INQUIRY INTO THE RETIREMENT OF THE
FORMER COMMISSIONER OF POLICE

SUBMISSIONS IN ADVANCE OF THE SECOND PRELIMINARY HEARING ON BEHALF OF FORMER COMMISSIONER MR IAN McGRAIL

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9th September 2022

A. INTRODUCTION

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

2. These submissions address the following issues, as set out in the Agenda for the Second Preliminary Hearing which was circulated on 7th September 2022:

    B. Short statement of factual position (§§3-25);

    C. Refinement of the provisional list of issues (§§26-37);

    D. Finalisation of policy documents (§§38-53);

    E. Progress towards final hearing (§§54)

    F. Funding difficulties (§§55-58).

B. SHORT STATEMENT OF THE FACTUAL POSITION

3. Direction 8 of the Commissioner's Directions dated 25th August 2022 which invites the Core Participants to submit "*suitable short draft statements, which the Commissioner will consider and adjudicate upon (providing reasons if required)"* is noted. This direction should be read alongside paragraphs 26 and 27 of the Commissioner's Amended ruling on Open Justice and Recommendations dated 25th August 2022 ("**25th August Ruling**") which states:

> 26. There are, in my judgment, other compelling reasons to permit Ms Gallagher QC at least briefly to set out the factual background of Mr McGrail's position. This is a public inquiry and the principles of open justice give the public a right to know what is being alleged, and indeed what answer the Government makes to the allegations made against it. If all this is left unsaid and unpublished until March 2023, there will be speculation as to the matters being complained about and – worse than that – suspicions of a cover up, something that the Government itself will surely be anxious to avoid.
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> 27. Moreover, it is only if there is some publicity of the matters being alleged that others, including potential witnesses, will be able to recognise that they might know of something that may be relevant to the issues that I must decide.

4. Whilst it is reasonable for the Commissioner to ensure that the Second Preliminary Hearing is focussed and efficient, the submissions we made at paragraph 12 (in particular) of our Submissions in Reply dated 19th July 2022 are reiterated: in summary, the Preliminary List of Issues ("**PLI**") is an item on the agenda and it is necessary to address the facts briefly, including matters of potential controversy, in order to make submissions on the PLI. It is highly unusual for an Inquiry chair to require that oral submissions are subject to pre-approval and potentially to prior restraint.

5. Whilst we understand how the position has been reached, particularly due to the objections of the Government Parties, this prior restraint approach risks undermining open justice, a principle which the Commissioner has directed (rightly, in our respectful submission) applies to this Inquiry. It is important that the core allegations are placed in the public domain at this stage both for reasons of transparency and to ensure that those who have relevant information know enough about the background facts to come forward and provide evidence.

6. Further, this approach creates potential difficulties in terms of addressing issues arising at the hearing, constraining advocates from making oral submissions in response to questions, or in rebuttal to points arising during argument, if they concern factual matters. This is cumbersome and problematic.

7. It is accordingly submitted that the Commissioner should not take too restrictive an approach to the submissions set out below, which are in any event short and focussed.

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[redacted]

[redacted]

C. REFINEMENT OF THE PROVISIONAL LIST OF ISSUES

26. We are grateful to the Commissioner for indicating in the letter from Attias & Levy dated 2nd September ("**2nd September letter**") that he intends to:
    (a) clarify that the listed issues will be investigated "*to the extent that he considers necessary and appropriate to address the matter under inquiry*",
    (b) include as an issue whether the Attorney General and/or Chief Minister place "*any or any inappropriate pressure on Mr McGrail regarding the Criminal Investigation or otherwise interfere with the investigation"*, and
    (c) include specific issues relating to the GPA's section 34 process and Mr Pyle's stated intention to invoke section 13 of the Police Act.

27. In relation to (a) above, this additional wording addresses our concern that a number of issues (for example the Airport Incident, Assault Investigation, the Federation Complaints and the Alcaidesa Claims respectively) are at most peripheral to the core issues in the Inquiry. However, we ask that the Inquiry remains vigilant to any attempts to muddy the waters by introducing peripheral issues relating to events which in a number of instances pre-dated Mr McGrail's tenure as Commissioner of the RGP and were not cited by the GPA or indeed the Chief Minister or Mr Pyle in contemporaneous correspondence as part of their decision-making, and particularly were not mentioned to the GPA.

28. In relation to (b), we agree with the wording "*any inappropriate pressure*" which in fact reflects wording we proposed in relation to the exercise of the section 13 and section 34 powers.

29. In relation to (c), we are grateful that the Inquiry has accepted our submissions on these points. Contrary to the Commissioner's indication, we do not consider that deciding whether the attempted exercise of the section 13 and section 34 powers was "*appropriate*" would necessitate reaching a legal conclusion, and in any event there is nothing precluding the Inquiry from reaching judgmental conclusions relating to the exercise of statutory functions.

30. However, we are reassured by the Commissioner's indication that in relation to this issue he may "*draw conclusions as he may deem appropriate, and also to make recommendations as to future conduct if necessary*". We submit that such conclusions and recommendations will necessarily have to consider the interaction between sections 13 and 34 of the Police Act and whether their attempted exercise was appropriate, in the circumstances. If those issues are not considered, there would be an insufficiency of investigation as the ambit and exercise of the Police Act powers were central to events.

The relevance of Op Delhi

31. We remain concerned about the way in which Issue 5 has been expressed. The wording, taking into account the Commissioner's indications in the 2nd September letter, will be as follows:

> 5. The RGP's handling of an investigation into the alleged hacking and/or sabotage of the National Security Centralised Intelligence System and alleged conspiracy to defraud ("the Conspiracy 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"). In particular:
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> 5.1. Did Mr McGrail seek or receive advice from the Director of Public Prosecutions ("DPP") or the AG as to the execution of the Search Warrants, and did Mr McGrail accurately communicate any advice from the DPP or the AG on the Search Warrants (or lack thereof) to the CM and/or AG?
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> 5.2. Was the RGP's execution of the search warrants on 12 May 2020 contrary to an agreement or understanding with the AG and/or the DPP?

5.3. Did the AG and/or CM exert any or any inappropriate pressure on Mr McGrail regarding the investigation or otherwise interfere with the investigation, and in particular the decision to execute the Search Warrants?

32. We proposed in our submissions of 23rd August 2022 that the following text is added to the end of paragraph 5.3: "*If so, what were the AG's and/or the CM's motivations for doing so*". We are grateful for the Commissioner's indication in the 2nd September letter that the "*AG's and/or CM's motivations for doing so would form part of the "relevant facts" (given that the state of a person's mind is a matter of fact), which the Commissioner has already committed to ascertaining through the introductory wording to the list of issues*".

33. However, as currently drafted Issue 5 is framed to focus on the RGP investigation rather than the underlying facts relating to it: the opening words of Issue 5 are "*The RGP's handling of an investigation…*" [redacted]

[redacted]

[redacted]

[redacted]

36. We appreciate the Commissioner's indication that the Chief Minister's motivation will be investigated in any event, however at present Issue 5 is framed according to the Government Parties' account, which is that the RGP's handling of the investigation was the fundamental issue. The Inquiry may ultimately agree or disagree with this in the final report, however it is important at this stage that Mr McGrail's central allegation, that the Chief Minister's personal interest [redacted] caused everything that followed, is reflected in the PLI. Moreover, in deciding whether the interference was "*appropriate*", the Inquiry will need to consider the Chief Minister's personal interest in the outcome of the investigation – we urge the Commissioner to make this explicit rather than implicit, not least so that the RGP can proffer relevant evidence and the Chief Minister and any other interested parties have the opportunity to respond.

37. Accordingly, we submit that the proposed wording relating to the Chief Minister and Attorney General's motivations should be included. Further/alternatively, the first part of Issue 5 should be amended as follows:

> **5. The Chief Minister's involvement (if any) in, and the RGP's handling of an investigation into, the alleged hacking and/or sabotage of the National Security Centralised Intelligence System and alleged conspiracy to defraud ("the Conspiracy 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").**

D. FINALISATION OF POLICY DOCUMENTS

(i) Section 10 of the Commissions of Inquiries Act 1888

38. In relation to the query raised regarding to section 10 of the Commissions of Inquiries Act 1888 (relevantly: "*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 to answer such a question will tend to incriminate such a person"), we submit as follows:

39. The wording of section 10 is very wide and on its plain meaning gives a power to the Commissioner (but not other parties), when read alongside section 12, to require answers to questions which would otherwise be covered by some kind of privilege, for example legal advice and litigation privilege. It does not (in answer to the Commissioner's Question (a)) exclude only the privilege against self-incrimination as that is addressed separately in section 10. If Section 10 it was aimed only at the privilege against self-incrimination, the words "*on the ground of any privilege*" would be redundant.

40. There are a number of examples of similar language in older statutes, generally those promulgated in the 19th Century. The language of section 10 appears to have been relatively common in statutes relating to commissions of inquiry or other kinds of inquiry such as relating to elections. For example:

    a. Bank of Bombay Failure Commissioners Act 1868: see section 8 "*no Person shall be excused from answering any Question put to him by such Commissioner or Commissioners on the Ground of any Privilege"*; the Act set up a Commission into the failure of the Bank of Bombay;

    b. The Special Commission Act 1888: section 9 relevantly provides: "*A witness examined under this Act shall not be excused from answering any question put to him on the ground of any privilege or on the ground that the answer thereto may criminate or tend to criminate himself"*. It is possible that this Act was a model for the Commissions of Inquiries Act 1888 given the year it was promulgated. The purpose of the Special Commission Act was to set up a special commission to inquire into particularly allegations which had been made against Members of Parliament (see pre-amble).

    c. Election Commissioners Act 1852: see section IX: "*no Person shall be excused from answering any Question put to him by such Commissioners on the Ground of any Privilege"*,

    d. See also the St. Alban's Bribery Commission Act 1941 (section XXXIX) and the Common Law Procedure Amendment Act (Ireland) 1853.

41. By contrast, in more modern legislation, legal professional and other privileges have been explicitly protected in inquiries, for example section 22 of the Inquiries Act 2005 and section 12(3) of the Trinidad and Tobago Commissions of Enquiry Act. It would appear, therefore, that section 10 is a feature of older (it may also be said outdated – see below) legislation which in Gibraltar has not been updated but should have been.

42. *Beer* at paragraph 5.59 lists six bases for claiming privilege which section 22 of the Inquiries Act protects: (1) duty of confidence, (2) legal professional privilege, (3) public interest immunity, (4) self-incrimination, (5) incrimination of a spouse or partner, (6) Parliamentary privilege.

43. Section 10, in conjunction with section 12 ("*Penalty for non-attendance or refusing to give evidence*") imposes an obligation on witnesses to answer all questions notwithstanding "*any privilege*". It also appears to impose a duty on the Commissioner not to excuse any person from answering any question on the basis of an asserted privilege. In other words, it appears that section 10 means that it would be unlawful for the Commissioner to excuse a witness answering a question because of any privilege, whether asserted or not.

44. Section 10 must now be read in conjunction with the Gibraltar Constitutional Order, section 7 of which secures the protection for privacy of home and other property. Section 7 is roughly analogous to Article 8 of the European Convention on Human Rights ("**ECHR**"), the protection of the right to respect for private and family life, and includes "*the right to respect for [a person's] private and family life, his home and his correspondence*" (emphasis added). Like Article 8, Section 7 is a qualified right which can be interfered with under the authority of law which makes provision, for example, for public morality or protecting the rights or freedoms of other persons, or the prevention of disorder or crime.

45. Although the provisions protecting rights in the Gibraltar Constitutional Order are different in some respects from the equivalent articles of the ECHR, the Privy Council has held that they are intended to provide at least a similar level of protection as is provided under the ECHR, and therefore provisions of the Gibraltarian Constitution which are equivalent to provisions of the ECHR should, if possible, be interpreted as

giving no less protection than their equivalents in the ECHR: see *Nadine Rodriguez v (1) Minister of Housing of the Government (2) The Housing Allocation Committee* [2009] UKPC 52, at §11 *per* Lady Hale, recently approved by the Privy Council in *Attorney General for Bermuda v Roderick Ferguson and others (Bermuda)* [2022] UKPC 5, *per* Lord Hodge and Lady Arden at §17 (with whom the other three Privy Councillors agreed).

46. Article 8 ECHR has been found by the European Court of Human Rights to afford "*strengthened protection to exchanges between lawyers and their clients*". This is "*justified by the fact that lawyers are assigned a fundamental role in a democratic society, that is of defending litigants",* a task which they would not be able to carry out "*if they are unable to guarantee to those they are defending that their exchanges will remain confidential*": see *Michaud v. France*, judgment of 6 December 2012, paragraphs 118-119.

47. In answer to question (b) in the 2nd September letter, we doubt that section 10 extends to the production of documents as well as answering questions. The language of section 10 is highly specific ("*no person shall be excused from <u>answering any question</u>*" (emphasis added)) and given the potential implications for the right to the protection of correspondence, the provision should be construed narrowly. Since section 10 does not in our submission extend to documents as well as questions, there is also no reason for the Commissioner to diverge from the approach set out in the Documents Policy towards assertion of privilege in relation to documents.

48. It is possible that Section 10 does not comply with Section 7 of the Gibraltar Constitutional Order, when read together with Article 8 ECHR and the case law of the ECHR. It is concerning that section 10 appears to give the Commissioner no discretion to excuse a witness from answering a question if they assert privilege. It appears (from the headnote to the Commissions of Inquiry Act 1888) that Section 10 is in its original unamended form so appears not to have been drafted with either the Constitutional Order or ECHR in mind (albeit, it has also never been amended despite other amendments being made in 1933, 1966, 1983 and 2007, which may suggest it has been intentionally not amended by the Gibraltar Parliament, however this proposition requires further research).

49. It is also possible that section 10 does not comply with modern common law principles which make clear the importance of legal privilege: see paragraph 5.57 onwards in *Beer,* and particularly: "*The power to require the provision of evidence and the production of documents or other things is plainly a necessary feature of most public inquiries. But it ought not to permit an inquiry to trample over the rights of witnesses and third parties. Exemptions from obligations of disclosure have existed at common law and pursuant to statute for decades in relation to court proceedings. They exist to protect the rights of individuals and broader public interests such as national security."*

50. The contrary argument would be that the intention behind the 1888 Act is to ensure that witnesses to inquiries give full and unconstrained evidence, unprotected by privileges but protected, also by section 10, from being liable to any civil proceedings or criminal prosecution from disclosures made during the inquiry. The case law relating to Article 8 tends to relate to civil and criminal proceedings, not inquiries which (a) do not determine civil rights or obligations and (b) have a unique purpose of getting to the truth of a matter of public controversy, which may necessitate, in principle, that privileges usually afforded in the civil and criminal courts are unavailable for witnesses giving evidence. As is stated in *Beer* at paragraph 5.57, "*These exemptions from disclosure may hamper the inquiry in its function of establishing the facts on the basis of all relevant information, undermine the credibility of the inquiry in the event that significant information is not taken into account by the inquiry, and delay progress of the inquiry".* Therefore, it is also possible that the limited interference with section 7 of the Constitutional Order / Article 8 rights (as it only relates to questions asked by the Commissioner, not documents or questions asked by any others) is proportionate/in accordance with the common law.

51. It is unfortunate that section 10 of the Commissions of Inquiries Act is drafted such that it may be incompatible with section 7 of the Gibraltar Constitutional Order read together with Article 8 ECHR and/or be contrary to modern common law principle. Nonetheless, a practical solution may be available, for example the Commissioner avoiding asking questions which are likely to breach privilege unless he felt it was necessary to do so in order to fulfil his statutory obligations, and seeking (as is already the case) prior notice of documents and issues which are likely to arise in evidence which may trigger the

assertion of such privileges. This would it is submitted be a proportionate approach and is unlikely to unduly impact on the inquiry.

52. Moreover, it is open to the Commissioner to interpret section 10 so as to only relate to questions asked directly by him, and not by his counsel. Although it is possible "*by the commissioners*" in section 10 could be construed to include questions put on the Commissioner's behalf by his counsel, for the reasons already stated section 10 should be construed as narrowly as possible, in which case it would be lawful for a witness to refuse to answer questions from the Commissioner's counsel on the basis of an asserted privilege, but not by the Commissioner himself. The Commissioner may also wish to indicate that if any privilege is validly asserted (in his determination) he would not certify an offence under section 12 meaning section 10 would become essentially irrelevant.

(ii) Draft policies

53. We have no further submissions in relation to the draft policies or the proposals made in the 2nd September letter.

E. PROGRESS TOWARDS THE FINAL HEARING

54. In order for Mr McGrail to reply to the affidavits of the Government Parties it will be necessary for him to have access to documentation which we assume will be or has already been disclosed by the RGP, for example his relevant professional letters, emails and files relating to all of the issues raised by the Government Parties. We respectfully request that the Inquiry set out a timetable for further relevant disclosure to be made and the affidavit filed.

F. FUNDING DIFFICULTIES

55. Regrettably, as at the date of these submissions, Mr McGrail's legal representatives have not yet been paid for any of the work they have done relating to the Inquiry since February 2022. In addition, Mr McGrail's representatives continue to have considerable outlay, at personal risk, for expenses, and are undertaking significant work, often with tight deadlines, despite the continuing uncertainty and delay regarding payment. We

appreciate that there have been delays in setting up internal Inquiry procedures, however we are deeply concerned that the Gibraltar Government will be spending (as has been estimated by the Inquiry team) four to six weeks analysing the bills of Mr McGrail's legal team and deciding whether to approve payment. We do not understand any of the other core participants to be subject to such scrutiny. The delays – now stretching back seven months – are causing significant and unnecessary hardship to Mr McGrail's legal team.

56. The government scrutiny is unnecessary, because all bills will already have been approved by the Inquiry twice – at the cost budgeting stage per the Inquiry's procedures and at the stage when final bills are submitted and approved. The government scrutiny is also inappropriate in the context of this Inquiry, where senior Gibraltar Government officials are Core Participants.

57. Put simply, it is inappropriate for a core participant to an inquiry (in this case the Gibraltar Government) to act as gatekeeper to the legal funding of another core participant, especially when that other core participant (in this case, Mr McGrail) is making serious allegations of misconduct against the former. We do not consider such an approach to be rational, reasonable or fair.

58. In the circumstances, we request that the Inquiry seek urgent clarification from the Government (a) as to why Mr McGrail's legal team's bills have not been approved and (b) that in future the rigorous process which the Inquiry is undertaking to approve budgets and final bills will be taken as sufficient to satisfy any legal duties which the Government may have to scrutinise expenditure.

G. CONCLUSION

59. We hope that these submissions are of assistance.

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9th September 2022