INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

SUBMISSIONS BY COUNSEL TO THE INQUIRY
FOR THE SECOND PRELIMINARY HEARING ON 20 SEPTEMBER 2022

References to the Public Bundle are in the following format: [**Tab/page number**]

1. These are submissions by Counsel to the Inquiry in advance of the Second Preliminary Hearing on 20 September 2022, which has been convened primarily to consider the draft policy documents and list of issues. Those documents were circulated by the Inquiry Team to the Core Participants ('**CPs**') on 27 July 2022. Mr McGrail and the Government parties each made written submissions on those drafts, and the Gibraltar Police Authority ('**GPA**') confirmed that it would not be making submissions on them.
2. In a letter from Attias & Levy (Solicitors to the Inquiry) dated 2 September 2022 [2/2; 3/10; 4/18] ('**the September Letter**'), the Commissioner informed the CPs of his current thinking on the issues in dispute and suggested a proposed way forward on a number of those issues. The CPs have each responded to these proposals in further submissions filed in advance of this hearing, which will be published on the Inquiry Website shortly after this hearing (subject to resolution of any disputes as to redactions).
3. We are pleased that this process has led to a significant narrowing of the matters that remain in dispute on the list of issues and policy documents, meaning that this hearing is likely to be shorter than anticipated. We are confident that the policy documents and a provisional list of issues can be finalised following this hearing. The provisional list of issues will, of course, be a live document and subject to further changes in due course, particularly in the light of further evidence or disclosure received.
4. These submissions address the following matters:
    a. The "short factual statements" to be delivered by the parties;
    b. Each of the draft policy documents, namely the:
        i. Protocol for Receipt and Handling of Documents, Redaction and Records Management ('**the Documents Protocol**'), including the related question of the interpretation of the privilege provision in section 10 of the Commissions of Inquiries Act 1888;

ii. Protocol for Vulnerable Witnesses and Restrictions on Public Access ('**the Vulnerable Witnesses Protocol**');

iii. Core Participants Policy ('**the Core Participants Policy**');

iv. Appropriate Policy Document: Special Category and Criminal Conviction Personal Data ('**the Appropriate Policy Document**'); and

v. Privacy Notice ('**the Privacy Notice**');

c. The list of issues;

d. The funding of Mr McGrail's legal team;

e. The representation of the Government Parties; and

f. The timeline for future progress of the Inquiry, including disclosure.

A. Short factual statements

5. Item 3 on the Agenda for this hearing provides for "short statements of factual position by counsel for the CPs". In his Amended Judgment Following the First Preliminary Hearing ('**the Ruling**'), the original version of which was originally circulated to the CPs on 17 August 2022, the Commissioner invited the parties to submit short draft statements, which he would consider and adjudicate upon [6/35]. Unfortunately, a dispute has materialised about the factual statements between the parties at a late stage, which has not been resolved at the time of settling these submissions.

6. Mr McGrail included a factual statement in his submissions dated 9 September 2022. The Government parties object to the contents of the statement on various grounds, and point out that Mr McGrail did not submit the statement to the Commissioner for approval before including them in the submissions as required in the Ruling. By email to the CPs on 14 September 2022, the Commissioner indicated that his initial view was that Mr McGrail's factual statement went beyond what he had envisaged in the Ruling, and urged the parties to seek to agree their proposed factual statements in accordance with the guidance in paragraphs 23, 28 and 30-31 of the Ruling. If the parties cannot agree a way forward, in our submission it is likely to be too late for the Commissioner to consider any further submissions and adjudicate upon this contentious issue prior to the Second Preliminary Hearing, given that 19 September 2022 is now a public holiday.

7. Until this issue can be resolved, we submit that the Commissioner should take the precautionary step of redacting Section B of Mr McGrail's submissions. Further, if it is necessary for Mr McGrail's counsel to refer to issues in the contested factual statement

to make arguments at this hearing, they should do so by reference to paragraph numbers only. This approach is adopted routinely in hearings involving private information: see, eg, ***GUH v KYT*** [2021] EWHC 1854 (QB) at [17]. The matter can then be resolved as soon as possible, and in any event by the time of the Third Preliminary Hearing.

8. We hope to provide an update on this issue in our oral submissions at the Second Preliminary Hearing.

B. Draft policy documents

i. The Documents Policy

9. This is the only policy document which, in our submission, still requires substantive consideration. In Section 1A of the September Letter [2/2], the Commissioner requested submissions from the parties on an "*important matter of principle*": the scope and application of s10 of the Commissions of Inquiry 1888 Act ('**the 1888 Act**'). The parties have provided detailed submissions on this issue, and appear to be in broad agreement on the appropriate approach to s10, although they have perhaps reached their conclusions by slightly different routes.

10. Section 10 of the 1888 Act reads as follows:

> "10. No person who shall give evidence upon any inquiry under this Act shall be liable to any civil proceedings or criminal prosecution for or in respect of any statement or discovery made by such person concerning any matter connected with such inquiry, and no person shall be excused from answering any question put to him by the commissioners on the ground of any privilege, or on the ground that the answer to such question will tend to incriminate such person."

11. We agree with the Government Parties' argument (at [4(iv)] of their submissions), based on the authorities cited in that paragraph, that public interest immunity is not properly classified as a "privilege", and therefore cannot be abrogated by s10.

12. As to the more nuanced question of the application of privilege to the Inquiry, we would submit as follows:

    a. First and foremost, we consider that the exclusion of privilege applies only to answers to questions by the Commissioner, and not production of documents in response to a request by him. This is based on the express language of s10 itself, which specifically states that "*no person shall be excused from answering any question put to him by the commissioners*" (underlining added). It should

be recalled that s8, which provides the power to require attendance by summons, reads as follows:

> "(1) The commissioners … may require the attendance before them … of any person whose evidence in the judgment of such commissioners may be material to the subject matter of any inquiry to be made by the commissioners under this Act, and may require such person to bring before them all such books, papers and writings as to such commissioners may appear necessary for arriving at the truth of all matters to be inquired into by them under this Act.
>
> (2) Every such person shall attend before the commissioners and shall answer all such questions as may be put by the commissioners touching the matters to be inquired into by them, and shall produce all books, papers and writings required by them, and in his custody or under his control, according to the tenor of the summons…"

Section 8(2) therefore places two obligations on persons who appear before the Inquiry: (1) to answer all questions put by the commissioners; and (2) to produce all books, papers and writings required by them.

The wording of s10 (which explicitly applies to "*answering any question put to him by the commissioners*") refers back to the first part of s8(2) ("*such questions as may be put by the commissioners*") and not the second part of s8(2) (which refers to production of books, papers and writings required by the commissioners). If the drafter had intended s10 to refer to the latter, one would have expected s10 to do so explicitly. While it is correct to note that the first part of s10 affords immunity from suit to persons for "*any statement or discovery*" made in connection with an inquiry, the second part of s10, which excludes privilege, only refers to answering questions ("*answering any question*", also echoed by the phrase "*the answer to such question*").

Further, as Mr McGrail points out, extending the language of s10 to encompass correspondence would have significant implications for the right to the protection of correspondence, which tends in favour of the provision being construed narrowly.

b. Second, while we have been unable to find any caselaw specifically addressing the scope of s10 of the 1888 Act, our interpretation above finds support in ***R v Leatham*** (1861) 121 ER 589, which interpreted a similar provision in the UK Corrupt Practices at Elections Act 1852. Section 7 of that Act provided that all persons summonsed must answer all questions put by the Commissioners and produce all books and documents bearing on the Inquiry: "*Provided always,*

that no statement made by any person in answer to any question put by such Commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal" (underlining added). During examination by the commissioners in the relevant investigation, a witness referred to a letter, which he later produced to them. The letter later formed the basis of a successful prosecution of the witness, which the witness challenged. The Solicitor General argued that judge had correctly admitted the letter int\o evidence (at 662):

> "This section excludes from evidence, in proceedings subsequent to the inquiry before the Commissioners, statements, only, made by a witness in answer to the Commissioners' questions: and it is impossible to maintain that the letter in question was such a statement. If it be a statement at all it is not a statement made in answer to a question by the Commissioners. The letter was not produced to the Commissioners during Wainwright's examination, but sent to them afterwards by him; and the fact that it was referred to in the course of the Commissioners' inquiry cannot preclude it from being proved by independent evidence in a subsequent civil proceeding." (underlining added)

The court accepted that the letter had been admissible. On the facts of the case it was unnecessary to decide upon the construction of the section (as the letter was not sent to the Commissioners by the Defendant, but the other witness, so could not "*possibly, therefore, be regarded as a statement by the defendant to the Commissioners*"). However, Crompton J nevertheless opined that:

> "The Legislature first empowers the Commissioners to summon before them all persons whose evidence may be material, and to require them to produce all books, papers, deeds and writings bearing on the inquiry; then follows an enactment making it compulsory on all such persons to attend and produce all documents, and answer all questions put to them by the Commissioners; and, lastly, there is a proviso "That no statement made by any person in answer to any question put by such Commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal." Now, as I have said already, it is clear to my mind that this proviso refers to a statement only, or to something which is in the nature of a statement, and does not include documents referred to in a statement. […]
>
> The obvious meaning of the word "statement" in the proviso to the 8th section of the Act is a statement made for the first time before the Commissioners; which statement alone is privileged. In the analogous case of confessions by persons accused of crimes, they cannot be used against such persons if

obtained from them under the compulsion of a threat, or the inducement of a promise; but matters to which such a confession gives a clue may nevertheless be unexceptionally put in evidence." (underlining added)

Hill J agreed, with the following reasoning which would apply equally to the 1888 Act. After reading the language of s8, he held:

> "Two things are thereby required of the witnesses who attend before the Commissioners: they are to answer all questions put to them touching the Inquiry; and to produce all books, papers and other documents, according to the tenor of the summons. … Plainly and literally construed, this proviso protects a witness in respect of the performance of his first duty only, that, namely, of answering all questions put to him. We are asked to extend its operation to all documents which the witness, in pursuance of the duty secondly imposed upon him, produces according to the tenor of the summons. I think, however, that the Legislature must be taken to have intended to leave all such documents as had an independent existence prior to the statement of the witness before the Commissioners, as unprotected as they were before, even although the witness should, in the course of his statement, refer to them; and that were we to hold otherwise we should be ourselves legislating instead of construing the Act." (Underlining added)

Consistent with Hill J's reasoning, the heading to s10 also appears to envisage two distinct obligations on the part of witnesses, given that it refers to "*statements or disclosure*" (although the extent to which the heading assists interpretation of the part of the section dealing with privilege is unclear, given that it only refers explicitly to the immunity). In the circumstances, although it is not necessary to determine this issue for the reasons we set out below, we would submit that any exclusion of privilege can only apply to answers to questions by the Commissioner only, and not provision of documents in response to a request for production by the Commissioner.

c. Third, we agree that the wording of s10 of the 1888 Act does not give the Commissioner discretion to excuse a witness from answering a question if they assert privilege. However, s10 cannot operate entirely to exclude the operation of legal professional privilege ('**LPP'**), for the following reasons:

    i. LPP is a fundamental human right, which has been recognised as part of the right to privacy guaranteed by Art 8 of the European Convention on Human Rights ('**ECHR**') and s7 of the Gibraltar Constitution Order 2006 ('**the Constitution**'). As explained by the House of Lords in ***R***

(Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2002] UKHL 21 at [7]-[8] (underlining added):

> "7. … LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice. The cases establishing this principle are collected in the speech of Lord Taylor of Gosforth CJ in ***R v Derby Magistrates Court, Ex p B*** [1996] AC 487. It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention (***Campbell v United Kingdom*** (1992) 15 EHRR 137; ***Foxley v United Kingdom*** (2000) 31 EHRR 637) and held by the European Court of Justice to be a part of Community law: ***A M & S Europe Ltd v Commission of the European Communities (Case 155/79)*** [1983] QB 878.
>
> 8. … The courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication. The speeches of Lord Steyn and myself in ***R v Secretary of State for the Home Department, Ex p Simms*** [2000] 2 AC 115 contain some discussion of this principle and its constitutional justification in the context of human rights. But the wider principle itself is hardly new. It can be traced back at least to ***Stradling v Morgan*** (1560) 1 Pl 199."

ii. Section 7 of the Constitution secures (as a qualified right) the protection for privacy of home and other property. Whilst s7 is not in identical terms to Article 8, the provisions of the Constitution should, if possible, be interpreted as giving no less protection than their equivalents in the ECHR, which here is Article 8: ***Nadine Rodriguez v (1) Minister of Housing of the Government (2) The Housing Allocation Committee*** [2009] UKPC 52 at [11].

iii. Section 2(1) of Annex 2 to the Constitution necessarily requires conformity with s7 of the Constitution and Art 8 of the ECHR.

iv. On this basis, and in the absence of express language in the 1888 Act ousting the operation of LPP, we agree that s10 must be read in

conjunction with s7 of the Gibraltar Constitution so as to permit parties to rely on LPP to resist answering questions put by the Commissioner during the Inquiry.

v. This interpretation is supported by the approach to LPP in more recent inquiry legislation, such as s22 of the Inquiries Act 2005 (UK) and s12(3) of the Commissions of Enquiry Act (Trinidad and Tobago), which explicitly protect LPP in the context of inquiries.

d. Notwithstanding the above, it is at least arguable that s10 is not amenable to a 'blue pencil' reading in accordance with s2 of Annex 2, because it is very explicit in its terms that privilege does not apply where a question has been asked: "*no person shall be excused from answering any question put to him by the commissioners …*"[1].

e. However, if a 'blue pencil' approach is not possible due to the explicit wording of the statute, we also agree that the Commissioner is not prevented from adopting, and likely bound by the Constitution to adopt, a course where he does not ask questions (nor make requests for disclosure) where the answers (or responses) are likely to require the witness to breach privilege (and thereby their fundamental constitutional and human rights). The Commissioner would be assisted in such an approach by the CPs, as per the proposal discussed below, providing the Inquiry with advance notice of matters likely to raise issues of privilege.

13. Taking all of the above considerations into account, in our submission, the best approach to reflecting the applicable legal principles would be to adopt the test set out in s22 of the Inquiries Act 2005 (UK), with the following minimal alterations:

> "(1) A person ~~may~~will not under section 21 be required to give, produce or provide any evidence or document if—
>
> > (a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in Gibraltar~~the relevant part of the United Kingdom~~, or
> >
> > (b) the requirement would be incompatible with a retained EU obligation.
>
> (2) The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as

[1] Much like the provisions of the now-repealed Criminal Offences Act 1960, which Dudley CJ held, in ***In re Chief Minister's Ref*** [2010-12 Gib LR 178] (at [34]), "*did not readily lend themselves to such a task*", namely construing the legislation "*with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution*", as required by s/2 of Annex 2 to the Constitution.

they apply in relation to civil proceedings in a court in Gibraltar~~the relevant part of the United Kingdom~~."

14. As it appears that the Government Parties and Mr McGrail agree that LPP and public interest immunity do apply to the provision of evidence to the Inquiry, we propose that the Commissioner adopt the approach that he was minded to adopt in the September Letter, namely to set out the applicable tests for LPP and/or public interest immunity in paragraph 13 of the Documents Policy. We consider that the wording of s22 suffices in respect of LPP (and guidance on the applicable definitions and tests can be found in the ***White Book 2022*** at §31.3), it is probably helpful to include in the Document Policy the wording of the public interest immunity balancing test set out by the House of Lords in ***R v H*** [2004] UKHL 3, [2004] 2 AC 134, and summarised in ***Beer on Inquiries*** §5.79 as follows:

    (1) What is the material that is sought to be withheld? This must be considered in detail.

    (2) Is the material such as may weaken a party's case or strengthen that of his opponent?

    (3) Is there a real or serious risk of prejudice to an important public interest if full disclosure of the material is ordered?

    (4) If the answer to (2) or (3) is yes, can the interests of the party not asserting the privilege be protected without disclosure or disclosure be ordered in such a way as to give adequate protection to the public interests in question and also afford adequate protection to those interests? This question requires consideration, with specific reference to the material sought to be withheld and the facts of the case and the issues as disclosed, whether it is possible for formal admissions to be made, or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries (or 'gists'), extracts of evidence, or the provision of documents in redacted form and approved by the tribunal.

    (5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question?

    (6) If limited disclosure pursuant to (4) or (5) is ordered, may its effect be to render the trial process viewed as a whole unfair?

    (7) These matters relating to disclosure and the assertion of public interest immunity must be kept under review throughout the trial process.

15. We also recommend that the Commissioner adopt the further amendments to the Documents Policy proposed by the Government Parties, as follows:

    a. Add a clarification to paragraph 25, which specifies that in exceptional circumstances parties may make applications to give evidence in private at any time, and that this may initially be without notice to the other parties. The words "*may initially be made without notice*" are important as they confine the circumstances where an application may be made without notice, which is always an exceptional step in litigation. In our view, the words "*where absolutely necessary*" should also be added to emphasise this point. Further, we consider that the other CPs should always be informed where: (i) the Commissioner decides that the application to give evidence in private should not be granted; or (ii) after evidence is given in private, that it need not have been given in private. In the case of the latter, we consider that he should be permitted to disclose the contents of the evidence given in private to the CPs through provision of transcripts.

    b. Add the words "*at or prior to the main hearing*" to the new paragraph 25, to make clear that a CP can raise issues of privilege with the Inquiry Team ahead of the main hearing to avoid possible delay and disruption to those hearings. However, the words "*on notice*" should also be inserted into this paragraph to make clear that claims as to privilege, including PI immunity, must be made on notice to other CPs. This need not disclose the substance of the claim, other than to alert the other CPs to the fact of the application.

    c. Add the words proposed in para 9.2(iii) of the Government Parties' submissions to illustrate the categories of the Inquiry's stakeholders.

ii. The Vulnerable Witnesses Policy

16. The Commissioner's preliminary position was set out in Section 1B of the September Letter [2/5]. The Government Parties have submitted that they are content with the indicated position, and Mr McGrail has made no further submissions on the policy documents. Accordingly, the Vulnerable Witnesses Policy can now be settled with the amendments proposed in the September Letter.

iii. The Core Participants Policy

17. The Commissioner's proposed amendments were set out in Section 1C of the September Letter [2/5]. The Government Parties are content with these indications of position, subject to a further submission (in response to Section 1C of the September

Letter) that where advance notice is provided to participants of potential criticism in the final report, this should be made: (a) in a manner that does not disclose the findings of fact; (b) on a confidential (not for publication) basis; and (c) only to the person criticised or commented on, and not "others".

18. Although the notification procedure referred is not specifically referred to in the Core Participants Policy, and we do not propose amendment of the Core Participants Policy to deal with this issue, we recognise that this is a standard procedure in inquiries (known in practice as 'Salmon Letters', or 'Warning Letters' under s13 of the UK Inquiry Rules 2006), and the Commissioner is likely to wish to follow such a process in this Inquiry. We also agree that points (b) and (c) are sensible, as the purpose of this procedure would be to give advance notice to participants who may be subject to serious criticism, so that they may be given a reasonable opportunity to respond and/or prepare as they may consider necessary.

19. However, we do not agree with the suggestion in (a) that findings of fact cannot be disclosed as part of this process, as it may be necessary to do so in order to explain or contextualise the potential criticism. While CPs would obviously not, as part of this process, be given access to the draft report, or told the entirety of the factual findings which the Commissioner is minded to make, it may be appropriate to reveal specific findings of fact, and the Commissioner should not be constrained from doing so.

20. Mr McGrail has made no further submissions on this document. In the circumstances, the Core Participants Policy can now be settled as proposed in the September Letter.

iv. The Appropriate Policy Document

21. The Commissioner's proposed amendment was set out in Section 1D of the September Letter [2/6]. The Government parties are content with this proposal, and Mr McGrail has made no further submissions on this document. Accordingly, the Appropriate Policy Document can now be settled with the amendment proposed in the September Letter.

v. The Privacy Notice

22. The Commissioner's proposed amendment was set out in Section 1E of the September Letter [2/6]. Mr McGrail has made no further submissions on this document. Accordingly, the Privacy Notice can now be settled with the amendment proposed in the September Letter.

23. The September Letter also noted Mr McGrail's concern as to the HM Government of Gibraltar's Information Technology and Logistic Department's provision of IT services

to the Inquiry, and invited the CPs to make any proposals as to viable alternative IT providers. As none of the CPs have made any such proposals, we do not consider that this is a matter which should be taken further (although the Inquiry team will continue to be open to any suggestions from CPs on such matters).

C. Draft list of issues

24. We are pleased to note that, following the September Letter, the Provisional List of Issues is very close to full agreement between the Commissioner and the CPs (although its drafting is, of course, ultimately a matter for the Commissioner). However, there are four outstanding matters which require consideration.

1. "Peripheral issues"

25. Mr McGrail has warned the Inquiry about "*any attempts to muddy the waters by introducing peripheral issues relating to events*": at [27]. In our submission, it is not possible at this early stage of the Inquiry to identify which issues are "peripheral", and which are potentially significant. This can only be achieved after the Commissioner evaluates the evidence and tests the alleged connection between certain events and Mr McGrail's retirement. As Mr McGrail points out, the additional language proposed in the September Letter ("*to the extent that he considers necessary and appropriate to address the matters under Inquiry*") provides the Commissioner with sufficient flexibility and discretion to discount or elevate issues of greater or lesser importance in due course.

2. Issue 5

26. Mr McGrail submits that as currently drafted, Issue 5 is framed in a way which focuses on the RGP's investigation rather than the underlying facts relating to it, and in particular alleged involvement by the Chief Minister in the alleged hacking and/or sabotage of the NSCIS: at [33]. He invites the Inquiry to add the words "*The Chief Minister's involvement (if any) in, …*" to the start of Issue 5. We do not consider that this addition is necessary or appropriate, for three main reasons:
    a. The Chief Minister's involvement in the investigation, including his reaction to the execution of the search warrants, falls squarely within sub-Issue 5.3, namely: "*Did the AG and/or CM exert any or any inappropriate pressure on Mr McGrail regarding the investigation or otherwise interfere with the investigation, in particular the decision to execute the search warrants?*".
    b. Furthermore, as was explained in the September Letter, the introductory paragraph to the list of issues requires the Commissioner to determine the

"*relevant facts*", which would include the Chief Minister's motives for his actions (a question of fact).

c. An inquiry into an "*investigation*" would entail, to the extent relevant, an inquiry into the substantive facts underlying the investigation.

27. Nevertheless, we recognise that the Provisional List of Issues should be drafted in as neutral a form as possible. We note the submission that with the current drafting of sub-Issue 5.3, the focus on the RGP's "*handling*" of the investigation at the outset of the sentence could be interpreted as being framed in accordance with the Government Parties' Account. While we consider that the words "*handling of*" are central to the focus of the Inquiry, we propose that the sentence could be reworded as follows to clarify that the RGP's handling of the investigation is only one aspect of the inquiry into the "*investigation*":

> "The ~~RGP's handling of an~~ investigation into the alleged hacking and/or sabotage of the National Security Centralised Intelligence System (NSCIS) and alleged conspiracy to defraud ("the Conspiracy Investigation"), and the RGP's handling of the same, including but not limited to the RGP's execution of search warrants as part of that investigation on 12 May 2020 ("the Search Warrants")."

28. In the context of the parties' submissions on Issue 5, a separate issue has arisen as to the language that the Commissioner may use in his final report. The Government Parties submit that the Commissioner does not have the power to "*come to judgments in 'judgmental terms' about any person (as opposed to evaluating the facts*)": [14.3(iii)] of their submissions. They seek to distinguish ***Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*** on the basis of the different statutory provisions in Canada, which expressly refer to findings of misconduct.

29. We do not consider that the Commissioner needs to decide that issue at this juncture, and that it would be more fitting to do so closer to the time of preparation of the report. Nevertheless, our provisional view is that the Commissioner's task is not limited to finding the relevant "primary" facts alone. By way of analogy, juries are directed that having found primary facts, they must go onto consider what inferences or conclusions they should draw from the facts that they have found. In our submission, it would also be appropriate for the Commissioner to draw inferences and conclusions from primary facts. Doing so will be essential to fulfilling the terms of reference, which require the Commissioner to not only determine what happened, but whether particular matters or events contributed to Mr McGrail's retirement.

3. Issue 9

30. In the September Letter, the Commissioner proposed the following reformulation of Issue 9:

> "Mr Nick Pyle's statement, made to Mr McGrail on 6 June 2020, that if Mr McGrail did not resign Mr Pyle would exercise his powers under Section 13 of the Police Act and therefore require him to do so. This will include consideration of Sir David Steel's imminent commencement as Governor, and particularly the date on which NP learned of the date on which that was expected to occur ("the Governor's Commencement")."

31. The Government's submissions argue that this draft formulation does not accurately reflect Mr Pyle's evidence. Having reviewed the evidence, we agree that the issue requires reformulation as its current drafting contains a contested statement of fact. Mr Pyle's evidence is that he met with Mr McGrail on the afternoon of 5 June 2020 to set out the process moving forward, and that he said that whilst he had not made up his mind as to whether he would use the powers invested in him, he would be prepared to do so. By contrast, Mr McGrail's evidence is that on 5 June 2020, Mr Pyle asked him to return to see him on the following Monday (the 8th) with a view of invoking his powers under s13 of the Police Act.

32. We also accept that the relevance of Sir David Steel's commencement as Governor should not be assumed, and it would be appropriate to add the words "if any".

33. We therefore propose the following amended version:

> "Mr Pyle's stated intention as to his powers under section 13 of the Police Act. This will include consideration of the relevance (if any) of Sir David Steel's imminent commencement as Governor, and particularly the date on which NP learned of the date on which that was expected to occur ("the Governor's Commencement")."

4. Paragraph 12

34. In the September Letter, the Commissioner indicated that he was open to including as an additional Issue 12:

> "The Gibraltar Police Authority's process and decision in purported compliance with Section 34 of the Police Act, and subsequent withdrawal of that decision ("the GPA Process")."

35. At [12(d)] of its submissions, the GPA avers that this proposed amendment is "*unduly wide*", and in any case wider than Mr McGrail's proposed issue 12.4: "*To what extent, if at all, did the GPA's actions constitute a reason or circumstance leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking an early retirement?*". We respectfully disagree with the GPA's submission:

a. It is entirely proper, and potentially of significant relevance to the terms of reference, to explore the s34 process. Inclusion of the word "*process*" denotes that the Inquiry will investigate the process as a whole, and not merely the decision, given that the process itself (and not merely the decision) may have formed part of the reasons or circumstances leading to Mr McGrail ceasing to be Commissioner of Police.

b. The Commissioner cannot be expected simply to accept from the outset, as the GPA argues, that the facts are "*well established and any further investigation of them would constitute an unnecessary exercise*" (paragraph 1(a) of its submissions). To do so would be an abdication of the Commissioner's responsibility under the terms of reference.

c. Although the s34 process was subsequently withdrawn, we do not accept that "*there is no need for this matter to be investigated further*" (paragraph 12(b)). As stated above, it is theoretically possible that the process may have impacted upon (or at least 'led to', to adopt the wording of the Terms of Reference) Mr McGrail's decision to retire, and this is therefore a matter which the Commissioner is required to investigate.

d. An examination of the 'process' would also allow the Commissioner to consider whether any, or any inappropriate, pressure was put upon the GPA by the Chief Minister.

D. Funding of Mr McGrail's legal team

36. Mr McGrail's legal team has raised concerns in his submissions about delays in payment of fees, as well as the procedure in general. The Solicitors to the Inquiry are responsible for approving budgets and bills in accordance with the Inquiry Protocol relating to Legal Representation at Public Expense. However, under the 1888 Act, it is the Government that is ultimately responsible for making payments from the Consolidated Fund. The Inquiry team is bound to follow this statutory scheme.

37. Relevantly, s13 of the 1888 Act states that commissioners "*have the power to include in the expenses of giving effect to the provisions of this Act any reasonable sum, which they may fit to recommend by certificate under their hand, to be paid to any witness for his expenses and loss of time, and which may be approved by Government*" (underlining added).

38. Our understanding is that:

a. The first set of approved costs for the work of Mr McGrail's legal team was submitted by the Solicitors to the Inquiry to Mr Turnock (Secretary to the Inquiry) on 2-3 August 2022.

b. Mr Turnock was on annual leave at the time (from 29 July 2022), and returned to the office on 22 August 2022. He immediately processed the bills and submitted them for payment to Government on 25 August 2022, and followed up the request for payment on 5 September 2022 (and again subsequently).

39. We recognise the difficulties which Mr McGrail's legal team is encountering as a result of not yet being paid for any of its work to date, and both Counsel (through Mr Turnock) and the Solicitor to the Inquiry have sought urgent payment of Mr McGrail's bills. We understand that further attempts were made by Mr Turnock and the Solicitor to the Inquiry to expedite the process on Tuesday of this week. However, Counsel to the Inquiry has informed Mr McGrail's counsel that in his experience thus far, his bills have taken four to five weeks to be paid after submission by Mr Turnock, and that he does not believe that anything can be read into the delay in payment of Mr McGrail's bills, which is not out of the ordinary.

40. In the circumstances, we do not understand the basis for Mr McGrail's submission that the Government is spending "*four to six weeks analysing the bills of Mr McGrail's legal team*" (paragraph 55 of his submissions). The bills have been considered by the Solicitors to the Inquiry and Mr Turnock, and now await approval and payment by Government as an unavoidable step in the process. Mr Turnock has assured us that he will continue to seek payment as soon as possible, which is the extent to which the Inquiry team has any input into the process. We propose that the Commissioner should continue to monitor the situation, and that the matter should be revisited if payment is not received by the end of this month.

E. Representation of Government parties

41. In their submissions following the First Preliminary Hearing,[2] Counsel for Mr McGrail stated that:

> "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

[2] McGrail submissions dated 20 July 2022, at para 3.

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."

42. By letter dated 16 August 2022, the Inquiry Team sought confirmation of this matter from Peter Caruana & Co, who responded on 18 August 2022. That response has now been communicated to Mr McGrail's legal team. In the interests of public clarification, we wish to highlight that the letter confirmed that:

> "Our engagement relates to and we represent and advise all branches of HM Government of Gibraltar. This includes, but is not limited to, the Office of Governor (i.e. the current Governor), Sir David Steel, the Interim Governor at the relevant time, Nick Pyle, the Chief Minister, Fabian Picardo QC and the Attorney General, Michael Llamas, QC in relation to the Inquiry convened by HM Government of Gibraltar into the retirement of the former Commissioner of Police, Mr Ian McGrail. This therefore includes the Government as a whole, including the Council of Ministers and the Governor.
>
> […]
>
> Should the Gibraltar Government as a whole, or any other branch of it, later be designated as a core participant in the Inquiry, or are otherwise granted by the Commissioner the right to be legally represented thereat, our instructions extend to representing them also as counsel at future Inquiry hearings."

43. Subject to any submissions from Mr McGrail at the hearing or any further developments, we do not consider that this issue requires any further action by the Commissioner.

F. Timeline for future progress of the Inquiry

44. As good progress has been made on the settlement of the provisional list of issues, we now consider that it will be possible to set out a timeline for further relevant disclosure and responsive evidence (as we have been invited to do by Mr McGrail). The proposed timeline is as follows:

    a. By 23 September 2022: Inquiry to publish final copies of policy documents;

    b. By 30 September 2022: Inquiry to send any further disclosure requests to existing CPs;

    c. By 4pm, 7 October 2022: Deadline for any applications for CP status;

    d. By 4pm, 28 October 2022: existing CPs to give disclosure (including electronic documents and metadata) to the Inquiry in accordance with the above requests;

e. 16 – 17 November: Third Preliminary Hearing if required;

f. By 21 December 2022: Inquiry to give disclosure to the CPs (of both CP evidence and evidence disclosed to the Inquiry by other participants);

g. By 27 January 2023: CPs to file responsive witness statements;

h. 7 – 8 February 2023: Fourth Preliminary Hearing (which must necessarily take place after exchange and consideration of responsive witness statements);

i. 6 – 24 March 2023: Main Inquiry Hearing.

45. We urge CPs, which by now will be very familiar with the issues to be investigated by this Inquiry and the witness statements of other CPs, to begin working in earnest on preparation of documents for disclosure and drafting of responsive witness statements, in order to ensure compliance with the deadlines set out above, which is necessary if a March 2023 Main Hearing is to be viable.

46. We anticipate that following matters would be addressed at the Third Preliminary Hearing:

a. The resolution of any outstanding issues surrounding the short factual statements;

b. Any issues surrounding applications for CP status; and

c. Any disputes surrounding applications for restriction orders. We note that the Government parties applied for a restriction order by letter dated 7 September 2022. We do not consider that the application should be determined at this stage, given that other applications may be received in due course and in any event, in accordance with the Documents Policy, witness statements and exhibits will not be placed on the Inquiry website until the Main Inquiry Hearing.

47. Following this hearing, it will be necessary to determine as soon as possible as to whether the Third Preliminary Hearing will be required, so that the parties can make necessary arrangements.

JULIAN SANTOS
HOPE WILLIAMS
5RB

15 September 2022