one looks at the acts here mentioned, one can hardly define in a clear way the rationale behind the inclusion or non-inclusion of prohibitions. In this context, one should perhaps consider looking at these entities anew in order that the need of or otherwise of such prohibitions is defined in a manner suitable for the present day.

70. In contrast to the cases mentioned thus far, the Commissioner does not see as 'fundamentally wrong' the practice of some parliamentary deputies having lecturing roles within the University: 'Such positions in academia cannot be considered as giving rise to conflict in view of the specific exemption granted in the Constitution itself.'[41]

71. In truth, however, the Constitution does not just speak of university lecturers and stops there: the Constitution qualifies more than just that. As we previously saw, the Constitution, while in principle prohibiting public officers from being parliamentary deputies, exempts from this prohibition persons who are simultaneously public officers and lecturers at the University of Malta, and who, moreover, have a private practice and asserts that they are not obliged to dedicate all their time to their governmental employment.

72. I think that here the Commissioner's report is conflicted within itself. While it considers this extension of public officers/lecturers as one which does not lead to a conflict of interest as this extension is granted by the Constitution, it considers as 'fundamentally wrong' that a parliamentary deputy sit on a governing board of a public entity even if this takes place in accordance with the provisions of the same Constitution.

73. The same happens in the case of parliamentary deputies on both sides of the House of Representatives whom Parliament legislated that they should be on governing boards of entities such as those of the Lands Authority and the Planning Authority. In this case, the Commissioner also finds nothing in conflict with the Constitution, and nothing 'fundamentally wrong' in a parliamentary deputy sitting on the board of a government entity, and therefore also in conflict with the code of ethics for public employees as board members of public entities. Prof Refalo also notes that the

[41] K/002, para 42, p.10.

Commissioner's argument that he does not see an incompatibility when there is representation from both sides of the House on public entity boards shows that there is an agreement, in principle, on the links that exist between the government on the one hand and the legislative on the other.

74. More than this, the Commissioner says that 'MPs appointed to such boards, whether or not allowed by the legislation regulating the body to which they are appointed, are nonetheless subject to the 'Code of Ethics for Public Employees and Board Members', and consequently placed in a position of conflict with the provisions of the said code.'[42] Public officers/lecturers also fall under this same code of ethics, but then these are not being considered by the Commissioner as being in conflict 'whether this is permitted by the law…and whether it is not.' Nor does he consider parliamentary deputies from both sides of the House to be in conflict when Parliament legislates that they should be on boards of public entities.

75. In the United Kingdom, these temporary appointments on a trust basis in order to serve a political function are expected to observe public service rules, but they are 'exempt from the general requirement that civil servants should be appointed on merit and behave with impartiality and objectivity, or that they need to retain the confidence of future governments of a different political complexion.'[43]

GOVERNMENT AND GOVERNMENT ENTITIES EMPLOYEES AND POLITICS

76. An amendment such as this might also be of value to those who are parliamentary deputies employed with the government or a public entity. There is a substantial number of parliamentary deputies who, before they were elected to Parliament, were already public officers or public employees. In his report, the Commissioner acknowledges that 'the public service is a large body consisting of around thirty thousand employees (…) such a large group should not be deprived *en masse* of its right to participate in politics and its members to stand for election.'[44] He also acknowledges that the Members of Parliament (Public Employment) Act of 2004 (Cap. 472) (which specifies which public officers or employees can or cannot be parliamentary deputies) 'is consistent with the Constitution in virtue of article 54(1)(b), in so far as this allows for exceptions by means of the phrase "save as otherwise provided by Parliament".'[45] However, the Commissioner feels that this act 'went well beyond making an exception'.[46]

77. The Members of Parliament (Public Employment) Act does not allow public officials who are in a salary scale of 1 to 5 to be parliamentary deputies. In these scales, one finds the leadership of the public service, including Permanent Secretaries, Directors

[42] K/002, para 72, p.15.
[43] 'Code of Conduct for Special Advisors', United Kingdom Cabinet Office, p.8.
[44] K/002, para 36, p.8.
[45] ibid, para 39, p.9.
[46] ibid.

General, Directors, and Assistant Directors of government departments among others. One can thus understand that the rationale behind this Act was to prevent the leadership of the public service from participating in politics.

78. However, the relationship between public officers and public employees with politics is not just limited to this law. There is also Directive 5, which has as its aim to regulate the 'political participation by public officers with a view to reconciling the political impartiality of the Public Service with the personal rights of public officers',[47] first issued in February 2011, which binds both public officers and public employees. This directive provides a not insubstantial number of grades who are prevented from participating in politics. Altogether, there are 120 other grades besides those which fall within scales 1 to 5 who are prohibited via this directive from participating in politics. Both the Act and this directive are together aimed at maintaining the impartiality expected from the public service and that they are seen as doing so. Indeed, the grades which are prevented from participating in politics attest to this fact.

79. I cannot agree with the Commissioner's view when, in paragraph 39, he considers as good practice that which was in actuality before the Members of Parliament (Public Employment) Act came into being, namely that as soon as a public officer becomes a candidate in a general election, he/she goes out on leave without pay, and resigns from his/her employment in the public service as soon as he/she is elected a deputy, and then are re-engaged by the public service if he/she loses or cedes his/her place in Parliament.

80. In my view, this disadvantages government and public employees from contesting elections as this makes it more difficult for them to try to seek election. More than this, it is discriminatory when one considers the public officers/lecturers mentioned previously: discriminatory in their regard as these public officers/lecturers can seek election without difficulty and without the need to resign their government employment. Further still, these public officers/lecturers are assigned salary scales from 1 to 5, this apart from the fact that it is not the law which would be determining whether or not a public officer can contest an election, but the University which appoints its own lecturers.

81. The recommendation made by the Commissioner in footnote 15 at the bottom of page 9, namely, that in order to determine whether a public officer can be considered as being in a salary scale from 1 to 5 (and consequently whether a public officer is eligible for contesting an election), one should add up the allowances together with the salary of the employee, is neither practical nor just, and neither does it make sense in the face of sectoral and collective agreements which are spread across the public sector: 'an officer's pay package may include allowances which, if added to his/her base salary, would place the officer in a higher salary scale. In my view this would also

[47] 'Directive No. 5: Political Participation and Communications with the Media, Office of the Principal Permanent Secretary, 1.1 (a).

need to be taken into account in determining the officer's salary scale for the purposes of chapter 472', the Commissioner recommends in his report.

82. This recommendation eliminates a great number of public officers and vastly increases the existing prohibitions, this not to mention the fact that allowances have nothing to do with salary scales. It is the latter which are tied with the responsibilities and functions of a particular grade, and not the allowances. In the appendices of the government's financial estimates which are published every year, one finds the government's entire schedule of grades and how these are tied to the salary scales in accordance with the responsibilities and functions of every grade.

83. In practice, essentially, were a recommendation such as this to be effected, that which the Commissioner himself does not want to happen would take place, namely what he writes in the previous paragraph (36), 'that such a large group should not be deprived *en masse* of its right to participate in politics and its members to stand for election.'

84. This discussion started on the eve of the granting of responsible government when, in 1919, a proposal was made that government employees who were university lecturers in the subjects of theology, law, and medicine be allowed to run for office, unlike other public officers who were prohibited from contesting. Indeed, the 1921 Constitution permits university lecturers who had a private practice and who were not full-time public officers to contest general elections. Here one can find the roots of the extension which we find today in the Constitution in this regard. Between 1948 and 1961, discussions on the matter continued unabated and proposals were made both from the government workers' side in general via the General Workers' Union in 1948, as well as in 1960 via the Advisory and Executive Board of the Medical and Health Department when a case was made so that all those who graduated from government but who were not full-time officials would be allowed to contest and this, as was said, in order for the country to avoid losing the input of some of its best minds.[48]

85. In March 1961, the United Kingdom's Malta Constitutional Commission 'recommended that having in mind the small reservoir from which persons of education and experience can be drawn for public service (including Parliament) the grounds for disqualification for taking an active part in political activity should be reduced to the barest minimum.'

86. We also see that there was the same line of thought before, when the Colonial Government in Malta was coalescing rules concerning public officials' political participation and everything was sent to London for approval. The Secretary of State for the Colonies wrote back in March 1960, warning that 'a drastic ban would be out

[48] OPM/589/1948, r 290.

of line (…) not appear to be justified either by present conditions in Malta or by the present constitutional arrangements.'[49]

87. When public entities started being set up, all their employees were expected to follow the rules established for public officers, but this was not applied wholesale. For instance, the University and the Malta Dockyard allowed their employees to contest general elections. In the seventies, public employees started being allowed to contest elections, and over time various circulars and regulations started more and more granting exemptions to public employees so that they might participate in politics, until we arrived at the legal and administrative rules and provisions that we have now.

88. The whole discussion has evidently always, and from the get-go, been placed in the small context in which we have to work and the resource limitations that we have as a country.

CONCLUSIONS

89. In this analysis of the Commissioner for Standards in Public Life's report, an in-depth examination of all the considerations which emanated from the report was given, and it was essentially found—even from the research conducted and the advice given—that when parliamentary deputies are engaged or appointed, in both cases temporarily on a trust basis, either to provide counsel to Ministers in public entities, or in boards of public entities, no breach of the Constitution is being made, no disavowal of the principles of the Constitution is taking place, no laws are being broken, and that one cannot say that there is a conflict of interest for the parliamentary deputies as so appointed.

90. The reasons as to why this analysis arrives at this conclusion are:
    a) Our Constitution is one based on the rule of law where, for instance, you have a Minister and a Parliamentary Secretary (the Executive) who are also parliamentary deputies (the Legislative);
    b) The Constitution itself is not so exacting so as to prohibit all those who are public officers or public employees from being parliamentary deputies, so much so that the Constitution itself provides for two exemptions with regard to cases where public officers cannot be parliamentary deputies, and, more than this, grants the power to Parliament to legislate in such a way either for public officers or employees to become elected as parliamentary deputies;
    c) The Members of Parliament (Public Employment) Act (Cap. 472) deals with and regulates situations where public officers are elected to Parliament, and nowhere refers to situations where a member of Parliament is given an appointment and/or temporary engagement within the public administration;
    d) The engagement of parliamentary deputies on a trust basis, both to provide counsel or to serve in some other function within a Ministry or a public entity, are

[49] OPM/589/1948, r 73, p.1.

not structures in the permanent public service, but rather ones made on a temporary basis and which are then dissolved and terminated once the Minister who engaged the said individual ceases to remain in their position;

e) Regarding the appointment of parliamentary deputies on government boards and public entities, nowhere is it stated in the report itself that the law is being broken when these are appointed. From Independence to the present, a number of public entities have been set up which did not prohibit parliamentary deputies from serving on their boards.

91. This analysis, however, considers that from the Commissioner for Standards in Public Life's report one might come up with proposals for change which should be discussed and decided upon:
    a) The experience of other countries with the same political and administrative system as ours shows that not only did they administratively regulate temporary engagements on a trust basis but that they also did so legally. In our country these engagements are already regulated administratively. The government has already stated that it agrees that there should be legislation in this regard. It is recommended that such legislation define these engagements in order to bring the matter to a close;
    b) It is further recommended that because historically no clear line emerges regarding the appointment of parliamentary deputies on boards of public entities, that the functions of every public entity be evaluated in order to determine when parliamentary deputies may or may not be appointed;
    c) The Commissioner for Standards in Public Life's report brings to light another shortcoming which needs to be addressed, and this with respect to the code of ethics for public employees and members sitting on the boards of public entities. Other countries with the same administrative and political systems as ours have exempted persons engaged on a trust basis for political work from the part in the code of ethics which states that everyone who is in the public administration must be impartial and work to gain the confidence of governments of different political stripes. I believe that our country is ready to take the same step. Provisions in the code of ethics, for public employees and board members, that exemptions from the code may be made already exist, but I am of the view that the code should include this proposed exemption in a stand-alone and binding manner.

92. This analysis of the Commissioner for Standards in Public Life's report (K/002) is being forwarded to the Prime Minister who tasked me with this endeavour on the 8th of July 2019.

Mario Cutajar
Principal Permanent Secretary and Cabinet Secretary