

**INQUIRY INTO THE RETIREMENT OF THE
FORMER COMMISSIONER OF POLICE**

**FURTHER SUBMISSIONS ON BEHALF OF IAN MCGRAIL
Reply to Government Participants' submissions dated 8th July 2022**

Caoilfhionn Gallagher QC
Adam Wagner
Doughty Street Chambers, London

Charles Gomez
Nicholas Gomez
Charles A. Gomez & Co., Gibraltar

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A. INTRODUCTION

1. These further submissions are made on behalf of Mr Ian McGrail, the former Commissioner of the Royal Gibraltar Police, pursuant to the Directions Timetable made following the Preliminary Hearing held on 22nd June 2022 and upon receipt of the Provisional List of Issues and various draft policies. Mr McGrail is grateful to the Inquiry for allowing him a short extension of time to provide these submissions.
2. These submissions address the following issues:
 - (i) The Provisional List of Issues (“**PLI**”) (§§3-30);
 - (ii) The draft policies (§§31-42).

B. THE PROVISIONAL LIST OF ISSUES

3. The Commissioner is required by the Issue of Commission LN. 2022/034 to “*inquire, as he shall in his absolute discretion consider appropriate, into the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking early retirement*”. These are broad terms of reference and reflect the statement by the Chief Minister on 31st July 2020 in the Gibraltar Parliament that the inquiry “*will be as broad and as wide as possible*” (Public Bundle for First Preliminary Hearing, page 174).
4. The preliminary list of issues is an important document and serves a number of purposes: see *Beer* at §§5.21-5.22:

It must be recalled that there is no indictment for an inquiry and no statements of case (or other pleadings) – the focus that such documents give to criminal and civil proceedings is therefore lacking; a list of issues acts as a surrogate for these documents. Instead, the inquiry will often have as its mandate terms of reference that will often be a single sentence or a paragraph long. A list of issues is, accordingly, a very important document. Such a list will assist the inquiry itself to focus its investigations; to ensure that relevant information, documents, and evidence are obtained; to select witnesses who should be called to give oral evidence to the inquiry; to structure or modularize the inquiry's hearings; to give focus to opening and closing speeches by counsel to the inquiry; to

form the basis for rulings by the chairman as to whether a line of inquiry (or a line of questioning in cross-examination) should be pursued; and perhaps even to assist in the structuring of the inquiry's report. A list of issues is of assistance to persons interested in the inquiry (whether core participants or otherwise), as in addition to some of the features previously mentioned, it is a public declaration of how - in practical terms - the inquiry interprets its terms of reference and what issues it intends to examine in order to discharge those terms of reference. Such persons can therefore see precisely what the inquiry regards as a particular topic or issue and can make representations as to whether an issue should be included or excluded from the list.

5. Mr McGrail is grateful to the Inquiry for the opportunity to comment on the PLI and also for the Inquiry's indication that this is very much a preliminary document which will be likely to be finalised at a third Preliminary Hearing in November/ December 2022 (or possibly January/February 2023). Mr McGrail makes four points in relation to the PLI.

6. **First**, as currently drafted the PLI may result in the Inquiry losing focus, and tends to skew the Inquiry away from the core issues. Whilst the issues identified in the PLI broadly reflect the reasons now given by the Chief Minister and Mr Pyle for "*losing confidence*" in Mr McGrail, they are not strictly issues in the inquiry. This is because the qualifier at the outset of the PLI is too widely expressed. It currently states:

In relation to each of the issues listed in paragraphs 1-9 below:

- A. What were the relevant facts?
- B. To what extent, if at all, did the issue constitute a reason or circumstance leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking an early retirement (either because they led to a loss of confidence in Mr McGrail or for some other reason)?

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The only reason that the Inquiry should consider these issues at all is to ascertain the extent to which they were in fact relevant to the decision-making of ~~the~~ Mr Pyle and Chief Minister.

8. The Inquiry was not established, and is not required, to investigate the detailed factual background to the issues currently identified, for example the Airport Incident (Issue 1), or the Assault Investigation (Issue 2). [REDACTED]

[REDACTED] The current wording of the PLI – which requires the Inquiry to ascertain the “*relevant facts*” – risks the Inquiry unnecessarily descending into the detail of each specific incident, in a ‘silo’ way, despite a number of these incidents appearing to be irrelevant or highly tangential to the Issue of Commission and in any event unparticularised to the extent that whatever criticism, if any, is being levelled at Mr McGrail as opposed to the RGP under previous leadership is not possible to decipher.

Issues 1, 2, 6 and 7

9. Mr McGrail respectfully doubts the relevance of Issues 1, 2, 6 and 7 (the Airport Incident, Assault Investigation, the Federation Complaints and the Alcaidesa Claims respectively).

[REDACTED]

10. The fact that Issues 1, 2, 6 and 7 were not referred to the GPA demonstrates that they were not considered issues which bore on the Chief Minister and Mr Pyle’s “*loss of confidence*” at the relevant time, and appear to have been included as “issues” by the Chief Minister and Mr Pyle *ex-post facto*, [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED] These issues are also not referred to in the 22nd May 2020 letter from Mr Britto to Mr McGrail setting out the purported reasons why the Chief Minister and Mr Pyle had “lost confidence” in Mr McGrail, and which was substantially drafted/edited by the Chief Minister [REDACTED]

- [REDACTED]
[REDACTED]
11. Both Mr Pyle and the Chief Minister again had the opportunity to properly articulate the nature of their concerns when they wrote to the Chairman of the Gibraltar Police Authority on the 3rd and 5th June 2020. Neither of them raised the “*Airport Incident*”, the “*Assault Investigation*” or the “*Alcaidesa Claims*” and to the extent that Mr Pyle vaguely alluded to “*numerous allegations of bullying and mismanagement that I had picked up on*”, he did not say that he had reached any findings / conclusions on those allegations.
 12. Mr McGrail accepts that there is brief mention of these issues in the contemporaneous record, however given that they were (i) not referred by the Chief Minister and Mr Pyle to the GPA, (ii) in the letter of 22nd May 2020 to Mr McGrail from the GPA which the Chief Minister substantially drafted/edited, (iii) in correspondence between the Chief Minister, Mr Pyle and the GPA (save, briefly, for the bullying allegations), it appears that they were at most tangential to the issues which led to Mr McGrail ceasing to be the Commissioner of Police in June 2020. The high point of their relevance is that they were briefly mentioned [REDACTED] between the Chief Minister and Mr Pyle but not considered by either to be reasons for their “*loss of confidence*” which should be referred to the GPA. It is unclear why these issues have been given major prominence in the PLI and whether it is proportionate for the Inquiry to call any evidence relating to them given that in addition to unnecessarily burdening the Inquiry process there is a risk of the waters being muddied.
 13. It would be disproportionate at present to invite evidence to develop an objective account of Issues 1, 2, 6 and 7. The risk of the Inquiry becoming an *ex post facto* investigation into the RGP generally, including a number of events such as the Airport Incident and Assault Investigation, which occurred before Mr. McGrail was the Commissioner of

Police, is concerning. He is of course willing and able to defend his professional record, however this Inquiry was not set up for this purpose and must avoid placing a disproportionate focus on issues which are at most tangential to the decision-making of the Chief Minister, Mr Pyle and the GPA.

14. It is important that the Inquiry carefully controls the extent to which each of the issues cited is investigated, otherwise it risks becoming distracted by fact-finding on issues which had no real relevance to Mr Pyle's and Chief Minister's decision-making at the time. It is respectfully submitted that it would be a disproportionate use of the Inquiry's time and public resources to investigate Issues 1, 2, 6 and 7 in detail, particularly ascertaining the "*relevant facts*", as these are all complex issues and could each themselves be the subject of an independent inquiry into the conduct of others in the RGP, and as stated above have no real relevance to the decision-making – a conclusion that can be reached even at this preliminary stage in light of the contemporaneous evidence.
15. If the PLI is published in its current form, and the Inquiry publishes a call to evidence relating to all of the issues, it risks becoming overwhelmed by evidence on complex issues such as bullying in the RGP or complex criminal investigations which occurred prior to Mr McGrail's tenure as Commissioner of Police.
16. Mr McGrail does not want to be seen by the Inquiry or any of the other Core Participants or the public at large to want to avoid any matters (regardless of direct relevance) and for this reason respectfully suggests that issues 1, 2 6 and 7 should remain separately listed in the PLI and that they should be referred to in a proportionate way, for example by making clear that they do not require at this stage separate detailed factual consideration. Mr McGrail has accordingly proposed the following alternative wording for the Issues List which would prevent consideration of Issues 1, 2, 6 and 7 becoming an unnecessary distraction from the Inquiry's work:

7. The Inquiry will also consider whether the following issues influenced the relevant decision-making of the Chief Minister and Mr Pyle, but does not at present seek detailed factual evidence in relation to them:

Exclusion of matters which were not known to the Chief Minister and/or Mr Pyle at the relevant time

17. Mr McGrail is concerned that as currently drafted, the PLI would lead to the Inquiry investigating matters which were not known to the Chief Minister or Mr Pyle at the relevant time, and therefore could not conceivably have any relevance to the reasons and circumstances leading to him ceasing to be the Commissioner of Police.
18. For example, in relation to Issue 3, the Incident at Sea: This occurred on 8th March 2020. At the time of the relevant decision-making, i.e. from 14th May 2020 to 9th June 2020, the independent report into the incident by the Metropolitan Police which had been commissioned by Mr McGrail had not been completed and was not available in interim form to Mr Pyle or Chief Minister.¹ There is no reason for the Inquiry to consider any information which was not available to the relevant individuals between 14th May and 9th June 2020, however as currently drafted the PLI would arguably require this as the Inquiry will need to treat these unknowns as “*relevant facts*”.
19. It is therefore submitted that following text should be included in the PLI to make clear the relevance of the identified incidents (the full proposed amended text is set out in the Annex to these submissions):
 1. **For what reason or reasons, if any, did the Chief Minister and/or Attorney General decide that Mr McGrail should not remain in post on or around 14th May 2020?**
 2. **In answering Question 1, each of the issues below should be considered. In relation to each issue:**
 - 2.1. **What were the relevant facts as known to Mr Pyle and the Chief Minister from 14th May 2020 and 9th June 2020?**

¹ See Exhibit FP1 to the Chief Minister’s statement, page 142, the 17th May 2020 18:47 email from the Mr Pyle to the Chief Minister in which he states “[the Metropolitan Police] report, for various reasons, has unfortunately not been finalised. They will also not be issuing an interim report”.

2.2. To what extent, if at all, did the issue constitute a reason or circumstance leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking an early retirement (either because they led to a loss of confidence in Mr McGrail or for some other reason)?

20. **Second**, the list of issues currently leaves out of account the process undertaken by the Gibraltar Police Authority under section 34 of the Police Act, and the threat by Mr Pyle to trigger his purported powers under section 13 of the Police Act. These are both important issues but the PLI as currently drafted would not require consideration of them. Mr McGrail respectfully proposes the following text is added:

12. In relation to the Gibraltar Police Authority’s (GPA) decision pursuant to section 34 of the Police Act, communicated on 22nd May 2020, inviting Mr McGrail to retire, and the subsequent withdrawal of that decision:

12.1 What are the relevant facts?

12.2 Was the section 34 process exercised appropriately by the GPA?

12.3 Were the Chief Minister’s actions in relation to the section 34 process appropriate?

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?

13. In relation to Mr Nick Pyle’s statement, made to Mr McGrail on 6th 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:

13.1 Were Mr Pyle’s actions appropriate?

13.2 Did Mr Pyle have authority to exercise the power granted by 13 of the Police Act at the relevant time?

13.3 To what extent, if at all, did Mr Pyle’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. This will include consideration of Sir David Steel’s imminent commencement as Governor, and particularly the date on which NP received notification of such commencement (“the Governor’s Commencement”).

14. **Third**, in relation to Op Delhi, an important factor which is not currently referred to in the PLI is what the Chief Minister and the Attorney General's motives were for exerting pressure on Mr McGrail in relation to the investigation [REDACTED]

[REDACTED] It is important that the Inquiry investigate the Chief Minister's motives in order to determine – if it finds that pressure was applied, undue, improper or otherwise – why it was applied. Accordingly, it is submitted that the following underlined text should be added to the current Issue 57:

5.3 Did the AG and/or CM exert pressure (undue, improper or otherwise) on Mr McGrail regarding the investigation or otherwise interfere with the investigation, and in particular the decision to execute the Search Warrants? If so, what were the AG's and/or CM's motivations for doing so?

15. **Fourth**, in relation to the question raised in Footnote 1 to the PLI, on the inclusion of the words “*undue, improper or otherwise*”, in light of its primary role as a fact-finding body, Mr McGrail submits that this wording is appropriate for the reasons set out below.
16. One of the primary purposes of a public inquiry is to ensure accountability which can include identifying wrongdoing, blameworthy conduct, or culpability by individuals, organisations and organs of the state. An important role of a public inquiry is to make findings of fact. However, from its findings of fact an inquiry may draw conclusions as to what went wrong and make recommendations: *Beer* §1.04. Often, a significant purpose of inquiries is to seek to allay public or Parliamentary disquiet about an event or series of events (a ‘scandal’): *Beer* §1.06.
17. A public inquiry is neither a criminal trial or a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, the inquiry is an investigation into an issue, event or series of events. Its findings are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. There are no legal

consequences attached to the determinations of a commissioner. Although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences: see the Canada Supreme Court in *Canada (Attorney-General) v Canada (Commission of Inquiry on the Blood System)* [1997] 3 SCR 440 (cited at *Beer* §2.132). The Canadian Supreme Court went on to say that an inquiry should not go as far as duplicating wording of the Canadian Criminal Code. This was because it could be taken by the public as the inquiry finding a person guilty of a crime (which it turn might indicate the inquiry was, in reality, a criminal investigation carried out under the guise of an inquiry). The court further held that an inquiry should “endeavour to avoid” the making of evaluations of its findings of fact in terms which are the same as those used by courts to express findings of civil liability: *Beer* §2.318.

18. There is no reference to making findings of criminal or civil liability in the Commission of Inquiry Act. The UK Inquiries Act 2005, which does not bind this Inquiry but is a useful guide on principle given it is far more detailed than the Gibraltar equivalent, relevantly provides:

2 No determination of liability

(1)An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.

(2)But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.

19. The Explanatory Note provides:

8. The purpose of this section is to make clear that inquiries under this Act have no power to determine civil or criminal liability and must not purport to do so. There is often a strong feeling, particularly following high profile, controversial events, that an inquiry should determine who is to blame for what has occurred. However, inquiries are not courts and their findings cannot and do not have legal effect. The aim of inquiries is to help to restore public confidence in systems or services by investigating the facts and making recommendations to prevent recurrence, not to establish liability or to punish anyone.

9. However, as subsection (2) is designed to make clear, it is not intended that the inquiry should be hampered in its investigations by a fear that responsibility may be inferred from a determination of a fact.

20. It is therefore submitted, in summary:
- 20.1 The primary purpose of public inquiries is to find facts;
 - 20.2 The purpose of inquiries can also be to identify wrongdoing, blameworthy conduct, or culpability by individuals, organisations and organs of the state;
 - 20.3 A public inquiry cannot determine criminal or civil liability;
 - 20.4 It should also avoid exactly duplicating the language of the criminal or civil law in order to avoid it appearing to have determined criminal or civil liability;
 - 20.5 However, this does not preclude it using judgmental language even if that language may impact on public opinion;
 - 20.6 An inquiry should not be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations it makes.
21. It would be appropriate and indeed desirable for this Inquiry to use the words “*undue, improper or otherwise*” in the list of issues.
22. This language does not duplicate any particular criminal offence. In particular, it does not duplicate, or use any of the language, of the ingredients of the common law offence of misconduct in public office, which requires that: (a) a public officer acting as such (b) wilfully neglects to perform his duty and/or wilfully misconducts himself, (c) to such a degree as to amount to an abuse of the public’s trust in the office holder, (d) without reasonable excuse or justification. The words “*undue, improper or otherwise*” also do not replicate the language of civil liability for example negligence, which requires a breach of duty of care which foreseeably causes damage.
23. Whilst a primary function of the Commissioner is to ascertain the facts (as stated in the Issue of Commission), he is also required to “*inquire, as he shall in his absolute discretion consider appropriate, into the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking early retirement*” (emphasis added). These are broad terms of reference and could include, if the Commissioner considers it appropriate, judgmental conclusions and recommendations

(the agreed position of the Core Participants is that the Inquiry has power to do so under section 6 of the Commission of Inquiry Act – see previous submissions). The Inquiry should also bear in mind the general purpose of public inquiries is to ensure accountability which can include identifying wrongdoing, blameworthy conduct, or culpability by individuals, organisations and organs of the state. There is no reason for it to be inhibited into avoiding judgmental language such as “*undue*” or “*improper*”, or other judgmental language such as “*inappropriate*” or “*appropriate*” (as used in Mr McGrail’s suggested amendments to the PLI) where the use of that language does not imply criminal or civil liability and – importantly – its use would allow the Inquiry to fulfil its general purpose of ensuring accountability.

24. It is entirely appropriate for the Inquiry to include the possibility of reaching judgmental conclusions in the PLI. The basis for this is Mr McGrail’s credible allegations, which are now backed up by the evidence of the Statutory Participants. Paragraphs 18-27 of McGrail Reply Submissions dated 20th July 2022 sets out a narrative, taken almost entirely from the evidence of the Chief Minister, Mr Pyle and the Attorney General, which on any reasonable view constitutes, at the least, *prima facie* evidence of improper and undue behaviour by those three individuals. In light of the evidence now available to it, it is submitted that it would border on perverse for the Inquiry to preclude itself at this early stage from reaching judgmental conclusions when there is no legal rule which would prevent it from doing so and clear *prima facie* evidence that such a conclusion would be open to it on the facts.
25. The Inquiry’s work is of course still at an early stage. The fact that it asks a judgmental question in the PLI does not mean it will reach a judgmental answer. If, after the substantive hearings have taken place, the Inquiry reaches the preliminary view that such language is appropriate to use in its findings, the affected parties will have the opportunity to make submissions on whether that view is well-founded. This adds a further layer of protection against the possibility that civil or criminal liability may be inferred from the language of the final report (though, as stated above, there is no risk of this given the proposed language does not reflect the criminal or civil law). Ultimately, the PLI at this stage should be expressed widely and include the language proposed by the Inquiry.

C. POLICIES

(i) *Protocol for Receipt and Handling of Documents, Redaction and Records Management*

26. In relation to paragraph 25 (c)(iii), this reflects the terms of section 19 of the UK Inquiries Act 2005. However, section 19 is clearer in its operation than the policy as it states that the question for the inquiry is whether the “*chairman considers [the restriction notice or restriction order is] conducive to the public interest, having regard in particular to the matters mentioned in subsection (4)*”. As presently drafted, paragraph 25 implies that where one of the factors in (a) to (c) is present a restriction or redaction will take place. In order to make this clearer, the following amendment (in underlined text) to paragraph 25 is proposed:

There are a number of 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, when balanced against the public interest in ensuring the public are able to view a record of evidence and documents provided to the Inquiry.

27. Paragraph 36 currently provides: “*The Inquiry has many stakeholders and it will sometimes be necessary to share data with them. This will be done securely in line with data protection legislation.*”
28. It is of concern that the stakeholders are not listed in this paragraph. It is submitted that now the Inquiry is set up it should be possible to list the parties who the Inquiry expects to share data with, and for what reason, or alternatively that illustrative examples can be provided. Such a list is provided at paragraph 20 of the Privacy notice.
29. In relation to paragraphs 44 to 48, Mr McGrail notes that members of Inquiry team continue to use their non-Inquiry professional email addresses to conduct Inquiry business. It is respectfully submitted that it would be preferable for Inquiry email accounts to be set up and all Inquiry business conducted through those accounts. Whilst individual professional email accounts are more likely to be secure than personal email accounts, for the purpose of ensuring effective information walls within organisations,

and more pertinently to ensure that Inquiry emails are retained and later destroyed following appropriate archiving, it is far preferable to set up, and mandate the use in this policy, Inquiry email accounts.

(ii) Core Participants Policy

30. Mr McGrail has no comments in relation to this policy.

(iii) Protocol for Vulnerable Witnesses and Restrictions on Public Access

31. In relation to paragraph 19, and particularly the reference to imposing a reporting restriction, it is unclear under what statutory authority such a restriction could be made.

32. There is no equivalent provision in the Commission of Inquiry Act to section 19 of the UK Inquiries Act 2005 which gives the Chair a power to impose restrictions on disclosure or publication of any evidence or documents given, produced or provided to an inquiry.

33. It is possible that a power to impose a reporting restriction could be implied from section 6 of the Commission of Inquiry Act (“*shall by all such lawful means as to them appear best, with a view to the discovery of the truth, inquire into the matters submitted to them*”), perhaps in order to give effect to the provision under section 3, in conjunction with the Issue of Commission, which permits the Commissioner to hold parts of the inquiry in private, as it would arguably render this power ineffective if it was not possible to impose reporting restrictions.

34. However, Mr McGrail would appreciate clarification of the Inquiry’s view on where, if anywhere, the power to impose a reporting restriction arises from. He will then consider this, take advice and submissions will be made if appropriate.

(iv) Special Category and Criminal Conviction Personal Data (the ‘Appropriate Policy Document’)

35. Regarding paragraph 4 (“*The Inquiry is investigating the matters set out in its Terms of Reference*”), there are no terms of reference for the Inquiry – it is suggested that this is replaced by “*Commission of Inquiry*”.

(v) **Privacy Notice**

36. The same point is made in relation to paragraph 5 as is made in relation to paragraph 4 of the Appropriate Policy Document, particularly the reference to “*Terms of Reference*” which should be replaced by “*Commission of Inquiry*”.
37. In relation to Paragraph 20, it is of concern to Mr McGrail that the Inquiry will be sharing data with the HM Government of Gibraltar’s Information Technology and Logistic Department, “through *their provision of IT services*”. The HM Government of Gibraltar is being represented by the same legal team as the Chief Minister, Mr Pyle and the Attorney General and, whilst not yet formally a Core Participant, is taking an active and highly opinionated role in the Inquiry. It is in effect a Core Participant, or alternatively it is implicated in the events through the fact that the Chief Minister is both a Core Participant and implicated (although admittedly there is no suggestion that the current Governor of Gibraltar, Sir David Steel, who is a member of the Government of Gibraltar, is in any way implicated in the matters of concern in the Inquiry). It is therefore of significant concern that the Inquiry is contracting its IT services to a participant in the Inquiry as it potentially gives the government privileged access to highly sensitive data which it would not have access to as a Core Participant. It is submitted that the Inquiry should urgently reconsider this arrangement.

D. CONCLUSION

38. We hope that these submissions are of assistance.

CAOILFHIONN GALLAGHER Q.C.

ADAM WAGNER

Doughty Street Chambers, London

23 August 2022