Commissions of Inquiry Act

Inquiry into the retirement of the former Commissioner of Police, convened by a Commission issued by Her Majesty's Government of Gibraltar on the 4th February 2022 in Legal Notice No 34 of 2022 ('the Inquiry')

SUBMISSIONS ON BEHALF OF HM GOVERNMENT OF GIBRALTAR, FABIAN PICARDO, NICHOLAS PYLE AND MICHAEL LLAMAS IN RESPONSE TO WRITTEN SUBMISSIONS DATED 20 JUNE 2022 OF IAN MCGRAIL AND ORAL SUBMISSIONS OF COUNSEL TO THE INQUIRY AND IAN MCGRAIL AT FIRST PRELIMINARY HEARING ON 22 JUNE 2022

A. INTRODUCTORY REMARKS

1. These submissions are made on behalf of (i) HM Government of Gibraltar, (ii) Fabian Picardo (Chief Minister), (iii) Nicholas Pyle (at all material times, Governor of Gibraltar) and (iv) Michael Llamas (Attorney General for Gibraltar) (hereafter collectively "**the Government Parties**") in response to written submissions dated 20 June 2022 made on behalf of Ian McGrail ("**McGrail Written**"), and oral submissions of counsel to the inquiry ("**CTI Oral**") and Ian McGrail ("**McGrail Oral**") at the first preliminary hearing on 22 June 2022.

2. The Inquiry takes place under and in accordance with the laws of Gibraltar, for the purposes set out in the Commission establishing it. Contrary to the apparent thrust of the McGrail Written it is not concerned with matters that are supposedly of the utmost public importance "*internationally*" (whatever that may mean). The purposes and scope of public inquiries under UK law (still less so under the laws of any other country), and the provisions of such laws, are not apposite to this Inquiry. Nor are statements in any Report of a Committee of the UK's House of Lords in relation to a UK Act of Parliament which has no application here (or otherwise).

3. Accordingly, the purposes of this Inquiry (still less so, its "*core purposes*") are not as set out in paragraphs 5 and 6 of McGrail Written. The purpose of this Inquiry is set out in the Commission establishing it, namely, inquiring into and ascertaining the facts relating to the reasons and circumstances leading to Mr McGrail ceasing to be Commissioner of Police in June 2020 by taking early retirement, and reporting thereon to the Government. Wide as they are, they do not permit of the expansive purposes and powers contended for by Mr McGrail.

4. So, for example, it is submitted that the statements that a "core purpose" of this Inquiry is "vindicating ECHR rights where applicable, in particular Mr McGrail's rights" would require a judicial adjudication of those rights, which is outwith the scope, and powers of this Inquiry. While the Government Parties deny that there has been a violation of any of Mr McGrail's human rights or other rights, this Inquiry is not the place for him to seek to establish that. That would be the competence of the Supreme Court of Gibraltar in adversarial court proceedings.

5. In inquiring into and ascertaining the facts relating to the reasons and circumstances leading to Mr McGrail's retirement, the Commissioner has wide latitude as to the matters that he can explore. But the issues explored by the Commissioner must at least be capable (subject to such exploration) of having been relevant to the core issue of the Inquiry, namely "the reasons and circumstances" leading to Mr McGrail's ceasing to be Commissioner of Police.

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PART C - THE POWER OF THE COMMISSIONER TO MAKE RECOMMENDATIONS

24. The issue of the making of recommendations in the Commissioner's final report, should he consider it appropriate to do so, arose orally in the first Preliminary Hearing.

25. For his part, the Commissioner expressed the view that that he is not required or indeed, even permitted by the terms of reference to make recommendations (page 10 transcript). For her part, counsel for Mr McGrail reserved the right to make submissions in the future to the effect that the Commissioner has power to make recommendations in reliance on arguments around the use of the words "as he shall" in the Commission, and also that an inherent power to make recommendations is contained in the word "inquire" (page 116-118 transcript).

26. It is submitted that the correct position is that under the Commissions of Inquiry Act ("**the Act**") itself the Commissioner has power to make recommendations but is not required to do so. Section 6 specifically empowers the Commissioner to "make such recommendations as [he] may think fit". This provision appears to have been overlooked in previous Inquiries (including the Dr Giraldi Home Inquiry) from which the contrary (and incorrect) view appears to have been imported.

C. PROCEDURE.

27. The "manner in which the commission is to be executed" was a matter for the Government (section 3(2)(a) of the Act). It chose to empower the Commissioner to widely inquire "*as he shall in his absolute discretion consider appropriate*". Furthermore, section 6 of the Act empowers the Commissioner to inquire "*by all such lawful means as to* [him] *appear best, with a view to the discovery of the truth*". These give the Commissioner very wide latitude of discretion on matters relating to procedure and to set his own procedure.

28. In any event, in the absence of relevant statutory provision, the Commissioner has an inherent jurisdiction to determine his own procedure: *Attorney General v Leveller Magazine Ltd* [1979] AC 440.[2]

29. It was indicated to participants at the first Preliminary Hearing that CTI would draw up a draft Procedure which he would circulate to the participants formally and /or informally with a view to allowing them to make submissions and try and reach a consensus, failing which the Commissioner would decide at the second Preliminary Hearing in September what procedure he wished to adopt. The Government parties will thus await receipt of CTI's draft procedure and thereafter participate in the process described above.

[2] Cited by Lord Toulson in *Kennedy V Information Comr* [2015} AC 455 at [109]

Cross-examination of witnesses

30. In the meantime, the Government Parties wish to make preliminary submissions in respect of the "model" of the Inquiry and the issue of who may examine and cross-examine witnesses.

31. In the UK this issue is provided for in rule 10 of the Inquiry Rules 2006. That rule does not apply in Gibraltar, and Gibraltar has no statutory rules on the matter. As stated in paras 27 and 28 above, the Commissioner has a wide discretion in setting his own procedure for the Inquiry. But, absent relevant statutory provisions in Gibraltar, that discretion must be exercised in accordance with applicable common law principles. Those principles include the principles of procedural fairness.

32. The Government Parties submit that, given the seriousness of the allegations made against them, in accordance with the common law principles of procedural fairness, their counsel should be entitled to –

    (i) cross-examine Mr McGrail, and every witness that may purport to corroborate his version of the facts and/or allegations or who may give similar evidence or make similar allegations ; and
    (ii) re-examine the Government Parties.

33. On this basis, the Inquiry will be a hybrid model, but closer to a traditional model. To avoid this extending the length of the Inquiry inordinately and/or prevent its effective time-scheduling, such rights could be reasonably (in the context of the gravity of the accusations) time-limited. But it is respectfully submitted that time and cost considerations should not trump issues of procedural fairness.

34. In *Chief Constable of the Police Service of Northern Ireland, Re Judicial Review*[3], the High Court of Ireland considered the Irish authorities that had established such a right in those circumstances, and said that those authorities had to be read in the specific context of the express provisions of the Irish Republic's constitution. Girvan LJ nevertheless said the following:

[3] [2008] NIQB 145

(i) "*It can be argued that the spirit and intent of the Irish constitution is little different from and drew inspiration from the concerns of the common law to protect the rights of the individual and to provide fair procedures that enable the individual to vindicate his life, good name and property rights. That being so the approach adopted by the Irish courts is at first sight persuasive authority for the proposition that the common law rules of fairness should require a right to cross-examine at a public inquiry should be available to individual or organisations whose reputation and good name are seriously at issue*."[4]

(ii) "*Furthermore, on close analysis R(D) v Secretary of State for the Home Department is not authority for the wider proposition which Mr Eadie contends that it decided. In that case what was in question was whether D had a right to cross-examine. In was not in issue that D was detained in prison and that he had sustained permanent and irreversible brain damage in controversial circumstances. His interests could be protected by the Inquiry counsel. The question whether it would not be unfair for his representatives not to have a right to cross-examine raised different issues from those which would have been raised if a named individual had been accused of serious wrongdoing leading to D's injuries. What might be fair in relation to D might very well not be fair in relation to such a named individual. Paragraph [41] of the judgment makes it clear that it all depends on the circumstances what fairness requires in individual cases*."[5]

(iii) "*the difference between the Irish constitutional law approach and the common law approach lies in the fact that under Irish law a party in certain circumstances has a right to cross-examine whereas under the common law approach the question of whether a person should be permitted to cross-examine falls to be determined, not by reference to the language of rights, but by consideration of the dictates of procedural fairness in given situations*."[6]

[4] At [20]
[5] At [21]
[6] At [22]

(iv) "*The real question in this application cannot be answered by recourse to the question whether there is an abstract right to cross-examine where allegations are made that impugn the integrity or reputation of individuals. Rather the true question is whether the tribunal has in all the circumstances acted unfairly to the applicants by refusing to accede to their application to cross-examine at large*."[7]

35. In *R(D) v Secretary of State for the Home Department* the court distinguished the victim of the facts being inquired into, whose interests it said could be represented by counsel to the inquiry, and named persons accused of serious misconduct. If the applicant had been the latter it would have *"raised different issues*", as are indeed raised in this Inquiry.

36. In *Chief Constable of the Police Service of Northern Ireland, Re Judicial Review* itself, the court "*not without hesitation*" refused the Police Chief's application to judicially review the Inquiry's refusal to allow cross-examination apparently on the basis that, by virtue of a series of factors specific to the issues and circumstances of that case (listed in paragraph 25 of the judgment), the common law fairness test did not appear to require cross-examination to be allowed in the circumstances of that case, given the limited lines that the applicants wanted to open up in cross-examination. "*The Inquiry has to make a balanced judgment on the question whether opening up these lines of Inquiry would be more prejudicial to the Inquiry than probative of relevant issues."*[8]

37. The Government Parties stand accused by Mr McGrail of very serious misconduct, including entirely unsubstantiated allegations of corruption, which may constitute the common law offence of misconduct in public office (which corresponds to the United Nations Convention Against Corruption offence of abuse of functions). It is submitted that, in these circumstances the common law principles of procedural fairness require the Government Parties to be allowed to cross-examine their accusers. The extreme seriousness of the allegations made against the Government Parties in this Inquiry places them in the very position described by Girvan LJ in *Chief Constable of the Police Service of Northern Ireland, Re Judicial Review* (see para 34 above).

[7] At [24]
[8] At [30].

38. *De Smith* has this to say on the matter[9]:

> *"Refusal to permit cross-examination of witnesses may amount to procedural unfairness, especially if a witness has testified orally and a party requests leave to confront and cross-examine him or if the evidence is fundamental or highly contested. The fact that the proceeding may be inquisitorial and informal is inconclusive. As with the question of entitlement to legal representation, the matter is one for the discretion of the decision-maker. However, where a "judicialised" procedure has been adopted and witnesses are called to give evidence, the courts will be very ready in the absence of strong reasons to the contrary to find unfairness where a decision-maker declines to allow the evidence of those witnesses to be tested in cross-examination……..The true question in every case is whether the absence of cross-examination renders the decision unfair in all the circumstances."*

39. For their part, and should the Commissioner so decide, the Government parties have no objection to being cross-examined by counsel for Mr McGrail, provided he and other relevant, related witnesses can be cross-examined by counsel for the Government Parties.

D. OPEN JUSTICE

40. The principle of open justice has as its principal element that judicial proceedings be held in public. This has binding implications to a number of aspects of those proceedings such as (among others) public access to proceedings and documents and the requirement for decisions to be handed down in public.

41. In exercise of its power under section 3 of the Act, the Government has in fact ordained in the Commission that the Inquiry is to be held in public. Furthermore, in exercise of his discretion to establish his own procedure, the Commissioner may of course, subject to statutory impediment, apply to the conduct of the Inquiry such elements of the principles of open justice as he wishes and chooses to.

[9] *De Smith's Judicial Review* Seventh Edition at para 7-081

42. But the (constitutional) principles of open justice do not apply as a matter of law (i.e. with legal compulsion) to public inquiries, either in Gibraltar or in the United Kingdom. The importance of this point is that, when he is at liberty to do so, the Commissioner applies open justice principles as a matter of choice and not of compulsion. In other words, as a matter of the exercise of his discretion. This will allow the Commissioner greater latitude of action or decision in respect of procedural matters that may arise.

43. The reasons for the submission that the principles of open justice do not apply as a matter of law to public inquiries, are as follows:

(i) The principle of opening justice is a "constitutional principle" which binds all courts and tribunals exercising the judicial power of the state.[10] A public Inquiry does not engage the exercise of the judicial powers of the state.

(ii) The Gibraltar Constitution also limits the mandatory application of the open justice principles to "all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation" (Section 8(9) of the Constitution). The Inquiry is neither of these.

(iii) Because inquiries do not determine civil or criminal rights or obligations, they do not attract the protection of the right to a fair hearing under Article 6 ECHR[11].

(iv) As in the United Kingdom, there is no legal obligation for public inquiries to be held in public, the very essence of the principle of open justice. Indeed, the very case cited in McGrail Written at para 51 for the proposition that "the constitutional principle of open justice applies equally to public inquiries" (*Kennedy v The Charity Commission*) was a case involving a statutory inquiry that did not need to be and was not held in public.

[10] *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618. Cited and applied by the Supreme Court in *Kennedy v Information Comr* [2015] AC 455 at e.g. [115] and [236]; see also *Supreme Court in cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 at [41].

[11] *Fayed v United Kingdom* (1994) 18 EHRR 393

(v) Neither *Kennedy v The Charity Commission* nor Lord Toulson's words in that case cited in para 51 McGrail Written are, as contended for by Mr McGrail, authority for the proposition that "the constitutional principle of open justice applies equally to public inquiries".[12] That case involved a journalist's right to obtain (under section 32 of the UK's Freedom of Information Act) documents from the Charity Commission in relation to a statutory Inquiry that it had held in private. The judges said as follows:

(a) Per Lord Mance at [48]:

"The present appeal concerns not proceedings before a court, but an inquiry conducted by the Charity Commission in relation to a charity, and the inquiry proceedings were not conducted in public. We are not being asked to say that that was wrong, or that court and inquiry proceedings are subject to the same principles of open justice. I agree with Lord Carnwath JSC (paras 243 and 244) that court and inquiry proceedings cannot automatically be assimilated in this connection."

(b) Per Lord Carnwath at [236]:

"I have no reason to doubt the authority of the Guardian News case itself as applied to the ordinary courts, with which it was concerned… The cases to which Toulson LJ referred were about courts. Although he treated the same principle as applying 'broadly speaking…to all tribunals exercising the judicial power of the state' (para 70), he gave no authority for that extension. Even assuming that wider proposition is correct, the Charity Commission cannot in my view be said to be 'exercising the judicial functions of the state'."

And at [238]:

"Furthermore, such authority as there is points against any general presumption that 'open justice' principles applicable to courts apply also to

[12] In footnote 9 to para 50 McGrail Written, it is stated that *Guardian News* was unanimously approved by the *Supreme Court in Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38. That is true, but not in any sense relevant to the issue under consideration. That case related to public access to documents in court proceedings. It said absolutely nothing about the application of the principle of open justice to public inquiries. The case is therefore not authority for any proposition in that respect

the various forms of statutory or non-statutory inquiry. The issues in an analogous context were discussed in detail by the Divisional Court in R(Persey) v Secretary of State for the Environment, Food and Rural Affairs [2003] QB 794. The court upheld the Secretary of State's decision that the inquiries into the 2001 outbreak of the food and mouth disease should be held in private. Applying the approach of Bingham MR in Crampton v Secretary of State for Health (1993); [1993] CA Transcript No 824, and distinguishing R(Wagstaff) v Secretary of State for Health [2001] 1 WLR 292, the court held that there was no legal presumption that such an inquiry should be held in public."

And at [240]:

"Indeed this comparison, with respect, discloses a basic fallacy in the alternative approach. The foundation of the Guardian News decision lies in the strong constitutional principles that courts sit in public. It is no surprise that the starting point of Toulson LJ's judgment is a quotation of the great case Scott v Scott [1913] AC 417 in which that principle was set in stone. It is not a large step from that principle to hold that papers supplied to the judge for the purpose of an open hearing should in principle be made available to the public, absent good reason to the contrary. For statutory inquiries, such as those conducted by the Charity Commission, there is no such underlying principle that they should sit in public. The essential foundation that is needed for application of the Guardian News approach is wholly absent."

And at [241]:

"In my view there is nothing in the Guardian case, or any other existing authority, to support the view that common law principles relating to disclosure of documents in the courts can be transferred directly to inquiries."

(c) Per Lord Toulson at [125]-[126].

"125. *The application of the open justice principle may vary considerably according to the nature and subject of the inquiry… These are all valid*

considerations but, as I say, they go to the application but not the existence of the principle.

"126. *In each case it is necessary to have close regard to the purpose and provisions of the relevant statute."*

(vi) Similarly, section 3(2)(e) of the Act gives to the Government the power to decide whether or not an inquiry is to be held in public. A decision that an inquiry be not held in public is inimical to the principle of open justice applicable to courts, and it is therefore axiomatic that those principles (in Gibraltar any more than in the UK) cannot be legally applicable to such inquiries.

The practical consequences of these submissions

44. As stated above, the Commissioner is at liberty (absent statutory impediment) to choose to apply open justice principles, but is not bound or obliged in law to do so. This distinction is relevant to some of the submissions made by Mr McGrail in McGrail Written and McGrail Oral, and one of Mr Santos's submissions in CTI Oral, as follows.

45. Mr McGrail invokes the principles of open justice ("as well as the fact that allegations of corruption are a substantial part of the subject-matter of the Inquiry, and in the light of the constitutional importance of unearthing corruption") to argue that "it is imperative that the Inquiry is held in public and that there is maximum transparency", which he advocates must include (among other things that are not controversial) (i) the availability of live streaming and (ii) the publication of the final report." (para 52 McGrail Written).

46. Accordingly, in para 53 of McGrail Written and also in McGrail Oral it is submitted on his behalf (amongst other things) that:

(i) All Inquiry hearings should be open to the public and press remotely, via online attendance (para 53b);

(ii) All Inquiry hearings should be live-steamed (para 53c); and

(iii) The final report should be published on the Inquiry website (para 53h). In this respect Mr Santos submitted (see page 30); "…*and, of course, it goes without*

saying that the Commissioner's final report will also be published on the inquiry website."

47. The submissions in paras 48 – 58 below are made on behalf of the Government Parties in respect of these matters.

Publication by the Inquiry of its Report

48. It is submitted on behalf of the Government that the Inquiry itself has no power to publish its Report, and should not do so. The Commission mandates the Commissioner to "ascertain the facts and report to the Government" (underlining added for emphasis). In stating this in the Commission, the Government was reflecting the requirements of the law, and not itself making any choice. Section 6 of the Act provides that the Commissioner shall inquire into the matters submitted to him "*and shall report to the Government*."

49. The Government has politically committed itself to publishing the report. In its press release number 84/2022 dated 4th February 2022 announcing the issuing of the Commission for the Inquiry, the Government said: "The full report will be published by the Government, subject only to such redactions as Sir Peter Openshaw, DL, may himself consider appropriate" (underlining added for emphasis). It is therefore the Act that requires that the Commissioner reports to the Government.

50. In this context, it is respectfully submitted that the Commissioner himself got his statement at the first Preliminary Hearing right, namely: "My findings will be made public. They will not be and are not subject to approval by the Government" (i.e. without suggesting that it would be the Inquiry itself that published the report) (see page 11 transcript). But the submissions on behalf of Mr McGrail and by CTI (referred to in para 46(iii) above), are wrong and unsustainable in law.

Live streaming of the proceedings of the Inquiry

51. The principle of open justice does not require the proceedings of the Inquiry to be live-streamed. Indeed, while it has happened in some UK Inquiries, it has not happened in

many (most) others. The principle of open justice applies primarily to courts and tribunals, yet it is a criminal offence in Gibraltar to broadcast court proceedings (section 477 Crimes Act). The Court has no power to authorise it. It is therefore axiomatic that broadcasting of legal proceedings in Gibraltar is not required by any applicable principle of open justice applicable here. The opposite is true. It is submitted that, in these circumstances, it would not be appropriate for the Inquiry proceedings to be broadcast.

52. In the UK, the position is now different by virtue of the provisions of Section 18 of the Inquiries Act 2005, which prohibits broadcasting except with the permission of the Chairman. That is not the position in Gibraltar and, even under section 18 of the UK Act there is a presumption that it will not be broadcast or recorded.[13]

53. In oral submissions, counsel for Mr McGrail invoked Article 10 of the European Convention of Human Rights in aid of their submissions (see page 67 transcript). This is wrong. Article 10 ECHJR (freedom of expression) is not engaged: Per Dame Janet Smith in the Shipman Inquiry[14]; Per Lord Hutton in the Hutton Inquiry[15]; and Kennedy v Information Comr.[16]

54. In any event, even in the UK, where an inquiry has power to allow broadcasting under section 18 of the Inquiries Act, many inquiries shy from permitting it because it places witnesses under additional and unnecessary strain and may affect their willingness to be candid. This was the case of the Hutton Inquiry and the Arms to Iraq Inquiry. In refusing to allow broadcasting in the latter, Sir Richard Scott (as he then was) said:

> "I have particularly in mind the possible effect on witnesses. It was foreseeable that there would be considerable media interest in the evidence to be given by Ministers, ex-Ministers and senior officials. There seemed to be a danger that the presence of television cameras might unfairly increase the inevitable pressure on witnesses resulting from the public character of the hearings."[17]

[13] Beer, *Public Inquiries*, first edition, para 6.79.
[14] Beer, para 6.83
[15] Beer, para 6.87
[16] [2014] UKSC 20
[17] Beer, para 6.87

55. In the Hutton Inquiry[18], the submission that consideration for the effect on witnesses should not extend to Ministers and senior officials was specifically rejected.

56. In this respect, it should be noted that the Chief Minister stands accused by Mr McGrail of "demonstrable lies" to Parliament (para 15 McGrail Written) and "egregious falsehood stated in Parliament" (para 16 McGrail Written). In the parliamentary context, and more generally in the political context, it is hard to exaggerate the gravity of these accusations.

57. The Government Parties submit that, even if it were otherwise appropriate to do so, the proceedings of the Inquiry should not be live-streamed (broadcast) because –

(i) It is not required by the principles of open justice and, in circumstances where it is illegal to live-stream court proceedings in Gibraltar, and there is no statutory provision empowering the Commissioner to permit it, it would be inappropriate and incongruous to permit live-streaming in the name of open justice;

(ii) The inevitable adverse effect on witnesses. In para 6.75, *Beer* speculates that these adverse effects on witnesses could include all or any of the following:

(a) They may be alarmed or worried about giving evidence that is being, or will be, broadcast;
(b) They may pull their punches;
(c) Conversely, they may ham up their evidence;
(d) Sources of information available to the Inquiry may dry up;
(e) They may feel inhibited in speaking freely, frankly, and with candour and may be more defensive than they would otherwise be.

(iii) Counsel for Mr McGrail submits that the proceedings should be live-streamed internationally ***because*** "the probity of Gibraltar's institutions is at issue in this inquiry" (page 102 transcript) and allegations of corruption are made and it is

[18] Beer, para 6.87

constitutionally important to unearth corruption (page 103 transcript). With respect, those are good reasons for not broadcasting, because –

(a) It is unfair to the Government Parties and to their reputations (while not being necessary for the proper performance of the Inquiry's functions and tasks) for untested, unproven and unfound allegations of corruption and severe improper conduct (which are flatly rejected as scurrilous) to be broadcast to the world beyond that which is necessary for the proceedings to be "in public" in the conventional sense (see paras 52 and 53 above).

(b) It is unnecessarily damaging to the international reputation of Gibraltar, and thus its public interest, for untested, unproven and unfounded allegations of lack of probity of its institutions (which are flatly rejected as scurrilous) to be broadcast to the world beyond that which is necessary for the proceedings to be "in public" in the conventional sense.

If the eventual outcome/ Report does not sustain the allegations, the damage will have been done, and the report itself is unlikely to obtain (indeed cannot obtain) the nature and extent of the coverage and dissemination achieved by live-streaming or broadcasting of the oral proceedings.

(iv) Given the sensationalist nature of the allegations, it will assist the Inquiry to avoid a media circus which does not materially advance the work of the Inquiry, and which may indeed serve interests inimical to that work and fairness. Further, in para 6.75, *Beer* warns that the possibility arises that only the sensational parts of the evidence within the Inquiry would be used by the media, leading to unrepresentative reporting of the Inquiry as a whole.

(v) The live-streaming of this Inquiry would, in the context of Gibraltar, make it well-nigh impossible to conduct any subsequent jury trial in the Gibraltar Courts of the criminal offences which Mr McGrail submits and alleges have been committed.

Remote, online attendance by public and press

58. This is effectively the same as live-streaming, and raises the same considerations as above. It is broadcasting. Furthermore, once proceedings are available online, anyone could then live-stream them. Accordingly, the same submissions are made.

E. Witness/Core participants Protection Policy

59. In para 54(iii) of McGrail Written, Mr McGrail says that "it stands to reason" that there may be potential witnesses who wish to give evidence anonymously, which may necessitate the putting in place of protective measures such as screening, redaction of transcripts/published documents. It is respectfully submitted that that submission is wholly unmeritorious. A witness' (let alone a core participant's) "wish to give evidence anonymously", or "that people need to be made to feel comfortable if they wish to approach the Inquiry" (page 113 transcript) is not a proper basis or reasons for such measures.

60. These submissions were further developed by counsel for Mr McGrail in oral submissions (page115 transcript). Effectively those submissions amounted to this:

(i) Because, according to Mr McGrail's version of events, he was placed under improper pressure at the highest level of Government in conducting his job (i.e. his highly disputed allegations about interference with the conduct of a criminal investigation), and

(ii) because (again according to his version of events) he was put under pressure by the same individuals to request early retirement against his will,

(iii) it is imperative that police (and other) witnesses be protected from similar pressure.

61. These submissions are without merit and should not prevail with the Commissioner because –

(i) They assume (and invite the Inquiry to proceed on the basis of) the truth and existence of the very contested thing that the Inquiry is supposed to establish,

namely, whether McGrail has been submitted to the improper pressure that he alleges;

(ii) They improperly assume that the Government and (necessarily) the current Commissioner of Police and senior RGP management (against whom no such allegations are even made) and who are the only people who could place pressure on police witnesses, would do so;

(iii) If witness protection is offered to witnesses for the reasons invoked by Mr McGrail, i.e., to prevent the Government Parties from placing them under pressure, that would require the Government Parties to be unaware of their identities. Three points arise in this respect:

(a) it is wrong for the Government Parties not to know who are their accusers and to be able to properly defend themselves against their very serious accusations/evidence;

(b) such measures would necessarily, in the context of the realities of Gibraltar, be wholly ineffective to achieve the invoked purpose. The identities of the witnesses would be immediately known and ascertainable by very crude processes of deduction and local knowledge by almost every citizen, let alone the Government Parties. The measure would be futile; and

(c) the principles of open justice militate against such measures except to protect genuinely vulnerable witnesses.

(iv) In any event, this inquiry is not about the conduct of a particular criminal investigation in question. It is about why Mr McGrail retired, and whether that was brought about by others properly or improperly. It has not yet been explored or established, and the Government Parties deny, that Mr McGrail retired on account of anything to do with the criminal investigation to which his allegations refer.

62. Accordingly, any protocol or policy that the Commissioner may decide to adopt should be motivated by and reflect the well-established applicable legal principles in that respect, including the common law principles.[19] The proper grounds and basis for such measures are considered by *Beer*, at paras 6.92 – 6.119.

F. Conflicts of Interest Policy

63. At para 55(v) of McGrail Written**,** it is submitted on behalf of Mr McGrail that "a policy should require each member of the Inquiry staff to declare potential conflicts of interest (for example professional or personal relationships between staff and potential witnesses)….".

64. This is said to be necessary because the operations of the Inquiry must be seen to be "scrupulously independent of those involved in the process, specifically the Government" (page 111 transcript) and because "Gibraltar is a small jurisdiction where there is often significant crossover between the personnel of different institutions." (para 55(v) of written submissions).

65. The question whether the Commissioner adopts the policy contended for on behalf of Mr McGrail and requires his staff be make the potential conflicts declarations proposed, is a matter entirely for the Commissioner upon which the Government Parties do not consider it necessary or appropriate to comment except, by way of assistance to the Commissioner, as in para 66 below.

66. In deciding whether to adopt the conflicts policy advocated by Mr McGrail in relation to his legal staff, the Commissioner may wish to have regard to the following factors:

(i) The reasons stated on behalf of Mr McGrail in support of his submission would apply equally to all court proceedings in Gibraltar. Courts in Gibraltar do not consider it necessary to have such a policy, perhaps for the reason stated in (ii) below.

[19] See for example, *Re Officer L* [2007] UKHL 36

(ii) There already exists a mandatory "policy" in relation to conflicts applicable to CTI, Mr Santos, namely the Bar Standards Board Code of Conduct (which is applicable to barristers in Gibraltar) and to the solicitors to the Inquiry (the UK Solicitors Regulatory Authority's Code of Conduct (which applies to solicitors in Gibraltar). These documents impose spontaneous obligations on barristers and solicitors in respect of conflicts of interests, and

(a) there is no reason to suppose that they are not complying with those obligations, as may be suggested by requiring them to make public declarations to that effect; and

(b) it is not clear what any such policy would, could or should add to those professional obligations.

(iii) We have been unable to find any precedent for this unusual proposal.

G. DISCLOSURE PROTOCOL

67. At paras 5.39 and 5.40, *Beer* suggests that, given the importance to the Inquiry's function of securing the disclosure of documents, and in order to promote understanding between the inquiry and persons who may provide documents to the inquiry as to the processes that are to be followed to secure orderly and timely disclosure of documents, and in order to introduce some transparency to the process, it has become common for inquiries to issue protocols regulating these processes.

68. The Inquiry may wish to consider doing so, and if it does there are precedent protocols. In the following UK Inquiries:

(i) Inquiry into the death of Sheku Bayoh (Scotland): https://www.shekubayohinquiry.scot/sites/default/files/2021-12/Protocol%20for%20disclosure%20and%20redaction%20of%20documents%20-%20Revised%20December%202021.pdf (issued Aug 2021, revised Dec 2021)

(ii) Grenfell Inquiry: https://assets.grenfelltowerinquiry.org.uk/inline-files/Protocol%20for%20the%20Redaction%20of%20Documents%20for%20Phase%201.pdf (issued July 2018)

(iii) Post Office Horizon IT Inquiry: https://www.gov.uk/government/publications/post-office-horizon-it-inquiry-2020/protocol-on-redaction-anonymity-and-restriction-

orders#:~:text=The%20Inquiry's%20approach%20to%20redaction,dates%20of%20birth%20and%20signatures. (issued July 2021)

(iv) Independent Inquiry into Child Sexual Abuse: https://www.iicsa.org.uk/inquiry-protocol-redaction-documents(inquiry established in 2015, but ongoing)

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