

INQUIRY INTO THE RETIREMENT
OF THE FORMER COMMISSIONER OF POLICE

SUBMISSIONS FOR THE FIFTH PRELIMINARY HEARING
ON BEHALF OF MESSRS CORNELIO, PEREZ and SANCHEZ

I. INTRODUCTION

1 This document sets out the submissions to be made at the hearing on 25 and 26 October 2023 by those representing Thomas Cornelio, John Perez MBE and Caine Sanchez ('the Op Delhi Ds). It is divided into the following four sections:

- (1) The *nolle prosequi*
- (2) General points concerning the applications for restriction orders
- (3) Responses to specific requests within the applications for restriction orders
- (4) Other matters

II. THE NOLLE PROSEQUI

2 The Commissioner has posed seven questions concerning the *nolle prosequi*, as follows.

Legal basis

Q1. *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?*

3 The Op Delhi Ds have always understood that the legal basis was (c): both. The document signed by the Attorney General cites section 59(2)(c) of the Constitution; this document was then forwarded to the Op Delhi Ds by the Director of Public Prosecutions under a covering letter that stated that:

[the Attorney General] has today signed a Nolle Prosequi to be filed in court today. A copy is attached.

4 'Nolle prosequi' is a phrase used in s223 of the 2011 Act, but not in the Constitution.

Relevance to the Inquiry

5 The Commissioner asks two questions concerning the scope of the Inquiry, most conveniently dealt with together:

- Q2. *In the factual context of the Inquiry, is it relevant to ask why the Attorney General discontinued the prosecution?*
- Q3. *If so, is it within the Terms of Reference of the Commission to ask the question?*

6 It is submitted that the correct answer to both questions is 'yes', for the following reasons:

- (1) The Commissioner has been appointed to inquire into the reasons and circumstances leading to Ian McGrail ceasing to be Commissioner of Police.
- (2) Ian McGrail contends that he was impeded in his pursuit of a proper criminal investigation by political interference. It must be relevant to ask why the prosecution that arose from that investigation came to a premature end.
- (3) The Op Delhi Ds contend that they were improperly investigated, and should not have been prosecuted at all. To the extent that there was political interference impeding this investigation (a matter outside their knowledge) it was merely 'fighting fire with fire'. It would be quite artificial, in these circumstances, to divorce the reasons for the (unusual) termination of the prosecution against them from the reasons for its institution.

Attorney's General right to silence

7 The Commissioner's questions concerning the Attorney General's 'right to silence' on the reasons for the issue of the *nolle prosequi* are most conveniently dealt with together.

- Q4. *If so, can the Attorney General properly be asked why he discontinued the prosecution?*
- Q5. *If so, is the Attorney General entitled – or even required – by law to decline to answer the question in (2) above? (for the avoidance of doubt, the "question" referred to is that set out in (2), namely why the Attorney General discontinued the prosecution)*
- Q6. *Is the Inquiry entitled to draw inferences from a failure by the Attorney General to answer the question in (2) above?*

Q7. *In relation to questions (2) and (4) above, is the Inquiry either bound by, or alternatively required to afford persuasive weight to, the Judgment?*

8 As the Inquiry is aware, the Op Delhi Ds have made an application to the Supreme Court for their costs incurred in defending the prosecution that arose out of Op Delhi. In his judgment of 08 August 2023, Dudley CJ determined some preliminary issues concerning an application made by the Op Delhi Ds for disclosure. One issue he considered was whether the Attorney General was obliged to give his reasons for the entry of a *nolle prosequi*.

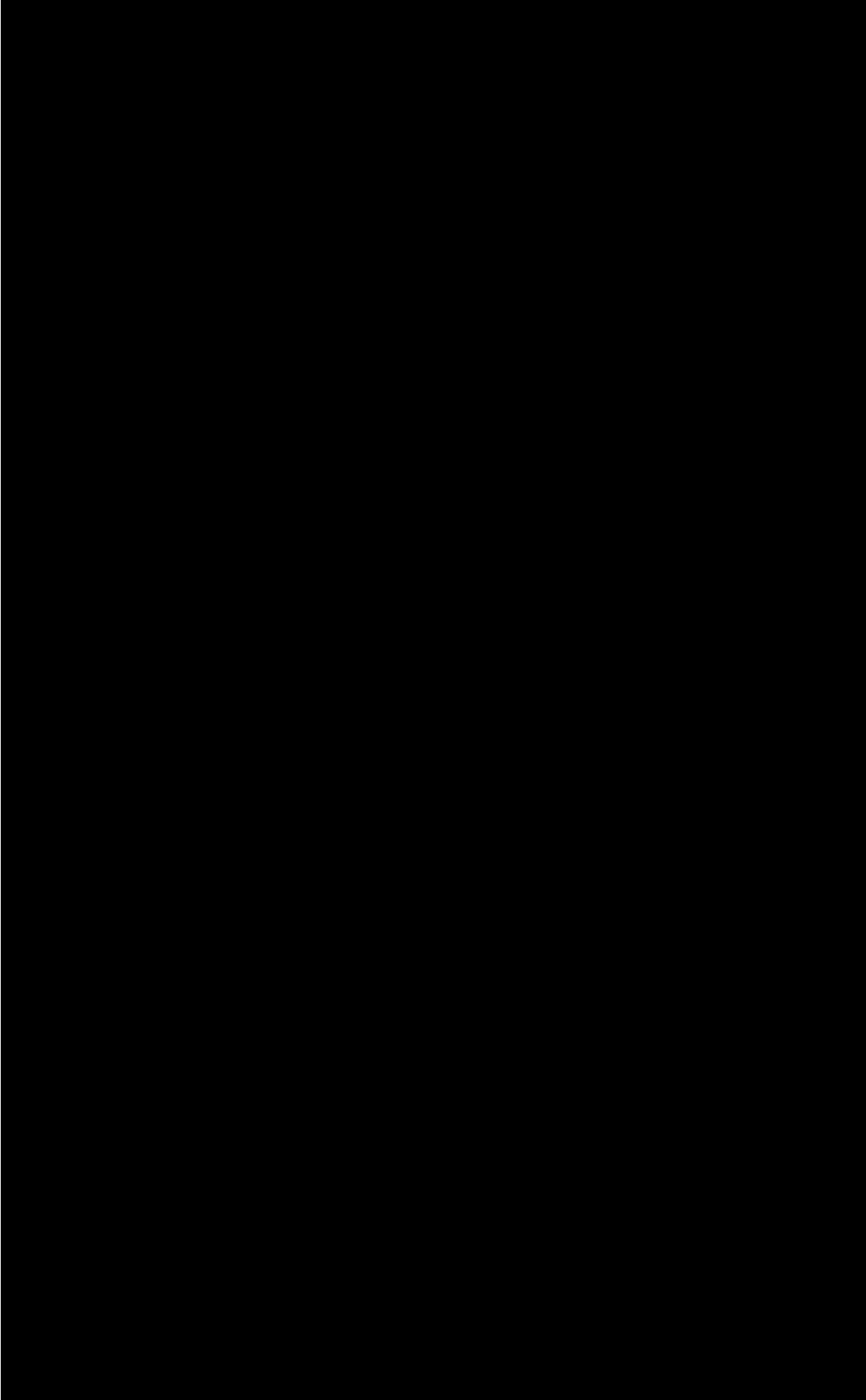
9 Relying on the Privy Council case of *Mohit v DPP of Mauritius* [2006] 1 WLR 3343 (PC), Dudley CJ concluded (at paragraphs 21-23) that the Attorney General may be asked for reasons, and may give them if chooses, but he is under no obligation to do so; furthermore, it may be proper to draw inferences from a failure to give reasons.

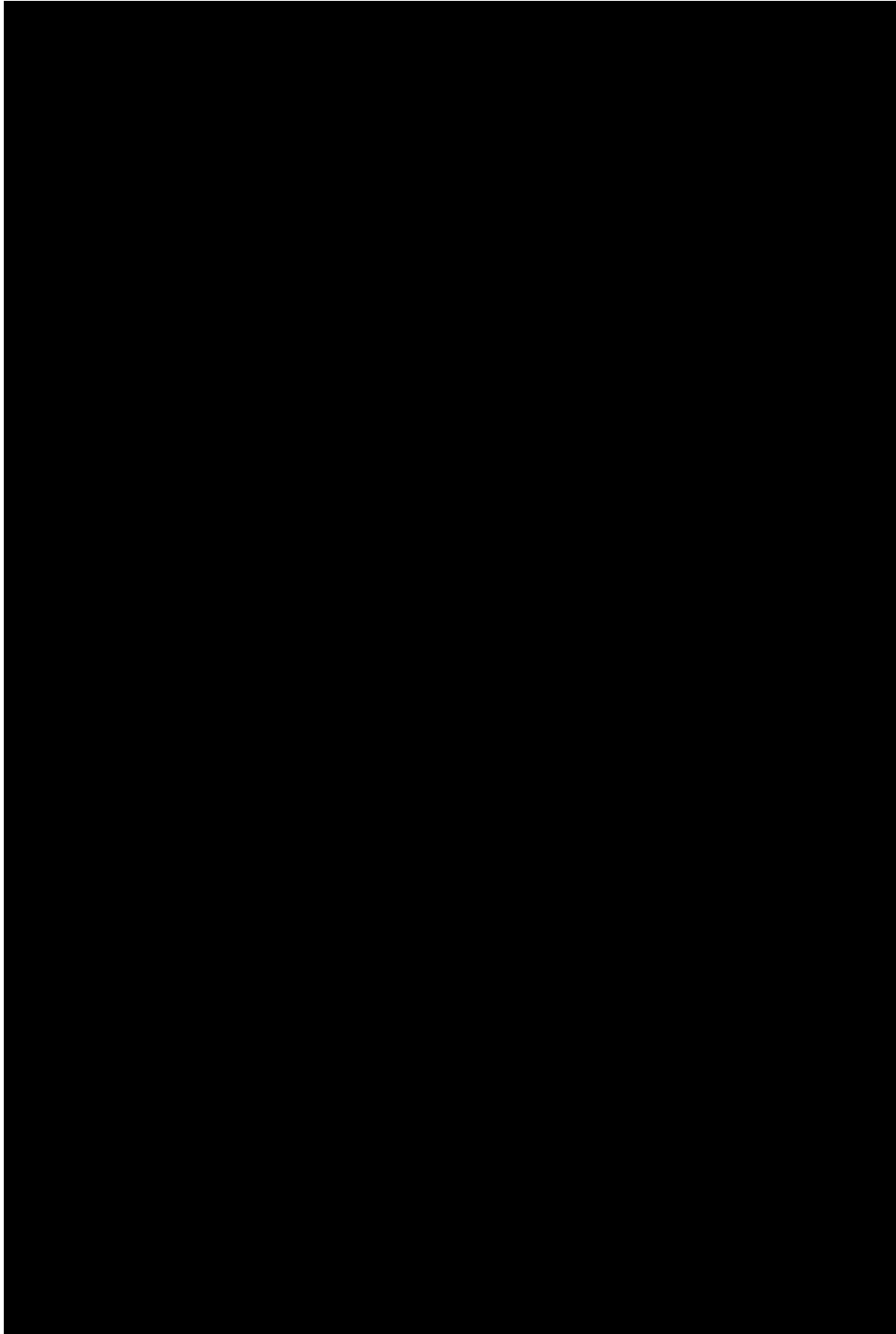
10 In reaching these conclusions Dudley CJ held that the construction adopted by the Privy Council for s72(6) of the Constitution of Mauritius must also be adopted for s59(6) of the Gibraltar Constitution. This is an unsurprising conclusion since both provisions are in identical terms. It is also a binding conclusion because it constitutes an operative determination by the Gibraltar Supreme Court on a matter of construction of Gibraltar law.

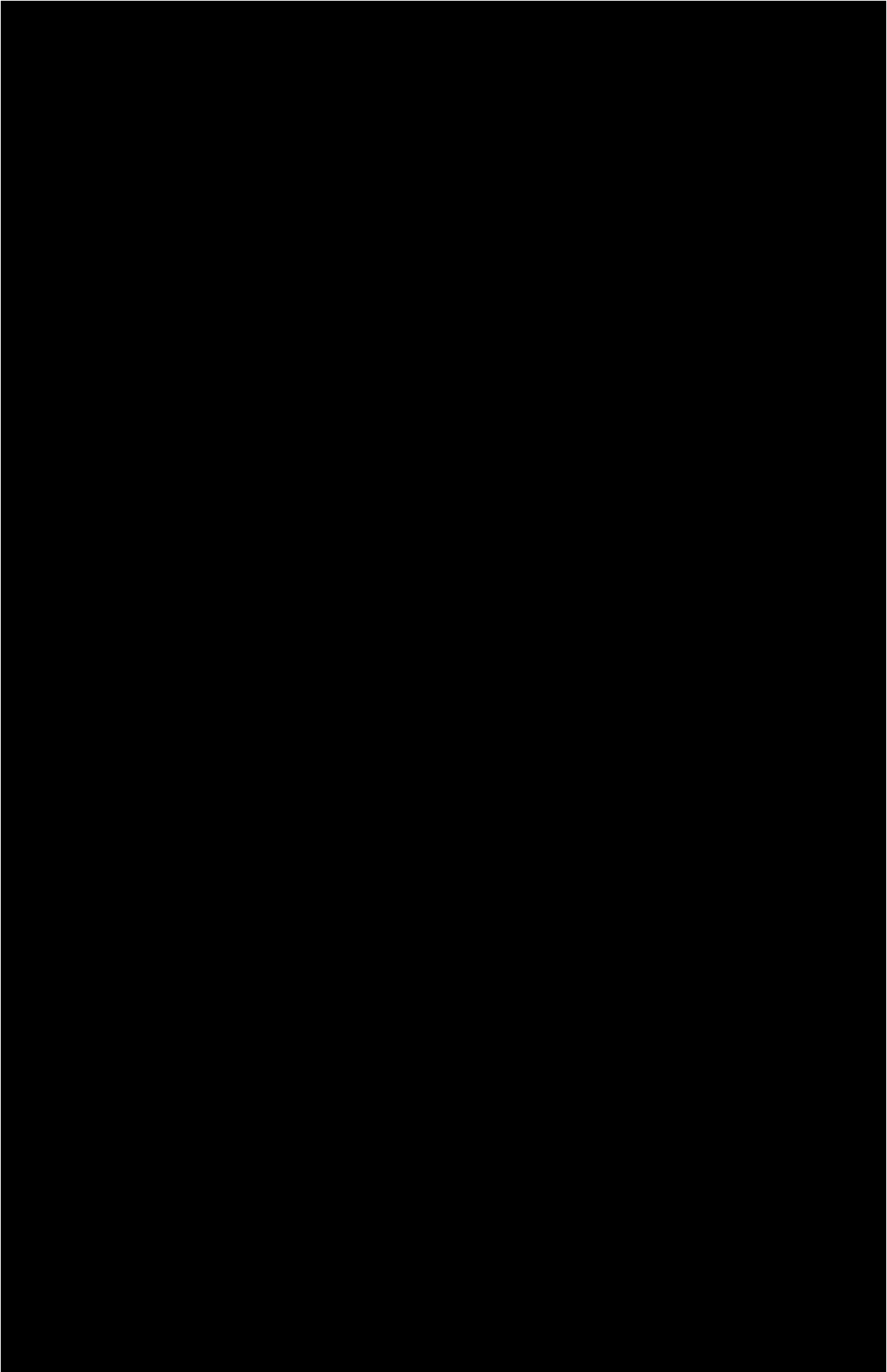
11 The Op Delhi Ds submit that it would be inconsistent with the construction adopted by the Supreme Court to find that there is any duty on the Attorney General to withhold reasons for the exercise of his power in s59 of the Constitution, or that it is impermissible for a finder of fact to draw inferences from a withholding of reasons.

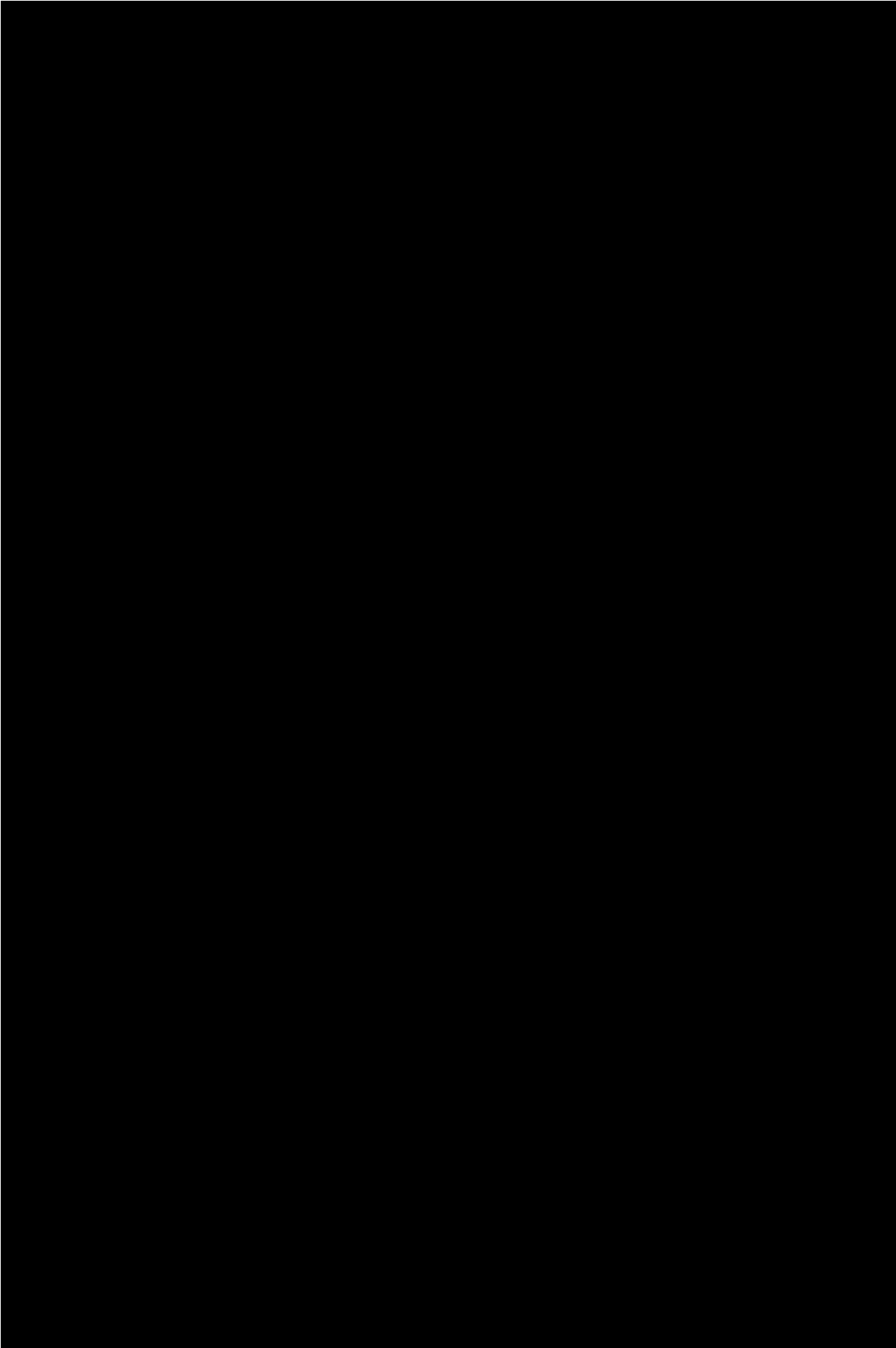
12 It follows that the Op Delhi Ds submit that the correct answers to the Commissioner's questions 4 to 6 are: 'yes' to Q4, 'entitled but not required' to Q5, and 'yes' to Q6.

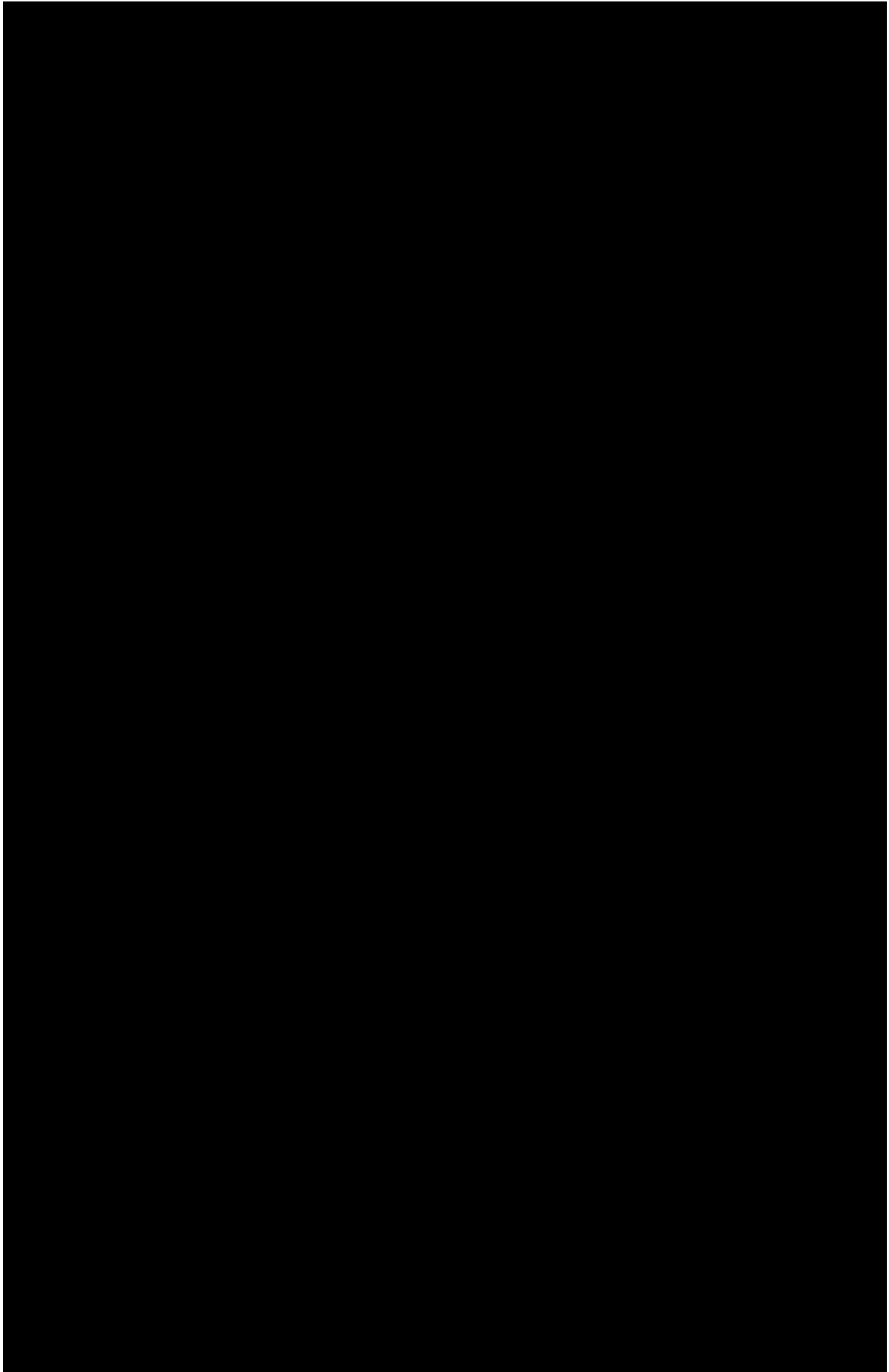
13 This is not because the Inquiry is directly bound by Dudley CJ's ruling (which, in any event, was produced in a very different context), but because this conclusion must follow from his interpretation of the Constitution, which is binding. The answer to Q7 is therefore 'not directly bound, but indirectly'.

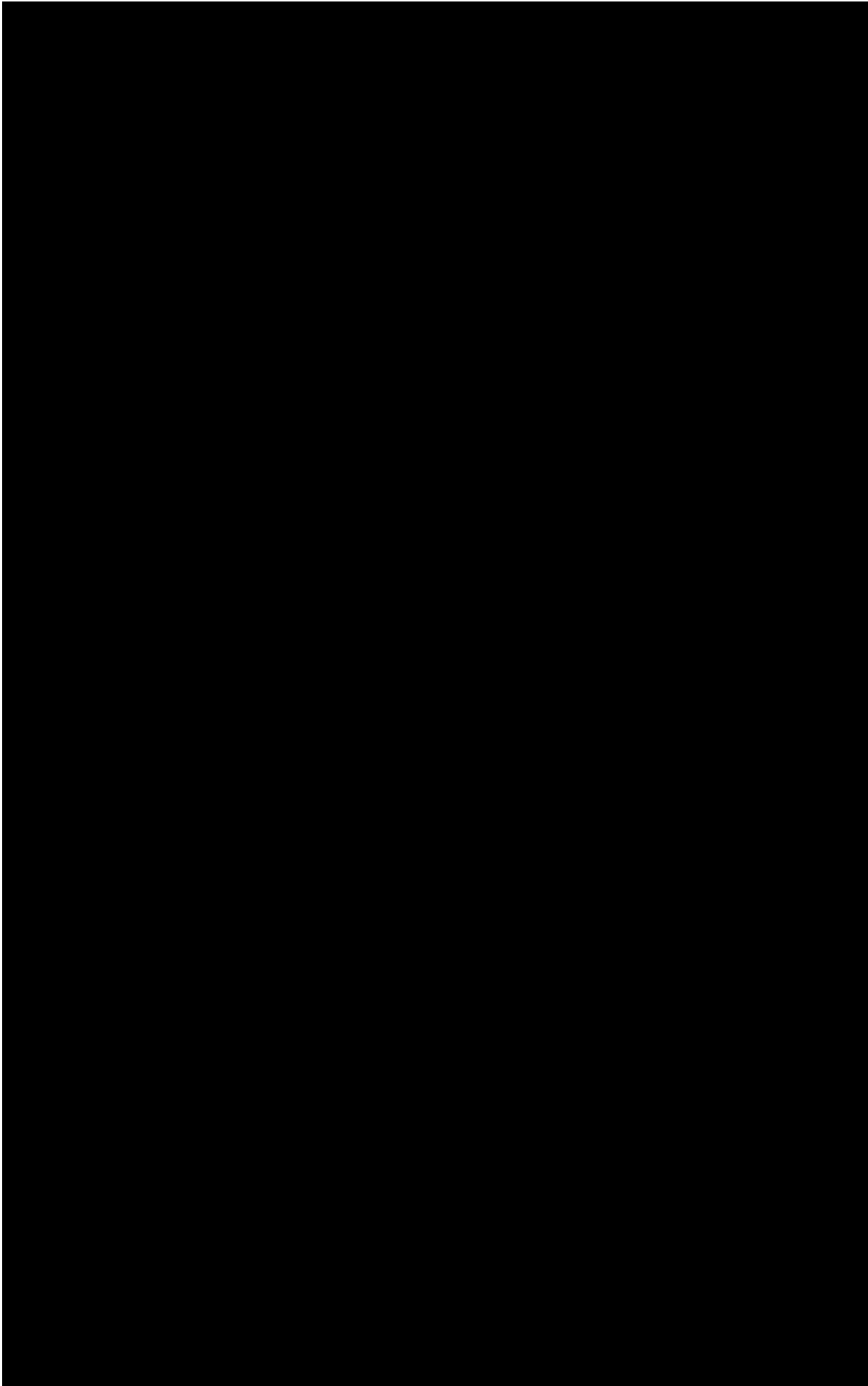


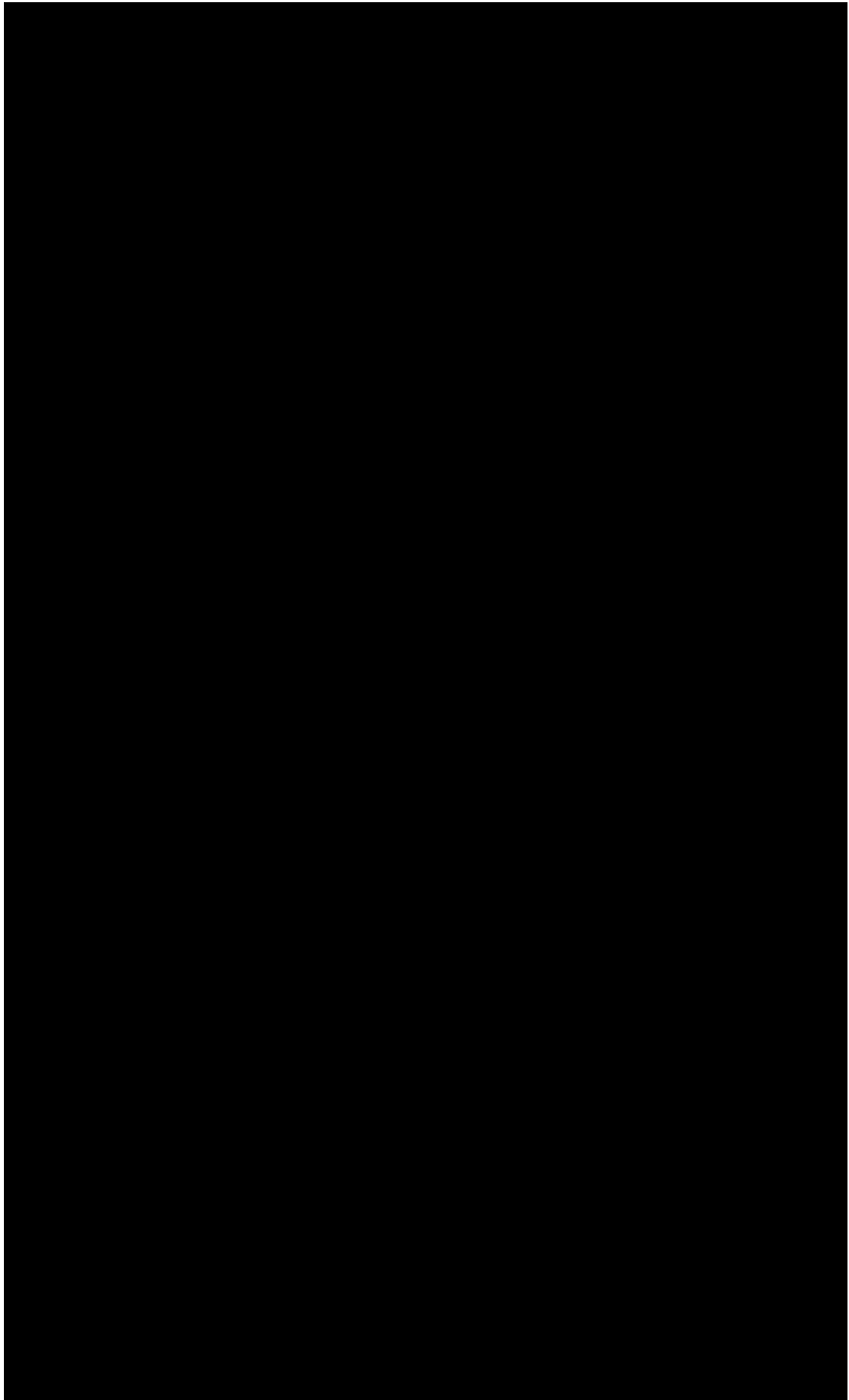


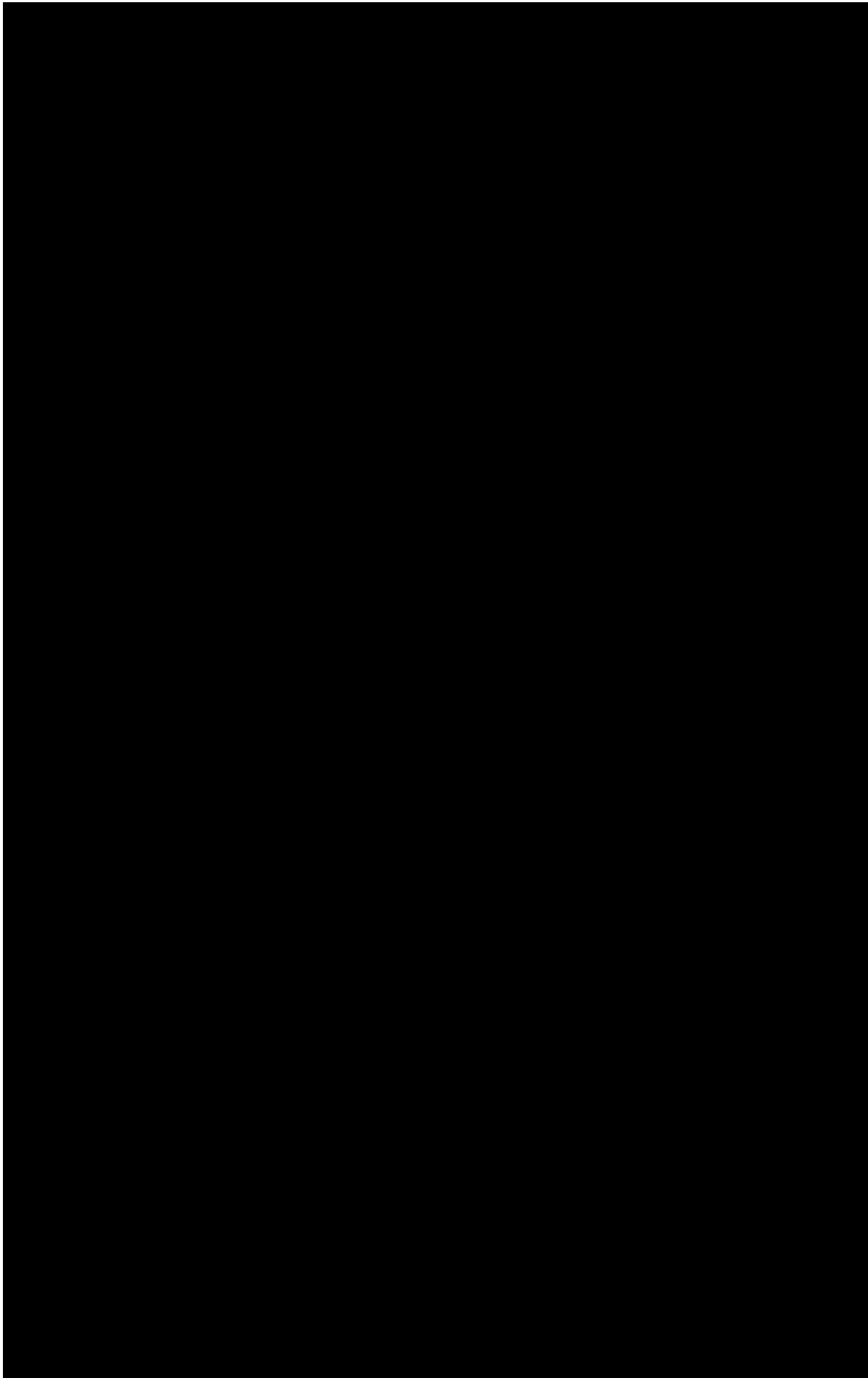


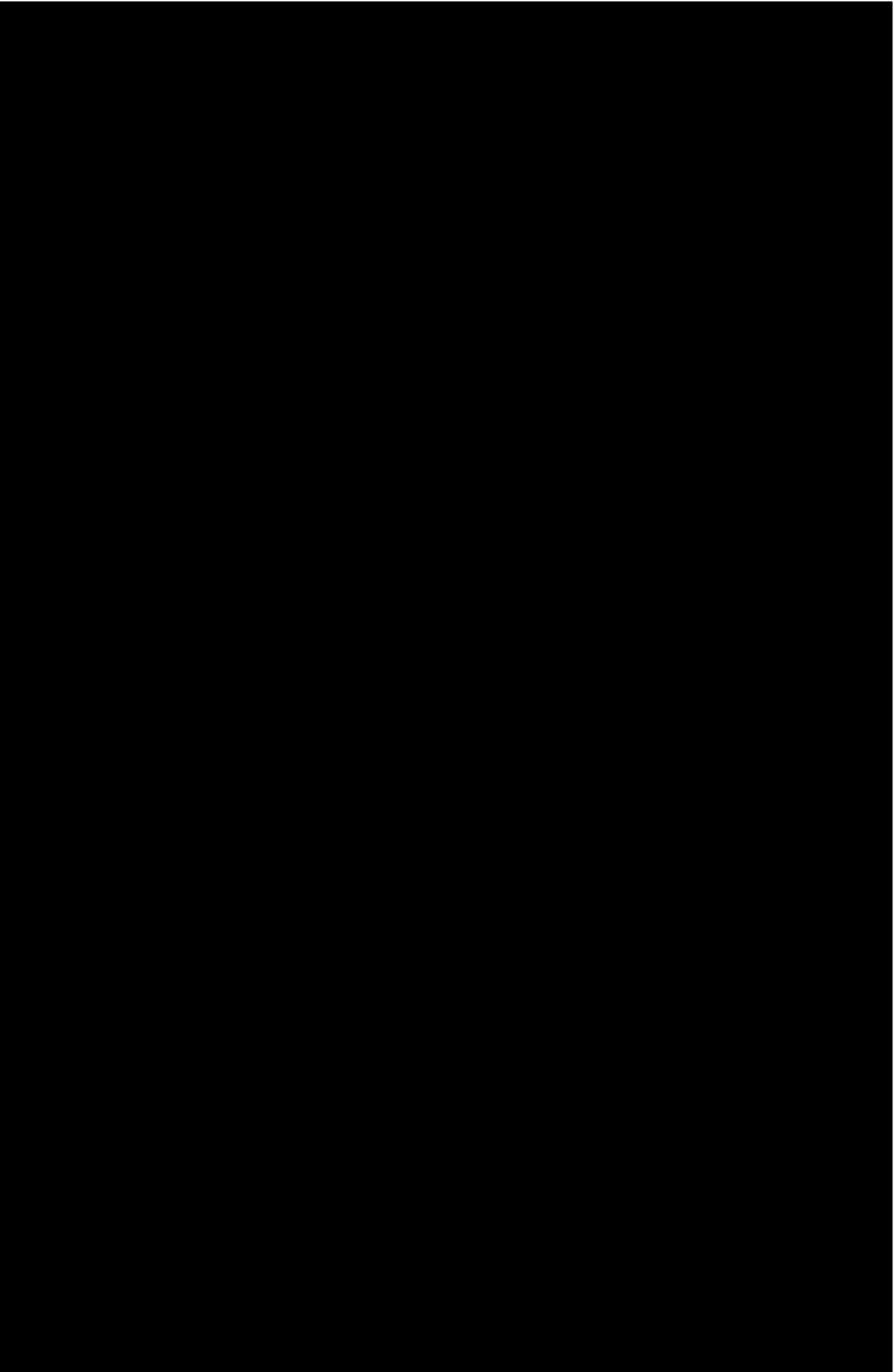


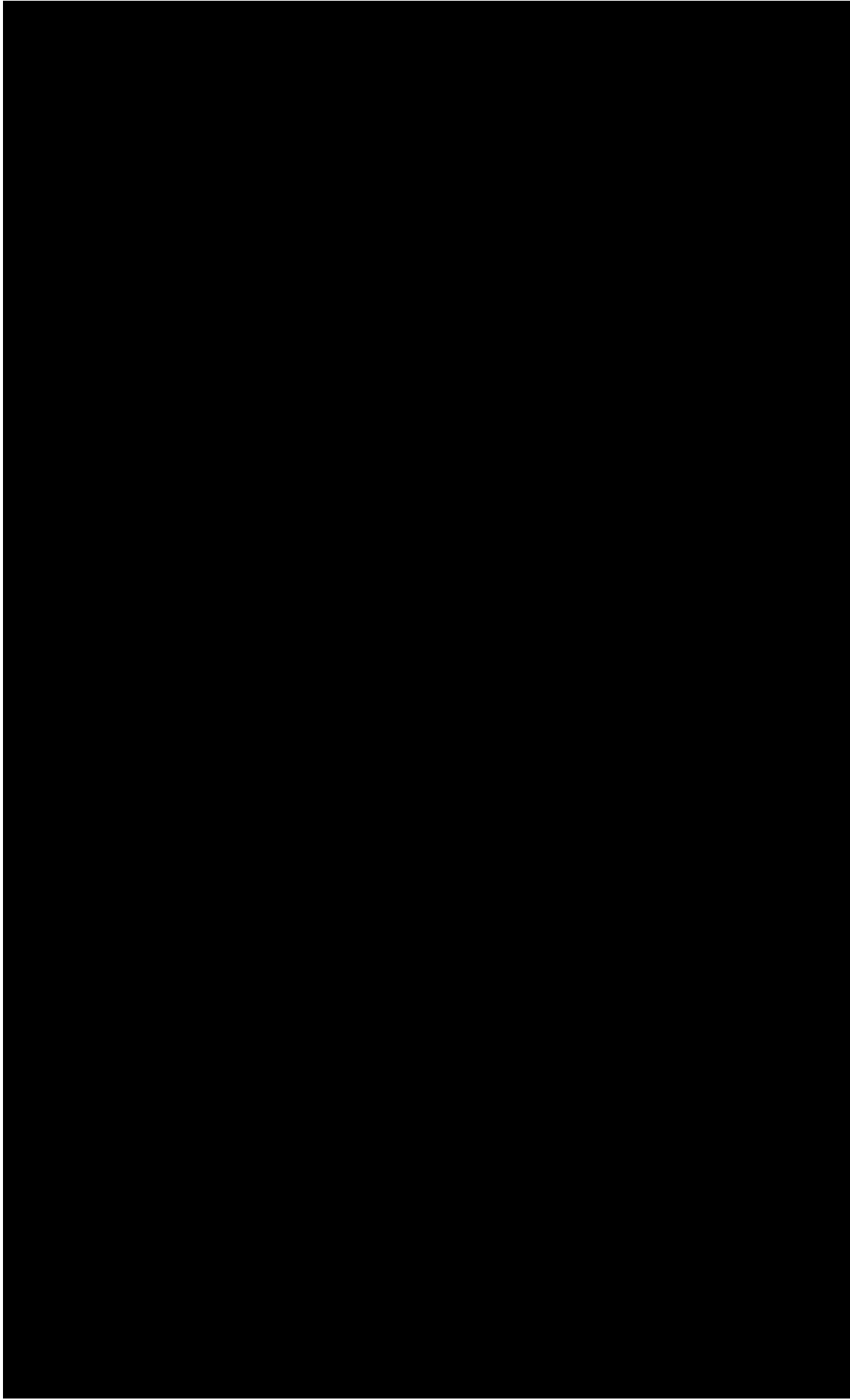


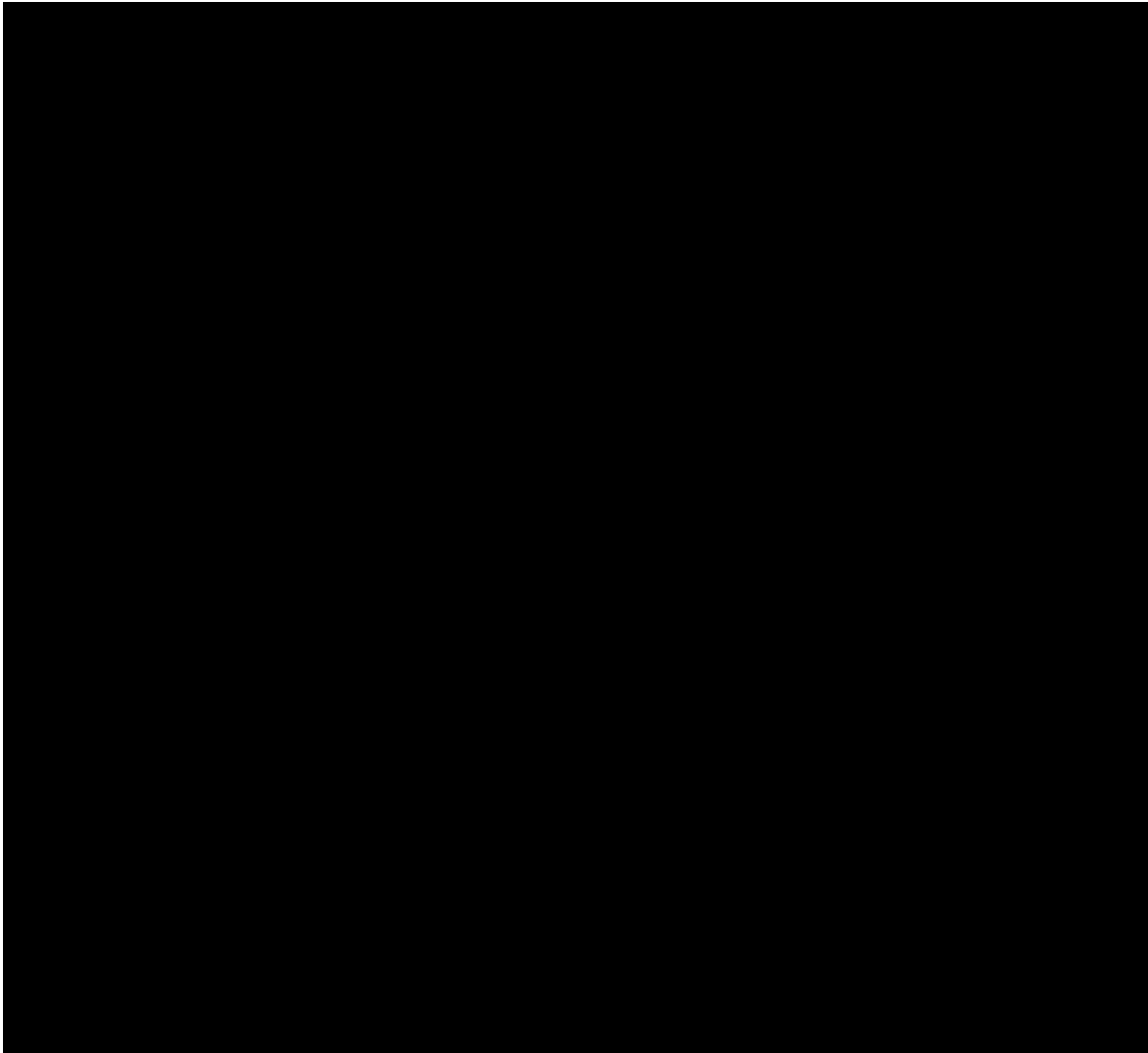












RGP Disclosure — Responsive Statements

42 Prior to the service of the material from the RGP on 13 October, the Op Delhi Ds did not consider it necessary to serve responsive statements, and so had not done so. Their view on this issue has changed since receiving this recent material. Other CPs may be in an analogous position.

43 The Op Delhi Ds invite the Inquiry to make directions for service of statements responding to issues raised in this recently served material.

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17 October 2023