INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

WRITTEN SUBMISSIONS ON BEHALF OF
THE CHIEF MINISTER, THE HON. FABIAN PICARDO QC,
THE INTERIM GOVERNOR AT THE RELEVANT TIME, MR NICHOLAS PYLE OBE
AND
HER MAJESTY'S ATTORNEY GENERAL FOR GIBRALTAR, MR MICHAEL LLAMAS CMG QC

(TOGETHER "THE GOVERNMENT PARTIES")

24th August 2022

1. These are the written submissions of the Government Parties in relation to the draft policies ("**the Policies**") and list of issues ("**the List of Issues**") enclosed with the letter dated 27 July 2022 addressed by Attias & Levy, the Solicitors to the Inquiry, to Peter Caruana & Co, the Solicitors to the Government Parties.

2. The Government Parties are grateful to the Commissioner for the opportunity to make submissions in relation to the Policies before he adopts them.

A. DRAFT POLICY: PROTOCOL FOR RECEIPT AND HANDLING OF DOCUMENTS, REDUCTIONS AND RECORDS MANAGEMENT ("THE DOCUMENTS POLICY")

3. The Documents Policy requests spontaneous and timely (by the specified deadline) production of "relevant documents" (as defined), and alludes to the Commissioner's right under the Act to require the mandatory production of documents by summons.

4. Whilst the Documents Policy provides comprehensively for the redaction of documents, it does not make any provisions relating to claims to privilege (including public interest immunity) against production of the whole document. (Similar issues may arise in relation to the provision of information orally, though that does not arise on this policy paper. But the Inquiry may wish to have a policy for dealing with claims to privilege or immunity in relation to providing oral information when giving evidence. This may avoid delay at the time that any such situation arises once the oral hearings start).

5. In so far as concerns a claim to privilege or immunity in relation to the production of a document (as opposed to redaction), the provisions of the Documents Policy are to be found in paras 12e, 13, where this possibility is specifically envisaged, but no actual provisions are made as to how/when such applications should be made and how the Inquiry will deal with them, despite the scope for this causing delay.

6. Furthermore, para 25 under the heading "Reasons for redaction", sets out (non-exhaustively) the reasons why "documents or parts of documents provided to the Inquiry may be withheld from wider dissemination and/or redacted prior to disclosure to Core Participants and/or inclusion in evidence". This assumes that the document is "in" and in evidence, and purports to deal only with limiting its dissemination beyond Core Participants, despite the fact some of the grounds listed would provide grounds for the non-production of the document at all by the person in possession of it claiming the privilege (including PII).

7. Submissions:

7.1 It is submitted that the Documents Policy should include provisions relating to –

(i) How and when applications for relief from the obligation to produce a document on the grounds of privilege (including public interest immunity) should be made, and how the Inquiry will deal with them.

(ii) The Commissioner being able to agree, in circumstances where he thought it right and appropriate to do so, to receive in private i.e. with no dissemination either publicly or to Core Participants, information and documents that would otherwise be the subject of a claim to privilege or public interest immunity. Such applications would have to be made in the absence of other parties. This would provide a mechanism whereby the Government Parties may be able and willing to provide certain information to the Commissioner which they would be unable or unwilling to provide to anyone else, without the need for a formal public immunity claim and the delay which a full and definitive resolution of such a claim could entail. It is envisaged that there may be both documents and oral evidence in respect of which one or more of the Government Parties may wish to assert public interest immunity or other form of privilege, but which documents and or oral information they may be willing to share with the

Commissioner privately, for his information, and to dispel the suspicion that PII has been raised as a pretext for the concealment of relevant information for the purposes of shielding any Government Party from adverse findings.

7.2 Para 12e refers to "a bar to disclosure" and para 13 to a legal rule "prohibiting" disclosure. Neither legal privilege nor the public interest immunity form of privilege are strictly bars to or prohibitions against disclosure, as such.

7.3 For the same reason, whether in this Document Policy or elsewhere, the Inquiry may wish to have a policy that facilitates the raising in advance of known or anticipated issues and questions which, if put to a Government Party or other Government witness orally, will attract a claim of privilege (including public interest immunity). Such a policy would avoid the need for delay on each occasion that this circumstance arises once the oral hearings get under way.

8. Jason Beer QC deals with Disclosure of documents, evidence and Privileged information at paras 5.57 – 5.121, and specifically with public interest immunity at paras 6.69 -5.83.

B. DRAFT POLICY: PROTOCOL FOR VULNERABLE WITNESSES AND RESTRICTIONS ON PUBLIC ACCESS

9. It is submitted that, while it is appropriate that there should be a policy for the application of protective measures for genuinely vulnerable witnesses, the threshold for categorization of a witness as vulnerable appears to have been struck below the established common law grounds for doing so, for the following reasons:

(i) As drafted, it suffices that, regardless of whether the witness has any personal characteristics (as defined), the witness himself/herself perceives a significant risk that by reason of threat, fear or intimidation he/she will experience "added stress" or "other difficulty" in being a witness or potential witness. This is an entirely subjective and unverifiable criteria, which may be true of witnesses generally. This untestable subjectivity is further carried forward into the second (separate) limb of the test at para 5e. i.e, that the witness has substantial fear or distress related to testifying about matters relevant to the Inquiry.

(ii) This appears to be much wider than the common law principle, which requires that, even though the fears need not be well-founded, they have to be based on reasonable grounds (see e.g. Jason Beer QC art para 6.92 (2), and the fear have to be genuinely and reasonably held (see Beer at para 6.104(4) and *Re Officer L* cited there). These factors, which introduce an element of verifiable objectivity, are absent from the current formulation.

10. It is submitted that there should be a statement that those who are or have recently been career police office, thereby experienced in giving evidence in criminal courts, and others who cannot show that their fears are genuinely held on reasonable grounds are unlikely to be able to benefit from this policy. It would wrong that the policy should be available simply on the basis of speculative fear or assumption that any Core Participant or other public officer would engage in intimidation, threats or retaliation. There is no need to apply a criteria different to that which is habitual in criminal and civil courts in this jurisdiction.

11. It is further respectfully submitted that the Policy should include a statement to the effect that a consideration of any application, and appropriate measures, should, in addition to factors affecting the witness, also have due regard to the potential for injustice to persons against whom serious allegation have been made (especially if those allegations are sustained by the evidence of the witness claiming special protective measures) and those measures impair the ability of such person to defend himself and/or effectively test that witness's evidence in cross-examination.

12. Finally, at para 6.104(5) Beer says that one of the factors that may be taken into consideration is the erosion of public confidence in the public inquiry which might ensue as a consequence of permitting a witness (or a category of witnesses) to remain anonymous.

C. DRAFT POLICY: CORE PARTICIPANTS

13. As the Commissioner has ruled (see Ruling following the First Preliminary Hearing) that he may not publish his report, given that he must report to the Government in accordance with the Act and the Commission, it is submitted that the fifth bullet of para 3 should be deleted, since the Commissioner cannot comply with it.

14. In the third bullet of para 4, it is not clear what is meant by "watch or attend". Since the Commissioner has ruled that he will not allow live-streaming, and that remote attendance has to be by application on an individual case by case basis, it is axiomatic that watching can, generally,

only be by attending. It is submitted that “watch or” should be deleted or replaced by “attend and watch”.

15. Para 9 (like para 2) should make clear that it applies to “an organization or other entity” as well as to a person. The Commissioner may wish to consider adding after the words “a person, an organization or other entity” in para 2, the words “(**hereinafter “a person**”)”, as a means of avoiding the need to mention all three on each occasion.

16. It is not clear whether the intended effect of para 17 is limited to the fact that appointment by a future applicant as a Core Participant does not automatically mean that the Commissioner will fund that party’s lawyer as a recognized legal representative under the funding protocol, or whether the effect is intended to be wider, namely that the Commissioner is reserving the right to not recognise that Core Participant’s appointed legal representative to participate on his/it’s behalf at the oral hearings. In our respectful submission it should be the former, since parties should be at liberty to be represented by whatever enrolled lawyer they choose to appoint at their own expense.

D. DRAFT POLICY: APPROPRIATE POLICY DOCUMENT

17. The Government Parties have no submissions in respect of this policy document.

E. DRAFT POLICY: PRIVACY NOTICE

18. The Government Parties have no submissions in respect of this policy document.

F. DRAFT LIST OF ISSUES

19. The starting point of the Government Parties’ submissions in relation to the List of Issues is that the Commissioner is, as a matter of law, at liberty to determine what issues are relevant to his terms of reference, and may follow leads as he seeks to establish a relevant connection between certain facts and the subject matter of the Inquiry. He may investigate any matter to the extent that he thinks that it is or may be relevant to the matter under inquiry. (See Jason Beer QC at paras 5.05 to 5.07 and the cases cited therein).

20. Nothing in these submissions is intended to or should be interpreted to derogate from that position. HMGOG has convened this Inquiry in order that the facts that caused and led to Mr

McGrail's early retirement should be independently established, and it is up to the Commissioner to decide what is relevant to that and thus what he investigates. Save one point in relation to point 5.3, each of the issues identified at paragraph 1-9 of the draft List of Issues would appear to be "relevant" in that sense and within the scope of the Commissioner's proper discretion.

21. Nevertheless, the Government Parties appreciate the opportunity to make a number of points about the language in which some of the identified issues are expressed, for the Commissioner's consideration, as follows:

    (i) It is submitted that, while each of the identified issues have a clear relevance to the matter under inquiry, the Inquiry is not an inquiry <u>about</u> or <u>into</u> any of those issues, and their relevance is limited to the extent (to be assessed by the Commissioner) to which they are in turn relevant to the issue under inquiry namely, the reasons and circumstances leading to Mr McGrail ceasing to be Commissioner of Police.

    (ii) It may therefore be helpful and appropriate to signpost the legal position by adding at the end of para 1, after the words "…shall be investigated", the words "in so far as the Commissioner may consider them to be relevant to the aforesaid matter under inquiry".

    (iii) <u>In relation to para 5</u>:

        (a) In the above vein, is the issue "the RGP's handling of" the investigation? It is suggested for the Commissioner's consideration that the preambular paragraph in para 5 might more appropriately read as follows:

            "In relation to the investigation by the RGP into the alleged hacking and/or sabotage of the National Security Centralised Intelligence System and alleged conspiracy to defraud ("**the Criminal Investigation**"), including but not limited to the RGP's execution of search warrants as part of that investigation on 12 May 2020 ("the Search Warrants"):

            5.1 ……..

            5.2………

            5.3………."

(b) The Inquiry has specifically invited submissions on the inclusion of the words "undue, improper or otherwise", in light of its primary role as a fact-finding body. Section 3(2) of the Commissions of Inquiry Act provides that every commission shall specify, inter alia, the nature and extent of the inquiry. The Commission for this Inquiry specifies that "the Commissioner is to ascertain the facts and report to the Government" i.e. the facts of the matter under inquiry, namely, the reasons and circumstances leading to Mr McGrail ceasing to be Commissioner. Accordingly, it is submitted that

i. while the Commissioner may make recommendations arising from the facts as he finds them, the identification of wrongdoing, blameworthy conduct or culpability by individuals and organisations requires a legal adjudication which goes beyond ascertaining the facts; and

ii. while it is certainly the position of the AG and the CM that they did not exert pressure, "undue, improper or otherwise" on Mr McGrail, nevertheless, the captioned words should not form part of the articulation of the issue to the extent that their inclusion is intended to extend the scope of the inquiry to permit the making of findings of wrongdoing, blameworthy conduct or culpability by the Attorney General or the Chief Minister.

(c) That said, the statement (without those words) would be "Did the AG and/or the CM exert pressure on Mr McGrail regarding the investigation or otherwise interfere with the investigation". While any form of that on the part of the CM (which is denied) may be thought to be inappropriate, the same is not necessarily true of the AG, given the roles and functions of his Office. Also, the allegations levelled against them by Mr McGrail are more specific (see e.g. para 10 of his Written Submissions dated 20 June 2022).

(d) These issues may therefore be resolved by recasting para 5.3 as follows:

" Did the AG and/or CM place inappropriate or any pressure on Mr McGrail to change the RGP's approach to the Criminal Investigation."

(iv) <u>In relation to para 9</u>:

(a) The language of this issue is not clear. What is meant by the date on which NP received notification of such commencement? Commencement occurred, as a matter of

constitutional law, on the date on, and time at, which Sir David arrived in Gibraltar and was sworn in by the Chief Justice. Are they intended to mean: when did NP discover the date on which it was intended that Sir David would arrive in Gibraltar?

(b) For clarity and neutrality of expression it is submitted that the issue should be identified as follows:

"Sir David Steel's commencement as the new Governor, and particularly the date on which the then Interim Governor, Mr Nicholas Pyle, learned of the date on which that was expected to occur."

Sir Peter Caruana KCMG QC

Chris Allan