INQUIRY INTO THE RETIREMENT OF THE
FORMER COMMISSIONER OF POLICE

FURTHER SUBMISSIONS ON BEHALF OF IAN MCGRAIL

Reply to Government Participants' submissions dated 8th July 2022

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[T/1/1] = page 1, line 1 of the transcript of the Preliminary Hearing
[PB/1] = page 1 of the Public Bundle for the First Preliminary Hearing

A. INTRODUCTION

1. These further submissions are made on behalf of Mr Ian McGrail, the former Commissioner of the Royal Gibraltar Police, pursuant to the Directions Timetable made following the Preliminary Hearing held on 22nd June 2022 ("**Preliminary Hearing**").

2. These submissions address the following issues in reply to the submissions on behalf of the HM Government of Gibraltar, Chief Minister Fabian Picardo, Deputy Governor Nicholas Pyle and Attorney General Michael Llamas dated 8th July 2022 ("**Government Parties' Submissions**"):
    (i) The relevance of HM Government of Gibraltar being represented;
    (ii) The principle of open justice;
    (iii) Issues in the Inquiry: the centrality of Op Delhi;
    (iv) Questioning of witnesses;
    (v) The Governor's power under section 13 of the Police Act;
    (vi) Procedures to protect witnesses.

B. THE RELEVANCE OF HM GOVERNMENT OF GIBRALTAR BEING REPRESENTED

3. It is noted that Peter Caruana & Co now act for "HM Government of Gibraltar". On behalf of Mr McGrail, we request that those acting be asked to confirm whether this means that they act for the Government of Gibraltar as defined in section 45 of the Gibraltar Constitution Order 2006 ("**Gibraltar Constitution**") as including the Council of Ministers (of which the Chief Minister is part) together with Her Majesty who is represented in Gibraltar by the Governor, i.e. whether they act in addition to the Chief Minister for the Council of Ministers and the Governor, Sir David Steel.

C. THE PRINCIPLE OF OPEN JUSTICE

4. Mr McGrail has already set out in detail why the principle of open justice applies to this Inquiry in the submissions which followed the First Preliminary Hearing. Those submissions are not repeated here, however the following further points are made in reply to the Government Parties' Submissions.

5. There is no disagreement that it might be appropriate to hold back from publishing certain information provided in disclosure or submissions until a later stage, so that all parties have a chance to respond. However, that concern can be overstated. It should not, for example, continue to be invoked once the original reason for invoking it no longer applies, and still less to a protect the political reputation of individuals concerned at the expense of the practical success of the Inquiry. Mr McGrail is concerned that the requests by the Government Parties for continuing secrecy and restraint on what Mr McGrail's counsel is permitted to submit orally, to last for at least another seven months, is misconceived.

6. Whilst there may be a good reason, for example, not to publish a witness statement until the witness is due to be heard (as is the general practice of public inquiries in the UK), it should be emphasised that this is a public inquiry, not a criminal or civil trial. There are good reasons for the public being aware of the general factual background at an early stage, particularly because this is necessary to ensure that those who have helpful information about the issues in the Inquiry know enough to offer their evidence to the Inquiry. Jason Beer QC[1] et al ("***Beer***") recommend a public opening of an inquiry be held at an early stage, including "*making an early and public statement as to issues which the inquiry is most concerned with?, so that interested persons and witnesses can come forward as soon as possible and be included in the inquiry's work"* (*Beer* §5.161).

7. Public inquiries are an important opportunity for allegations to be ventilated in public. In this regard, they are distinct from the carefully controlled adversarial arena of a criminal or civil trial where individual rights are determined. The public airing of allegations is an important part of the inquiry process, and in no previous public inquiry (as far as Mr McGrail is aware) has there been any restriction made on airing of

[1] Public Inquiries, Jason Beer QC et al, Oxford University Press, 2011.

allegations until the final possible moment, as proposed by the Government Parties. Beer states as follows:

> "Conducting an inquiry in public enables the public to reach its own conclusions on the subject matter of the inquiry. Public Inquiries will often involve consideration of allegations of incompetence, misconduct, or worse. Such allegations will often be made against public servants or public authorities. It is sometimes suggested that, in order for full atonement to be made, the public must not only know the conclusions as to what happened, but also see the chain of events being unearthed in public, in order to know that they are getting the full story. As the Royal Commission on Tribunals of Inquiry put it: 'It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth." (*Beer* §6.03)

8. Unusually, the background facts which caused this Inquiry to be commissioned have not been published by the Government or the Inquiry as part of the inquiry process. A member of the public reading the Inquiry website with no prior knowledge would not know why it had been called save that there is some issue of controversy over Mr McGrail's retirement. This is not sustainable if the Inquiry is to conduct its proceedings in public and intends for the list of issues to be the subject of oral submissions at the Second Preliminary Hearing. The Government Parties attempt to frame the allegations against them as "*sensationalist*" and "*intemperate"* (Government Party Submissions §57(iv) and §17), and the general tenor of its submissions, both at the Preliminary Hearing and in the written submissions, implying that this Inquiry involves two competing versions of the facts, or is akin to commercial litigation, is wholly misconceived. The Government framing the allegations against them in this way also could be seen as amounting to victim-blaming.

9. In that regard, the position taken at §13 of the Government Parties' Submissions, that counsel for Mr McGrail should "*not be permitted to refer to the contents of this section B [of Mr McGrail's written submissions for the First Preliminary Hearing] orally*" during the Second Preliminary Hearing goes too far and is in any event unworkable. One of the purposes of the Second Preliminary Hearing is to finalise the provisional list of issues. This will necessarily involve submissions being made on the background facts. It would be absurd, and counter-productive, to prohibit any of the parties from referring to

the background facts when making submissions on what the issues in the Inquiry should be.

10. Of course a preliminary hearing is not an opportunity for any participant to make an opening statement, as that would not fit with the purpose of the preliminary hearing. However, it is quite another matter to seek to constrain participants from any reference to background facts when making submissions.

11. If the Inquiry intends to make a restriction order of the kind requested by the Government Parties then Mr McGrail requests that this is made formally in writing sufficiently in advance of the Second Preliminary Hearing so that it can be addressed in written submissions, and a draft of any proposed order is circulated in advance so that parties may make submissions on it. It is respectfully submitted, however, that an order of this kind would be unjustified, as would any continuing attempt to prevent written submissions (including those made by the Government Parties) being published, because:

    (a) The principle of open justice applies. The default position should be that documents are published and parties are able, through their legal representatives, to make unrestrained oral submissions, subject only to where there is a real risk of a breach of Articles 2, 3 or 8 ECHR.

    (b) A restriction order preventing parties referring to particular issues should only be made if legally required, for example arising from a real risk of the breach of Convention Rights and/or the rights in the Gibraltar Constitution. There is no such risk in this case. Despite submitting, without particularisation, that such allegations "*may very well violate the Government Parties' human rights*" (Government Parties' Submissions §10), the Government Parties have not identified any concrete or tangible repercussions which the airing of allegations would have on their private lives, as required by the European Court of Human Rights to even begin to displace the obvious public interest of misconduct being publicly exposed: see the recent case of *Algirdas Butkevičius v. Lithuania* [2022] (Application No. 70489/17), in which the ECHR held that the publication of transcripts by a parliamentary commission of telephone conversations between a town mayor recorded as part of an anti-corruption investigation, which led to no charges, did

not breach Article 8 ECHR. The Court agreed with the Lithuanian Constitutional Court that actions of a public nature did not attract the protection of Article 8 and a person may not expect privacy: see in particular §97 and §§101-102.

(c) The concerns which the Government Parties raised at the Preliminary Hearing, that the factual allegations should not be aired until they "*have had an opportunity to make detailed written submissions in an appropriate period of time*" (Transcript, Page 45, lines 11-16), have now been allayed. The Government Parties have had an opportunity to respond and have accordingly made detailed written submissions on the factual background to the Inquiry in the Government Parties' Submissions dated 8th July 2022 (see in the section entitled "Mr McGrail's case", §§14-23).

(d) The Government Parties hold the highest public offices in Gibraltar and have no reasonable expectation that their conduct of public affairs would be kept confidential from the public. The issues at stake in this public inquiry relate to alleged corruption and political misconduct. There is a substantial public interest in the allegations being made public.

(e) The allegations which the Government Parties appear to be concerned about are in major part already in the public domain: see the Annex to these Submissions.

(f) Finally, as well as substantial allegations already being in the public domain, Mr McGrail's allegations are factually uncontroversial. As demonstrated from the factual summary in the next section, derived almost entirely from the Government Parties' witness statements, far from being "*sensationalist*" the <u>factual</u> allegations are supported by the Government Parties themselves. Whilst there is a difference of opinion as to the reasons behind Mr McGrail's departure, the accounts of the underlying factual background is shared by all parties.

12. Accordingly, it is submitted that:

(a) All written submissions of the parties should be published in full. The Government Parties have not said whether they consider their own submissions should be published. It is submitted that they should be. The Gibraltar public is entitled to

know the position that its Government, Chief Minister, Deputy Governor and Attorney General are taking in this inquiry. And, since the submissions respond substantively to parts of Mr McGrail's submissions which have been redacted, the unredacted version of Mr McGrail's submissions prior to the First Preliminary Hearing should be published simultaneously.

(b) The parties' oral submissions at the Second Preliminary Hearing should not be restrained in the way proposed by the Government Parties. The restraint on Mr McGrail's representatives proposed is legally unjustifiable and would also be unworkable given that the List of Issues is one of the items on the agenda and cannot be discussed without some reference to the underlying allegations being made, and parties should not be restrained in making those submissions.

(c) If the Commissioner decides that written submissions should not be published/ redacted, or oral submissions at the Second Preliminary Hearing should be restrained, it is requested that reasons for any such decision be provided by way of a written ruling in advance of the Second Preliminary Hearing, and a draft order provided to the parties in order that they may comment upon it.

(d) If it is practically possible (including viable in cost terms), the Inquiry's hearings should be livestreamed. This accords with the principle of open justice. The Government Parties cite in support of their submission that proceedings were not broadcast in the Scott and Hutton Inquiries, which concluded in 1996 and 2004 respectively. However, in the almost two decades since the Hutton Report, a very substantial proportion of public inquiries in the UK have been livestreamed, for example the Leveson Inquiry, the Grenfell Tower Inquiry and the Independent Inquiry into Child Sexual Abuse, in order to allow the public to observe and in a sense participate in proceedings. The Government Parties' submission that "*it is illegal to live-stream court proceedings in Gibraltar, and there is no statutory provision empowering the Commissioner to permit it*" is nothing to the point. The hearings of Commission of Inquiry are not court proceedings and are therefore not caught by the prohibition on broadcasting. The Commissioner has a wide duty under s. 6 of the Commission of Inquiry Act to *"by all such lawful means as to them appear best, with a view to the discovery of the truth, inquire into the matters*

submitted to them". This plainly grants the Commissioner a wide discretion and power to conduct his or her inquiry in whatever lawful manner "*appears best*" to them, and would include provision for livestreaming of hearings.

(e) It is recognised that the Commissioner must consider the cost involved in livestreaming. This can now be undertaken relatively inexpensively, through the use of platforms such as Microsoft Teams and with fixed camera points in the room. It may also be sensible to add a short delay on the live broadcast so that it is possible for sensitive evidence not to be broadcast. We are happy to liaise further with the Inquiry team, if helpful, on these practical matters.

D. ISSUES IN THE INQUIRY: THE CENTRALITY OF OP DELHI

13. The Commissioner is required by the Issue of Commission to *"inquire, as he shall in his absolute discretion consider appropriate, into the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking early retirement*". These are broad terms of reference.

14. The preliminary list of issues is an important document and serves a number of purposes: see *Beer* at §5.22:

> Such a list will assist the inquiry itself to focus its investigations; to ensure that relevant information, documents, and evidence are obtained; to select witnesses who should be called to give oral evidence to the inquiry; to structure or modularize the inquiry's hearings; to give focus to opening and closing speeches by counsel to the inquiry; to form the basis for rulings by the chairman as to whether a line of inquiry (or a line of questioning in cross-examination) should be pursued; and perhaps even to assist in the structuring of the inquiry's report. A list of issues is of assistance to persons interested in the inquiry (whether core participants or other-wise), as in addition to some of the features previously mentioned, it is a public declaration of how- in practical terms- the inquiry interprets its terms of reference and what issues it intends to examine in order to discharge those terms of reference. Such persons can therefore see precisely what the inquiry regards as a particular topic or issue and can make representations as to whether an issue should be included or excluded from the list.

15. The Government Parties, in their written submissions, attempt to persuade the Inquiry to substantially narrow its focus so that only the issues which the Governor, in his affidavit, claims were the reasons he lost confidence in Mr McGrail are issues in the Inquiry, which would therefore exclude consideration of Op Delhi. The clearest articulation of this position is at §18 in which it is stated "*[t]here is therefore no causal link between that criminal investigation and Mr McGrail's decision to retire"*.

16. If the Government Parties are indeed attempting to exclude Op Delhi from the issues in the Inquiry, that submission is wholly misconceived and if accepted would prevent the Inquiry from fulfilling its Commission. Mr McGrail makes detailed submissions on why it is misconceived below, but begins with a more simple point: even if it is *possible* that Op Delhi played no role in the "*reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police"* (to be clear, Mr McGrail submits that it is not possible because even a cursory reading of the Government Parties' affidavits demonstrates the central significance of Op Delhi to the material events) the extent to which Op Delhi played a role is not a matter to be decided now, but rather to be fully considered following written and oral evidence. It is paradigmatically a matter to be resolved in the final report, not at the stage of the list of issues.

17. As is now clear from the Government Parties' affidavits, the factual background is essentially undisputed and straightforward, and in short summary is as follows (referring to paragraph numbers in respectively the affidavits of Ian McGrail ("**IM**") the Chief Minister ("**CM**"), Deputy Governor ("**NP**") and Attorney General ("**AG**"):

Brief summary of the factual background

18. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

- [redacted]

- [redacted]

- [redacted]

[redacted]

E. THE GOVERNOR'S POWERS UNDER THE POLICE ACT

33. Another issue which arises from the Government Parties' Submission is the extent to which the Acting Governor, as he was then, in fact had a power to require Mr McGrail to resign. §21 of the Government Parties' Submission states that the "*consideration of whether to invoke the procedure in section 13 of the Police Act to call for Mr McGrail's resignation was entirely the Governor's*". However, the Acting Governor, and those now representing him, appear to have disregarded section 22 of the Gibraltar Constitution which provides:

> **Vacancy in the office of Governor**
> **22.**-(1) During any period when the office of Governor is vacant or the Governor is absent from Gibraltar or is for any other reason unable to discharge the functions of his office those functions shall, during Her Majesty's pleasure, be assumed and discharged by such person as Her Majesty may have designated in that behalf by instructions given through a Secretary of State.
>
> (2) Before assuming the functions of the office of Governor, any such person as aforesaid shall make the oaths directed by section 21 to be made by the Governor.
>
> (3) Any such person as aforesaid shall not continue to perform the functions of the office of Governor after the Governor or some other person having a prior right to perform the functions of that office has notified him that he is about to assume or resume those functions.
>
> (4) The Governor or any other person as aforesaid shall not for the purposes of this section be regarded as absent from Gibraltar or as unable to perform the functions of the office of Governor at any time when there is a subsisting appointment of a deputy under section 23.
>
> [emphasis added]

34. HM Government of Gibraltar announced on 19th May 2020 that Sir David Steel had been appointed as Governor.[2] He was sworn in on 11th June 2020. Therefore, at the point when, on 5th June 2020, the Acting Governor warned Mr McGrail that he would invoke his powers under section 13 of the Police Act on 8th June 2020, section 22(3) of the Gibraltar Constitution had been triggered (as the new Governor had been appointed and must have notified the Acting Governor that he was about to assume his functions as Governor), meaning Mr Pyle did not have any power to perform any functions of the office of Governor. Therefore, by that stage, any invocation of his power under section 13 of the Police Act would have been *ultra vires,* as was him acting as a consultant to the section 34 process undertaken by the GPA.

35. In light of the above, Mr McGrail requests that this issue (a legal issue which will require some factual investigation, for example of when Mr Pyle was notified that the new Governor was about to assume his post) is added to the preliminary list of issues.

F. QUESTIONING OF WITNESSES

36. Mr McGrail agrees with the submissions of the Government Parties at §§30-39 that legal representatives of Core Participants should be entitled to ask questions of witnesses after they are questioned by Counsel to the Inquiry. Mr McGrail would have no issue with a reasonable time limit being placed on such questioning, or for broad topics to be proposed by Core Participants and agreed by the Inquiry in advance. Insofar as requiring topics to be proposed and agreed in advance would bring the procedure closer to the "hybrid" model than the "traditional" model, no issue is taken over this as long as a procedure is put in place to permit the Core Participants to ask questions in relation to key issues and be permitted a reasonable amount of time to do so. Mr McGrail also agrees that re-examination should be permitted.

G. PROCEDURES TO PROTECT WITNESSES

37. In relation to the submissions made by the Government Parties in their submissions at §§59-62, they appear to have misunderstood Mr McGrail's submissions, which are that

[2] HMGoG Welcomes Appointment of New Governor - 343/2020, 18th May 2020 <https://www.gibraltar.gov.gi/press-releases/hmgog-welcomes-appointment-of-new-governor-3432020-5908>

(a) there should be a protective measures policy, (b) this should comply with well-established legal principles, and in particular where required by Articles 2, 3 or 8 ECHR, the Gibraltar Constitution, the common law or on a public interest basis because the refusal of protective measures would erode the ability of the applicant to perform his or her job in the future: see *Beer* §§6.92-6.119. The Government Parties' Submission cite the same paragraphs from *Beer* (at §62) and in this regard there appears to be no disagreement on the relevant legal principles.

38. The submissions made at §61 of the Government Parties' Submissions including the subparagraphs are premature. The question of whether protective measures should be put in place in relation to any particular witness is necessarily a fact-sensitive one and no particular factor should be prejudged. Insofar as the Government Parties appear to be submitting that measures should <u>never</u> be put in place to protect potential witnesses who wish to make allegations against the Government Parties, because they should "*know their accusers*", and such measures would be unworkable in a small jurisdiction, these issues simply cannot be decided in advance. In any event, the submission is unsustainable because the Inquiry would have no option but to put in place protective measures if the appropriate legal test, supplemented by any policy it may promulgate, was met.

H. CONCLUSION

39. We hope that these submissions are of assistance.

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20th July 2022

ANNEX

References in the public domain to factual matters which are relevant to this Inquiry

1. 28th January 2022 - Chief Minister's GBC Interview on the "Nolle Prosequi"http://www.gbc.gi/news/nolle-prosequi-fabian-picardo-confirms-public-interest-was-engaged-national-security-reasons

   In this interview, Mr. Picardo claims that the AG filed the "Nolle Prosequi" as a result of National Security and Public Interest reasons.

   He acknowledges that he had to file a Witness Statement in the Criminal proceedings.

   The questions from the interviewer highlight that there was and still remains a public perception that the 36 North prosecution had something to do with Mr McGrail's early retirement.

2. 1st February 2022 - GBC Article and video on the "Nolle Prosequi"https://www.gbc.gi/news/gsd-says-nolle-prosequi-reason-political-public-interest-no-political-embarrassment-him-case-says-ch

   This relates to statements made by Keith Azopardi QC, the leader of the opposition. Mr Picardo states that he wanted all of his involvement in the 36 North case to be made public. He was clearly referring to the Inquiry. This accords with Mr Picardo's statements in Parliament on the 27th June 2020 when he said that he wanted everything to be put before the Inquiry.

3. 27th January 2022 - GBC coverage on the GSD's perspective on the "Nolle Prosequi" www.youtube.com/watch?app=desktop&v=RbT4PXrVsIU

   A further GBC interview of Mr. Azopardi in which he makes a direct connection between the 36 North prosecution and Mr. Picardo's law firm who, he says, stood to gain from the alleged conspiracy against Bland.

   Mr Azopardi expressly refers to an "open secret" of a connection between 36 North and the McGrail inquiry.

4. 26th January 2022 - GBC Article on the Op Delhi defendants reaction to the Nolle Prosequi www.gbc.gi/news/defendants-tell-gbc-michael-llamass-comments-fly-face-presumption-innocence

   Here the 36 North Defendants deny that there was any public interest issue and say that they were acting with the support of the Government.

5. 26th January 2022 - GBC Article on the Nolle Prosequi for public interest reasons www.gbc.gi/news/conspiracy-defraud-case-prompted-bland-complaint-ended-trial-public-interest-reasons

A clip from GBC in which the AG is said to have told them that he acted in the public interest.

6. The reference by Mr Caruana QC himself in submissions to the Preliminary hearing to the Nolle Prosequi, which directly linked the issues in this Inquiry to Op Delhi: see transcript, page 48, line 17 to page 49, line 13. This connection was reported in the press and on social media, see for example the blog of Robert Vasquez QC, Llanito World on 23 June 2020: www.facebook.com/llanitoWorld/posts/pfbid0DmD34CbyMaQMthJU2VzWoqdEoZJbyMm5nmKxETKcRpwR9umnCFG7dLgNdRjFrS6FI