

INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

OPEN SUBMISSIONS BY COUNSEL FOR THE GOVERNMENT PARTIES **FOR THE FOURTH PRELIMINARY HEARING ON 19 JULY 2023**

1. These are the open submissions by counsel for the Government Parties in advance of the Fourth Preliminary Hearing ('PH4') on 19 July 2023. They are limited to agenda items 4 to 7, mostly responsive to the Submissions dated 11 July 2023 (reissued 12 July 2023) of CTI, Julian Santos ('**CTI Written PH4 (open)**').
2. These submissions do not anticipate unnecessary repetition by Mr McGrail of his allegations and case theories against the Government Parties, and thus do not set out the Government Parties' position in respect or denial of them. Counsel for the Government Parties reserves the right (should the Commissioner agree) to respond orally at PH4 should Mr McGrail's written submissions (once again) contain such material.

A. PROCEDURE AT THE MAIN HEARING

3. Timetable

The Government Parties agree with the timetable set out in para 15 of CTI Written PH4 (open).

4. Witness examination procedure

Save as appears below, the Government Parties agree with the witness examination procedure set out in paras 17-20 of CTI Written PH4 (open):

4.1 The generality of witnesses ('non-specific witnesses')- the Hybrid Model

- (i) While it is agreed that, in principle, CTI should 'bear the brunt' of the examination of non-specific witnesses:

- (a) It should not be the case that “*questioning should be conducted solely by CTI*”. Where these witnesses give oral evidence (or have given written evidence) that impugns the evidence of a CP, it would seem (in the circumstances of this Inquiry) fair and necessary to allow counsel for any such CP to cross-examine the witness. That right should be enshrined in the directed witness examination procedure.
- (b) In addition, there should also be enshrined in the directed witness examination procedure liberty for counsel for any CP to apply *ad hoc* during the hearing for the Commissioner’s permission to cross-examine the witness. This should be for good cause identified to the Commissioner’s satisfaction. Needless to say, it is not possible to give 7 days’ notice (as proposed by CTI in para 18c.) in the case of a need to cross-examine that arises from oral evidence given.
- (c) In all cases where cross-examination of a CP has been allowed, re-examination by that CP’s counsel should also be allowed.
- (d) In any event, in relation to CTI’s proposal, there should be transparency to all CPs about the questions of which notice is given by any other CP. This will allow for objections to be taken in good time, and for consequential notices to be given.
- (e) The reasons given by CTI (in para 19 of CTI Written PH4 (open)) for his proposal (namely the need to balance case management in the context of the time available and the need to ensure focus given the complexities), being procedural and otherwise controllable as they are, should not (in the very important context of this Inquiry and the seriousness of the allegations made) displace the overarching priority of fairness to parties who may be criticised with considerable consequences to them.

4.2 The Unrestricted Witnesses – the traditional model

- (i) The Government Parties are strongly of the view (in agreement with CTI) that the traditional model should apply to the Unrestricted Witnesses. It is assumed that this includes (a) Written Evidence standing as evidence in chief (b)

examination by CTI (c) cross-examination and (d) re-examination by witness' own counsel.

- (ii) It is suggested that the right to cross-examine Unrestricted Witnesses should be limited to counsel for other Unrestricted Witnesses. There would seem to be no reason to allow all CPs (and any other represented parties that may participate) the right to cross-examine Unrestricted Witnesses.
- (iii) The Government Parties agree with the list of Unrestricted Witnesses proposed by CTI in para 20, namely:
 - (a) Ian McGrail, former Commissioner of Police;
 - (b) the Hon Fabian Picardo KC MP, Chief Minister;
 - (c) Nicholas Pyle, formerly Deputy Governor and, at the material time, Interim Governor appointed under s.22 of the Constitution;
 - (d) Michael Llamas CMG KC, the Attorney General;
 - (e) Dr Joseph Britto;
 - (f) Paul Richardson, former Superintendent of the RGP;
 - (g) Christian Rocca KC, Director of Public Prosecutions.

5. The witness list

5.1 The Government Parties:

- (i) Do not consider it necessary to comment on Category 1 – Witnesses who will give oral evidence, save (a) as explained in para 5.2 below and (b) to say that they agree that the Unrestricted Witnesses and Mr John Goncalves should give evidence.
- (ii) Do not consider it necessary to comment at this stage on Category 2 – Witnesses who may give oral evidence (but currently not).
- (iii) As to Category 3 – Witnesses who will not give oral evidence, see para 5.2 below.

- 5.2 (i) There may be a contradiction between the evidence of Mr Pyle and some of the other GPA members as to whether the GPA discussed allegations relating to Mr McGrail.
- (ii) Also, there appears to be a contradiction between the witness statements of (i) Mr Goncalves (ii) Mr Pyle and (iii) the evidence of Henry Bautista (para 22), Leif Simpson (paras 155-158) and Maurice Morello (paras 145 – 148) that they complained to the GPA about Mr McGrail.
- (iii) Mr Pyle does not accept the evidence of GPA members that there were no complaints made by the GPF to the GPA. Nor does Mr Pyle accept Mr Lavarello’s evidence in relation to the COP selection process that “*At some point Mr Pyle said that he would not support either candidate...*” Unless Mr Pyle’s failure to call for them to give oral evidence will not be treated as an acceptance by him of their evidence and will not prevent him from contradicting it in evidence or submissions, his position is that the following GPA witnesses should be required to give oral evidence (dates in brackets after names are the dates of the GPA membership, as appears by their statement):
- (a) Julio Alcantara (1/4/2018 to 1/4/2021)
 - (b) Joey Britto (1/8/2019 to 1/8/2021)
 - (c) Francis Carreras (22/10/2018 to present)
 - (d) Nadine Collado (1/4/2019 to 31/3/2022)
 - (e) Rebecca Figueras (1/4/2019 to 31/3/2022)
 - (f) Ernest Gomez (23/1/2014 to present)
 - (g) Edgar Lavarello (1/11/2016 to present)
 - (h) Claire Pizzarello (6/3/2018 to present).

B. FINALISATION OF LIST OF ISSUES AND CONSIDERATION OF AGREED FACTS

6. In para 24 of CTI Written 4PH (open), CTI asks the Government Parties to indicate the extent to which the two issues referred to in para 7 below “*will be relied upon as reasons for Mr McGrail ceasing to be Commissioner of Police*”. By way of high-level clarification:

- (i) it is the position of the Government Parties that none of the issues in the Provisional List of Issues are reasons “*why Mr McGrail ceased to be Commissioner of Police*”;
 - (ii) Mr McGrail ceased to be Commissioner of Police because, knowing that he had lost the confidence of both the Governor and the Chief Minister, fearing that the Governor would exercise his statutory power to call for his resignation and believing (wrongly) that if that occurred he would forfeit his pension, he chose to apply for early retirement to avoid the above scenario; and
 - (iii) some of the issues listed in the Provisional List of Issues (or specific aspects of them) are reasons why the Governor and or the Chief Minister lost confidence in Mr McGrail. This does not convert them into reasons for his early retirement.
7. Accordingly, the Government Parties do not rely on any of the listed Issues as “*reasons for Mr McGrail’s ceasing to be Commissioner of Police*”. Subject to that clarification:

- (i) Issue 2: the Assault Investigation is one of the issues (though an important one to Mr Pyle) to which the following statement by Mr Pyle applied: “*my loss of confidence in Mr McGrail’s probity and integrity, and his leadership of the RGP had been progressive over a period of time and by reason of a number of incidents and matters, which I now explain*” (para 20, Pyle 1).

(Then) Commander British Forces Gibraltar, Michael Walliker, refers to this incident in paragraphs 13 of his Witness Statement dated 24 November 2022 in the following terms:

“13. Turning to the incident involving the investigation into an assault on a helicopter pilot, the irony is that there is no evidence of any investigation being conducted whatsoever. At the time, there were rumours that an assailant had been arrested, but allowed to go home to change his clothes, and that he was released without charge only a few hours later. When I spoke to Supt McGrail about the incident, I was told that whilst the RGP was investigating the incident, there was evidence that the helicopter pilot was drunk and abusive and therefore deserved what he got. I reported this conversation back up my command chain as further evidence that the RGP was operating to a standard far below that which the general public should expect. It gave me further ammunition to request an Inquiry and this time, for it to be broadened to

include systemic cultural issues including that of exceptionalism, rather than just focus on operational judgement.”

- (ii) Issue 7: the Alcaidesa Claims. As correctly identified by the Inquiry Team, the Chief Minister, Mr Picardo, included this item in a litany of issues which he told Mr Pyle in the Whats App dated 14 May 2020 that had caused him to start losing confidence.

8. Agreed Statement of Facts

- 8.1 The Government Parties are in principle content to participate in an exercise to agree facts.
- 8.2 However, given the number of issues, the number of facts and the number of parties that would have to participate in such a process, it seems impractical to expect that the parties can undertake such an exercise by a series of multiple bilateral communications or multilateral communications between them. They may not even be able to agree what facts are relevant to try and agree.
- 8.3 There seems to be insufficient time left for such a process, not least during the period of preparation for the conduct of the Main Hearing itself and the preparation of written submissions etc.
- 8.4 Accordingly, the Government Parties would suggest the following alternative process:
 - (i) Each CP identifies to the Inquiry Team the key facts which he/it considers should be the subject of agreement.
 - (ii) The Inquiry Team can form a view about (i) above and circulate its filtered list to all, or all relevant, CPs. In other words, the Inquiry Team acts as a clearing house for the identification and circulation of facts to be agreed, and the precise terms in which agreement of those facts is articulated.
 - (iii) Each CP then responds to the Inquiry Team as to whether the facts are agreed in the terms so articulated, or alternatively, the terms in which they could be agreed.

- (iv) Once the process is complete in respect of all key facts so identified, the Inquiry Team will produce and circulate a statement of agreed facts.

C. GBC BROADCASTING APPLICATION

- 9. The Government Parties do not consider it necessary to express a view on this matter.

D. RESTRICTION ORDERS – WITHHOLDING DOCUMENTS FROM PUBLIC DISSEMINATION

- 10. Mr Picardo and Mr Llamas agree to accept the position set out in paragraph 33 of CTI Written PH4 (Open) in relation to their extant application for a restriction order set out in Peter Caruana & Co’s letter dated 7 September 2022, namely that several of the documents in the application could be redacted in a more limited way – for example to remove specific operational information, matters relevant to national security/international relations or sensitivities surrounding deceased persons – rather than withholding them altogether. Also that, where this approach is not practical in respect of any document as a whole, the applicants will provide greater justification (including evidence if so advised) for the withholding of an entire document from public dissemination. A modified application will therefore be submitted.
- 11. In respect of further applications to withhold documents, the Government Parties agree with the position set out in paras 38-40 of CTI Written PH4 (Open) and propose the following timetable:
 - (i) In respect of the modified, extant application by Mr Picardo and Mr Llamas, that this be submitted by 4pm Friday 28 July 2023.
 - (ii) In respect of disclosure circulated thus far, that applications be submitted by 4pm on Friday 11 August 2023.
 - (iii) In respect of any further disclosure after the date of PH4, that applications be submitted within such period of time as the Inquiry Team may specify at the time of disclosure, bearing in mind the volume of each disclosure batch.

E. AGENDA ITEM 8 – ADMISSIBILITY OF 19 WITNESS STATEMENTS

12. At the request of the Inquiry Team, this is the subject of a separate, closed written submission.

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14 July 2023