INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

OPEN SUBMISSIONS BY COUNSEL TO THE INQUIRY IN REPLY TO CPs FOR THE FIFTH PRELIMINARY HEARING ON 25-26 OCTOBER 2023

INTRODUCTION

1. These are submissions by Counsel to the Inquiry ('**CTI**') in advance of the Fifth Preliminary Hearing ('**PH4**') on 25-26 October 2023.

2. The Fourth Preliminary Hearing ('**PH4**') took place on 19 July 2023. At that stage, the Main Inquiry Hearing was scheduled to proceed in September/October 2023, and accordingly PH4 was focused on preparations for that hearing (for example, the witness list and schedule). However, in the weeks following PH4, the Commissioner took the decision to adjourn the Main Inquiry Hearing due to an ongoing and active investigation concerning allegations that witnesses may have received incentives for providing evidence to the Inquiry.[1] New dates for the Main Inquiry Hearing are explored in Part C below. In the interim, PH5 has been fixed within the window previously set aside for the Main Inquiry Hearing to ensure that the Inquiry's progress continues.

3. The following items fall to be considered at PH5:
    a. Questions posed to CPs about the impact of the nolle prosequi on the Inquiry;
    b. Restriction order applications ("**ROAs**");
    c. Proposed amendments to the Provisional List of Issues; and
    d. Progress towards the Main Inquiry Hearing, including:
        i. Amendments to witness categorisations proposed at PH4; and
        ii. Provisional dates/window for the Main Inquiry Hearing.

PRELIMINARY MATTER: PRIVATE HEARING

4. On 19 October 2023, the Inquiry informed CPs that the Commissioner is minded to order that the hearing of the ROAs will take place in private, not least because otherwise the very object of the ROAs would be defeated by the hearing itself,

[1] https://coircomp.gi/wp-content/uploads/2023/08/2023-08-11-Ruling-.pdf.

regardless of the outcome. CTI agreed with this approach. At the time of drafting, the Inquiry is waiting to receive any applications from CPs that, contrary to the Commissioner's current view, the ROAs should be heard in public. In any event, the Commissioner intends to determine this issue before the hearing with a short ruling on Monday 23 October 2023.

5. However, by way of broad overview for public understanding, the ROAs have been submitted by the Chief Minister ('**the CM**') and the RGP. The ROAs seek to redact certain information in documents that have been disclosed to the Inquiry, so that such information is not deployed in public hearings and/or uploaded to the Inquiry's website. These applications will be decided in accordance with para 13(d) and 24-28 of the Inquiry's Documents Protocol.[2]

6. CTI have also considered whether item A (submissions on the nolle prosequi) should be heard in private. CTI consider that these arguments can properly take place in private, particularly due to the Chief Justice's public judgment in ***Cornelio and others v R*** 2023/GSC/029 ('***Cornelio v R***') on the same subject matter. CTI do not understand that any CPs are making an application for submissions on the nolle prosequi be heard in private, but any CP who wishes to do so should make this application at PH5. Advance notice of any such application should be provided by no later than **4pm on Monday 23 October**.

A. NOLLE PROSEQUI

7. Item 5 of the Inquiry's Provisional List of Issues concerns the investigation into the alleged hacking and/or sabotage of the National Security Centralised Intelligence System and alleged conspiracy to defraud ('**the Conspiracy Investigation**'). On 21 January 2022, the Attorney General ('**AG'**) discontinued prosecutions against three individuals charged in that investigation ('**the Delhi Defendants**') by entering a nolle prosequi ('**the nolle**').

8. The Commissioner has invited CPs to make submissions on seven questions regarding the nolle, which are addressed in turn below. CTI have endeavoured to distil the positions of each of the CPs before expressing their proposed approach.

[2] https://coircomp.gi/wp-content/uploads/2023/05/2023-05-22-UPDATED-Documents-Policy.pdf .

References to party names below are to their written submissions for PH5, unless otherwise stated.

1. What was the legal basis on which the prosecution was discontinued: (a) section 59 of the Gibraltar Constitution; (b) section 223 of the Criminal Procedure and Evidence Act; (c) both; or (d) some other basis?

9. It now appears clear that the legal basis for the nolle was s59(2)(c) of the Gibraltar Constitution, which provides that: "*The Attorney-General shall have power in any case in which he considers it desirable to do so … (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority*". The Government parties have referred to a document in which the AG entered the nolle and referenced "*Section 59(2)(c) … and all other enabling powers…*": Government at [5]. CTI request that the Government disclose this document to the Inquiry, or alternatively highlight where it can be located in the public domain.

10. CTI agree that s223 of the Criminal Procedure and Evidence Act 2011 (**CPEA**) appears to complement s59 of the Constitution and provide a procedure for the exercise of the s59 power. All Gibraltar statute is subject to the Constitution: see Government at [6], McGrail at [4].

2. In the factual context of the Inquiry, is it relevant to ask why the Attorney General discontinued the prosecution?

3. If so, is it within the Terms of Reference of the Commission to ask the question?

11. Questions 2 and 3 can be taken together. Mr McGrail, the Delhi Defendants and the RGP argue that the reasons for the nolle are relevant to the Inquiry's Terms of Reference, whereas the Government argues that the reasons are not relevant. Mr Richardson has taken a middle ground, arguing that "*if but only if Mr Llamas in entering the nolle prosequi in 2022 may still have been influenced by some or all of the same considerations as influenced him and/or Mr Picardo and/or Mr Pyle in May 2020, it would be relevant for the Commissioner to ask Mr Llamas why he discontinued the prosecution"*: at [6].

12. CTI's view is that the Commissioner cannot determine whether the reasons for the nolle are relevant (and nor can CPs make meaningful submissions on relevance) until those reasons are disclosed in evidence. The AG has already stated in evidence that "*My decision [on the nolle] was based on matters that were brought to my attention over a year after the events of May/June 2020*": Llamas 2nd WS at [47]. If the Inquiry were to accept that evidence, it would tend to rule out that the AG's reasons for entering the nolle were the same as those which Mr McGrail contends were operative in May/June 2020. However, CTI accept Mr McGrail's submission at [5(e)] that the Inquiry cannot proceed on the basis of this unchallenged evidence alone, and Mr Richardson's submission at [15] that "*unless the Commissioner is persuaded that Mr Llamas's 2023 account … can be adequately tested against the 2020 and 2021 evidence alone, and either confidently endorsed or confidently doubted without further inquiry, the question why the A-G discontinued the prosecution … may be relevant…*".

13. If the AG gives evidence revealing reasons entirely unrelated to the events of May/June 2020, this would tend to undermine Mr McGrail's evidence that "*the events post my resignation chime with the AG's startling emotional statements in May 2020 that he would 'defend the CM to the death'*": McGrail 2nd WS at [19]. "*The events*" appears to be a reference to, amongst others, the fact that the CM was invited to provide a voluntary statement in Operation Delhi: McGrail 2nd WS at [17]. CTI do not fully align with the Government's submission that "*the nolle cannot properly be regarded as a subsequent manifestation … of the Attorney General's alleged (and denied) motivation (in May 2020) to protect the Chief Minister or James Levy*", because James Levy KC ('**JL'**) and the CM were not the beneficiaries of the nolle: Government at [11.3]. It is accepted that the CM and JL were not the subjects of the criminal proceedings and thus the primary beneficiaries of the nolle were the Delhi Defendants. However, without hearing the relevant evidence, the Inquiry cannot discount the possibility that the nolle was motivated by a desire to protect the CM and/or JL from having their respective roles in events, and evidence referring to them, aired in open court.

14. There also remains the theoretical possibility that the AG gives evidence that the reasons for the nolle are the very same reason which Mr McGrail says is what motivated the Government Parties to act as they did in May/June 2020. If that were

the case, then the relevance of the AG's response is plain. However, that scenario appears unlikely, given the AG's evidence referred to above.

15. In either case, CTI are sceptical as to the practical benefit to be derived by the Inquiry from learning the reasons for the nolle. If the AG discloses the reason for the nolle, CPs may dispute the genuineness of that reason in any case. It is difficult to see how the Inquiry could ascertain whether the reason given by the AG was in fact genuine, other than by looking at the material which it is already going to be examining when determining the central question with which it is tasked. It appears to CTI that CPs are already able to rely on that material in answering the much more pertinent question at the heart of this Inquiry (i.e. the reasons and circumstances leading to Mr McGrail's retirement). In other words, learning the reasons given by the AG for the nolle is unlikely significantly to advance the evidential picture or the Inquiry's progress in determining the reasons and circumstances leading to Mr McGrail's retirement.

16. Notwithstanding these reservations, CTI consider that there is still some value in asking the question, if only to either rule out or confirm the scenario posited in the preceding paragraph, particularly bearing in mind that evidence to the Inquiry is provided under oath.

4. If so, can the Attorney General properly be asked why he discontinued the prosecution?

17. CPs appear to agree that there is no impediment to the Inquiry asking this question. CTI agree, particularly having regard to the Inquiry's broad powers in ss8 and 10 of the Commissions of Inquiry Act 1888 ('**the 1888 Act**'). The more complex issue is not whether the Inquiry can ask the question, but whether the AG is: (i) required to answer; (ii) entitled to answer; or (iii) required to refuse to answer.

5. If so, is the Attorney General entitled – or even required – by law to decline to answer the question in (2) above?

18. The Government accepts that the nolle is amenable to judicial review ('**JR**') pursuant to s83 of the Gibraltar Constitution ("*No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as*

precluding a court of law from exercising jurisdiction") and ***Mohit*** at [21]. Mr McGrail (at [16]) and Mr Richardson (at [19]) agree.

19. However, the Government seeks to distinguish the context of the Inquiry from JR, and argues that the AG is not required to (and in fact cannot) provide reasons in this case because:
    a. In ***Mohit*** at [22], the Privy Council held that if a JR were to occur, the AG would not be required to give reasons during those proceedings: "*That evidence [before the Supreme Court] will include any reasons the DPP may choose to give. But it is for the DPP to decide whether those reasons should be given and, if reasons are given, how full those reasons should be*".
    b. The AG is the "*guardian of the public interest*" and "*it would necessarily be a breach of duty on the part of the Attorney General not to jeopardise the very public interest of which he is, in law, the guardian*": Government at [19], [21].

20. The RGP and Delhi Defendants take a middle ground, arguing that the AG is entitled to but not required to provide reasons: Delhi at [9]-[12]; RGP at [23]. The RGP submits that the AG "*can decline*" to answer if he considers the reasons for the nolle remain extant at the time of the Inquiry Hearing. The Delhi Defendants rely on ***Cornelio v R***, arguing that:
    a. Dudley CJ concluded at [21]-[23] that the AG may be asked for reasons, and may give them if chooses, but he is under no obligation to do so.
    b. This is binding because "*it constitutes an operative determination by the Gibraltar Supreme Court on a matter of construction of Gibraltar law*".
    c. It would be inconsistent with the construction adopted by the Supreme Court to find that there is any duty on the AG to withhold reasons for the exercise of his power in s59 of the Constitution.

21. By contrast, Mr Richardson argues that the AG is required to give reasons if asked by the Inquiry, and it would be an offence under s12 of the 1888 Act for him to refuse: at [18]. He argues that as the Gibraltar AG's discontinuance decisions are justiciable as a matter of JR, "*it would be odd if they were not also susceptible to a Commission of Inquiry under the 1888 Act*". Mr McGrail makes the same point at [14]: "*…this follows the ordinary rule that a body exercising powers whose source is a statute, is subject to judicial review … By extension, there would be no bar to an Inquiry investigating such*

events". Mr McGrail adds at [30(b)] that: "*So as to enable a court to fulfil its supervisory jurisdiction*" (in the capacity of a JR), "*the Supreme Court (for example) could order disclosure of documentary and other evidence of the reasons behind the discontinuance.*"

22. With respect, these arguments disregard an important distinction between the nolle being justiciable through JR, and by extension examinable by an Inquiry, and the AG being required to provide reasons for the nolle in the context of that JR or Inquiry. By way of illustration, in ***Mohit***, the Privy Council recognised that it would be possible to conduct a JR of a nolle, but that the evidence before the court on the JR may or may not include the reasons for the nolle. See at [22] (emphasis added):

> "*That evidence will include any reasons the DPP* ***may choose*** *to give. But* ***it is for the DPP to decide whether reasons should be given and, if reasons are given, how full those reasons should be****. The English authorities cited above show that there is in the ordinary way no legal obligation on the DPP to give reasons and no legal rule, if reasons are given, governing their form or content. This is a matter for the judgment of the DPP, to be exercised in the light of all relevant circumstances, which may include any reasons already given. The Supreme Court must then decide on all the material before it, drawing such inferences as it considers proper, whether the appellant has established his entitlement to relief.*"

23. Where the AG refuses to provide reasons, the tribunal's ability to draw inferences will become more important – indeed, it is difficult to see how a JR of a nolle could be effective if reasons were not provided and the tribunal could not draw inferences form a refusal to provide reasons. This is considered further below.

24. Turning to Mr McGrail's additional submissions:

    a. Mr McGrail relies on ss 8(2) and 10 of the 1888 Act. Section 8(2) provides that: "*Every such person shall attend before the commissioners and shall answer all such questions as may be put by the commissioners.*" Section 10 then explains that: "*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 the answer to such question will tend to incriminate such person.*" Mr McGrail

argues that pursuant to s10, there is no right to remain silent on the grounds of any other privilege, and no exception is made to s8 in the context of a discontinuance: McGrail at [25]-[26]. A similar issue arose in the context of arguments about legal professional privilege in the Inquiry's Documents Protocol. On that occasion, CTI submitted that s10 could not operate entirely to exclude the operation of LPP, as it is a fundamental right guaranteed by the European Convention on Human Rights and s7 of the Gibraltar Constitution.[3] In the absence of express language in the 1888 Act ousting the operation of LPP, CTI therefore submitted that s10 must be read in conjunction with s7 of the Gibraltar Constitution so as to permit parties to rely on LPP when resisting answers put by the Commissioner. The current situation is more complex, as the AG's power to enter a nolle is granted by the Constitution, but the Constitution is silent on the issue of whether the AG can or should provide reasons. There are viable arguments on both sides, particularly given the language of ss8 and 10 of the 1888 Act. Ultimately, however, we consider that it would be most prudent for the Inquiry to follow Dudley CJ's interpretation of the Gibraltar Constitution in ***Cornelio v R*** (that the AG may be asked for reasons but is under no obligation to provide them): see further question 7 below.

b. McGrail argues that as the AG has already given evidence on the nolle (at Llamas 2nd WS [47]), "*it would be an abuse of the Inquiry's process for the A-G … to decline to answer questions about a particular issue on grounds that he is legally prohibited from doing so, when he has already provided (self-exculpatory evidence) on that very issue*": McGrail at [27]. We do not agree with this argument. First, the Government's position (summarised above) is that the AG is open to provide reasons except where he considers that doing so would damage the public interest. The AG has therefore presumably decided that the explanations provided to date do not damage the public interest. That does not mean that he is bound to provide reasons where he considers that doing so would damage the public interest. Separately, the Inquiry may, if it considers it appropriate, draw inferences from the fact that the AG has provided some evidence but not fully explained his reasons.

[3] See https://coircomp.gi/wp-content/uploads/2022/09/Counsel-to-the-Inquiry-Submissions-for-Second-Preliminary-Hearing-15-September-2022.pdf at pp6-7.

c. McGrail seeks to distinguish the decision in ***Cornelio v R*** on the basis that it was decided in a wholly different context, and that the decisive factor was that seeking the AG's reasons indirectly via the DPP in costs proceedings would "*subvert the statutory provisions*": at [30(a)]. Using the vehicle of costs proceedings against the DPP is a more obvious example of "*subverting the statutory provisions*". However, requiring the AG to provide reasons in the context of a statutory Inquiry would also have the effect of subverting the AG's constitutional powers and discretion under s59 of the Constitution (as interpreted by the Chief Justice in ***Cornelio v R***), and the Privy Council's reasoning in ***Mohit***.

6. Is the Inquiry entitled to draw inferences from a failure by the Attorney General to answer the question in (2) above?

25. If (as CTI have concluded in response to question 5): (i) the AG's decision to enter a nolle prosequi is amenable to JR; (ii) the AG can decide whether to put his reasons before the Court on the JR; and (iii) the JR could therefore proceed *without* any evidence of the AG's reasons, then it is difficult to see how the JR could meaningfully proceed without the Court at least being entitled to draw inferences about what the reasons may have been from other contemporaneous evidence. Doing so would be necessary to assess whether the decision to enter a nolle was (for example) irrational, or influenced by irrelevant considerations.

26. This position finds support in ***Mohit*** and ***Cornelio v R***. In ***Mohit,*** Lord Bingham held at [22] that during the (remitted) JR of the nolle: "*The Supreme Court must then decide on all the material before it, drawing such inferences as it considers proper, whether the appellant has established his entitlement to relief*". The Chief Justice also agreed in ***Cornelio v R*** at [23] that: "*at such stage as all the evidential material falls to be considered, it may be proper to draw inferences from the failure to provide the reasons.*" See Mr McGrail at [31] and the Delhi Defendants at [9]. Mr Richardson adds that the Inquiry would be entitled to draw inferences if the AG declined to answer "*knowing the likely section 12 consequences of his failure*": Richardson at [27]. CTI agree that ***Mohit*** and ***Cornelio*** provide clear authority that the Inquiry may – in principle – draw inferences from a failure to provide reasons for a nolle (although CTI

do not accept that a refusal to answer on public interest grounds would necessarily result in the consequences foreseen by s12 of the 1888 Act).

27. Turning to the Government Parties' opposing position:

    a. CTI disagree with the Government Parties' submission at [26.4] that "*the inferences that may be drawn … are whether the decision was made in a lawful, proper and rational manner, and not as to the reasons for the decision by the DPP to enter the nolle prosequi*". It is clear from ***Cornelio v R*** that "*it may be proper to draw inferences from the failure to provide the reasons*" (emphasis added). In any event, as explained above, the two matters are related: a court may need to draw inferences about the reasons for a nolle prosequi, in order to decide whether the decision was made in a lawful, proper and rational manner.

    b. Further, it is submitted that there is no basis for the argument that the ability to draw inferences "*inure[s] only to the benefit of a court of law in the exercise of its judicial review jurisdiction*": Government at [26.5]. JR was the context of the decision in ***Mohit***, but not ***Cornelio v R***, suggesting that the capacity to draw inferences is available in various contexts. There appears to be no reason why this should not extend to a public inquiry.

    c. The Government at [25] also seeks to rely on statements by Viscount Dilhorne in ***Gouriet v HMAG & Ors*** [1978] AC 435 that: "*one does not know the reasons for the AG's refusal in this case but it should not be inferred from his refusal to disclose that he has acted wrongly*" (p489) and "*even if good reasons for his decision were not immediately apparent, the inference that he abused or misused his powers is not one that should be drawn*" (p491). However, we would note first of all that the decision in ***Gouriet*** was premised on the basis that decisions of the English Attorney General were not amenable to JR (the English Attorney General is not a creature of statute and exercises prerogative powers): p487, cited in ***Mohit*** at [14]. Second, CTI interprets Viscount Dilhorne's statements as meaning that an inferences were not appropriate in the facts of that case, and not that it was never appropriate to draw inferences from a refusal to answer, however apparently unjustified. Third, and in any

event, Viscount Dilhorne's statements did not relate to a refusal to give reasons for a nolle prosequi.

28. It is a separate question whether it would be proper to draw inferences in the circumstances of this Inquiry. CTI consider that it would be premature to decide this question until all of the evidence has been heard, examined and challenged as necessary. However, our current view is that the following matters might create difficulties in terms of drawing an inference against the AG:

    a. The AG's offer to tell the Commissioner (and Inquiry Team) the reasons for the nolle on a confidential basis: Government at [25.2]. The Inquiry team is reticent to accept this offer, due to the condition placed by the AG on the offer, namely that the Commissioner may not fully and frankly address the topic in the Report. CTI would be more amenable to recommending this option – although it would still not be a perfect solution – if the Government were to extend their offer to all CPs within the Inquiry confidentiality ring, so that the reason could at least be addressed in a confidential section of the Report for CPs.

    b. The AG's evidence that "*my decision [on the nolle] was based on matters that were brought to my attention over a year after the events of May/June 2020*" (Llamas 2nd WS at [47]) appears to contradict the case advanced by Mr McGrail, namely that the reasons for the nolle were the same as those which motivated the Government Parties' actions in May/June 2020.

    c. The Government's submission that "*it is [the AG's] judgment that [providing reasons] would visit serious prejudice on a vital public interest of Gibraltar (which to be clear is not its national security interests, much as those do of course exist)*": Government at [22]. This would obviously need to be confirmed in the form of evidence under oath. However, this factor chimes with the RGP's submission that an adverse inference should not be drawn against the AG absent "*some adverse finding that is suggestive of a breach of duty by the AG in that he has not acted in the public interest, but for ulterior motives…*": RGP at [24].

7. In relation to questions (2) and (4) above, is the Inquiry either bound by, or alternatively required to afford persuasive weight to, the Judgment?

29. We agree with Mr McGrail's submission at [35] that, as the Inquiry is not a court of law, it is not subject to a system of precedent and is not technically speaking 'bound' by decisions by law courts. The Inquiry's primary function is to establish the facts, and its role does include determining civil rights and obligations or criminal liability: see *Public Inquiries* at [1.02], [5.08]. Needless to say, in fulfilling that fact-finding role, the Inquiry must abide by Gibraltar law, and CTI's role is to advise the Inquiry and ensure that it complies with the law. It is certainly not open to the Inquiry to disregard applicable local law. In this instance, the Inquiry is required to ascertain the applicable law as a precursor to its evidence-gathering process, with the assistance of CTI and submissions from CPs. CTI therefore submit that ***Cornelio v R*** must be followed to the extent that it is applicable. For the reasons explained above, we do not consider that the different (costs) context of that judgment justifies a departure from the Chief Justice's reasoning and approach.

B. PROPOSED AMENDMENTS TO PROVISIONAL LIST OF ISSUES

30. On 2 October 2023, the Inquiry wrote to CPs proposing changes to Issues 1, 5 and 6 of the Provisional List of Issues. The proposed amendments were (as indicated in tracking):

> 1. The actions of the Royal Gibraltar Police ("RGP") on:
>
> 1.1 8 February 2017 in obstructing an aircraft at Gibraltar airport to remove an employee of the UK Ministry of Defence who ~~was under arrest~~ had previously been arrested by the UK Service Police; […]
>
> 5. The investigation into the alleged hacking and/or sabotage of the National Security Centralised Intelligence System and alleged conspiracy to defraud ("**the Conspiracy Investigation**"), and the RGP's handling of the same, including but not limited to the RGP's ~~execution of~~ stated intention to execute search warrants as part of that investigation on 12 May 2020 ("**the Search Warrants**"). In particular: […]
>
> 6. The difficult relationship between Mr McGrail and the Gibraltar Police Federation, and particularly any complaint(s) made by the Gibraltar Police Federation ("**the Federation**") and/or its members to the Gibraltar Police

Authority about Mr McGrail, and any allegations of bullying or intimidation by Mr McGrail discussed by the Gibraltar Police Authority. ("**the Federation Complaints**").

31. No CPs have made submissions on the proposed amendments to Issues 1 and 5, which CTI consider to be uncontroversial amendments that reflect the updated evidential position. However, both Mr McGrail and the GPA have made submissions on the proposed amendment to Issue 6.

32. The GPA submits that the proposed language "*could be construed as implied acceptance that complaints were in fact made by the GPF to the GPA and these were discussed by the latter*". CTI disagree with this interpretation. The words "*any complaint*" do not presuppose the existence of any such complaint, and allow for the interpretation that no such complaint was made (as the GPA members attest).

33. Mr McGrail more broadly objects to the amendment, on the basis that:

> "*We are … extremely concerned that the Inquiry is considering significantly widening one of the issues which we doubt any CP would contend was ever a 'core' issue, namely the GPF complaints. We are particularly concerned by the reference to '[t]he difficult relationship between Mr McGrail and the Gibraltar Police Federation', followed by the words 'in particular'. The giving of an example is illustrative, not exhaustive…"*

34. We respond to his specific arguments as follows:

    a. Mr McGrail argues that Mr Picardo has "*explicitly accept[ed]' that there was no causal relationship between the GPF issue and his supposed loss of confidence in Mr McGrail*". However, the passage of Mr Picardo's evidence must be viewed in its context:

> "*110. On one occasion, I recall Mr McGrail writing to the Governor to ask him to propose legislation to limit the powers of the Federation in the representation of its members. I told Mr McGrail that I did not agree with the proposal to curtail the representative rights of those elected by police officers to represent them in the Federation.*

111. Although this did not cause me to lose confidence in Mr McGrail, it was a demonstration of his very fractious and difficult approach to relationships. Additionally, I am aware from my continued contact with the Police Federation that, in contrast, they have had a very positive relationship with the new Commissioner, Richard Ullger."

It seems that one interpretation of this evidence, which can be explored in oral evidence, is that the specific occasion mentioned in [110] did not cause Mr Picardo to lose confidence in Mr McGrail.

b. Mr McGrail has raised various reasons to question Mr Pyle's evidence at Pyle 1st WS [23]. These can be explored during the Inquiry. However, that is not a reason to discard his evidence altogether. Where a "decision-maker" in the retirement process asserts a reason, we consider that this necessarily falls to be investigated, although of course it may ultimately be discredited.

35. However, we are persuaded that the language of "*in particular*", used in the proposed amended wording, could have the effect of unduly widening the Inquiry's investigation into matters not known to the decision-makers at the time. Whilst we think that this issue is addressed to a significant extent by the introductory wording to the Provisional List of Issues, we would propose the following amendment to put this absolutely beyond doubt:

6. Any complaint(s) made by the Gibraltar Police Federation ("**the Federation**") and/or its members to the Gibraltar Police Authority about Mr McGrail (including as to the difficult relationship between Mr McGrail and the Federation), and any allegations of bullying or intimidation by Mr McGrail discussed by the Gibraltar Police Authority. ("**the Federation Complaints**").

C. PROGRESS TOWARDS THE MAIN INQUIRY HEARING

C1. Witness list/witness categorisations

36. The Inquiry also invited CPs to make any further submissions on the categorisations of witnesses, as set out in CTI's written submissions for PH4 at [23.4].[4] Submissions have been received that two witnesses should be re-allocated as Category 1:

    a. Mr Lavarello: GPA at [4]. CTI agree that there is a conflict of evidence here on a matter that is relevant to the Inquiry (namely, Mr Pyle's dealings with Mr McGrail as a member of the GPA). CTI would therefore recommend that Mr Lavarello be added as a category 1 witness, while noting that the scope of his oral evidence is likely to be very narrow.

    b. Mr DeVincenzi: RGP at [4] and Richardson at [47]. At PH4, CTI recommended that in the first instance a further witness statement should be sought from Mr DeVincenzi to clarify his evidence, before a decision was made on whether to move him to Category 1 [**Transcript p41-42**]. This was disclosed to CPs on 19 October 2023. Having considered this evidence, and given the importance of the factual dispute about what Mr McGrail may or may not have agreed with the DPP as to rationalisation of charges (Issue 5.2), CTI agree with this re-categorisation.

37. Accordingly, CTI recommends that the Commissioner now finalise the witness list, as proposed in CTI's written submissions for PH4 at [23.4],[5] incorporating the two amendments above.

C2. Provisional dates for Main Inquiry Hearing

38. The Solicitors to the Inquiry have explored the availability of CPs in January – March 2024 to relist the Main Inquiry Hearing. This exercise revealed that lawyers for CPs had several pre-existing court commitments, and a 4-week hearing could not be accommodated during this period. We therefore propose the following dates, which remain tentative due to the ongoing criminal investigation:
    a. **3-5 April 2024**: Designated reading days;
    b. **8 April – 9 May 2024**: Main Inquiry Hearing with the following designated as reading days: (i) **22-24 April 2024** (Passover); (ii) **6 May 2024** (Bank Holiday).

[4] https://coircomp.gi/wp-content/uploads/2023/08/CTI-Skeleton-OPEN-PH4-Final-11.07.23-Reissued-12.07.23.pdf.
[5] https://coircomp.gi/wp-content/uploads/2023/08/CTI-Skeleton-OPEN-PH4-Final-11.07.23-Reissued-12.07.23.pdf.

39. We would ask CPs and their legal teams to signal their availability for a hearing on these dates as soon as possible (and ideally prior to PH5). We accept that legal representatives may not be available on every day within this window. The Inquiry will seek to make arrangements to prevent prejudice occurring to CPs as a result of any counsel unavailability, for example by managing the witness schedule. However, it is imperative that the Main Inquiry Hearing be re-listed as soon as possible, and we consider it unlikely that an entirely clear date for all counsel will be found if the Inquiry is to take place in the first half of 2024.

C3. Dates for Agreed Facts process

40. The process for agreeing facts was (understandably) paused over the summer when the Main Inquiry Hearing was postponed. However, CTI now urge CPs to recommence the agreed facts process (not least as it may assist the parties when considering potential redactions to documents). We propose the following dates (although there is obviously scope for flexibility and we would welcome submissions from CPs at PH5):
    a. **By 30 November 2023**: for each issue, Counsel for Ian McGrail to produce a first draft of the agreed facts for that issue, and circulate this to other CPs (copying the Inquiry).
    b. **By 21 December 2023**: Each CP to produce a marked-up version of that document & send to the Inquiry.
    c. **By 2 February 2024**: Inquiry to circulate a final draft of the agreed facts.
    d. **By 23 February 2024**: CPs to submit any final comments on the final draft.

41. Finally, the Delhi Defendants at [42]-[43] have requested directions in relation to RGP evidence that was served on CPs on 13 October 2023. We recommend **7 December 2023** as the longstop date for any outstanding applications for restriction orders, or responsive witness statements. We anticipate that, if the overarching principles governing ROAs can be resolved at PH5, the remaining ROAs can likely be determined on the papers.

JULIAN SANTOS
HOPE WILLIAMS
5RB

20 October 2023