

Commissions of Inquiry Act/Inquiry Act 2024

INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

Convened by a Commission issued by His Majesty's Government of Gibraltar on 4th
February 2022 in Legal Notice No.34 of 2022

RGP's Closing Submissions Inquiry 7 June 2024

A: Introduction:

1. These closing submissions have as their objective, the observations and recommendations that the RGP invite the Chairman to have regard to when he drafts his report after the Oral Closing Submissions due on the 25-26 June 2024 ("June Hearing"). They will be expanded and or explained further at the June Hearing as required.
2. It is hoped that they will assist the Chairman in his assessment *"into the reasons and circumstances leading to Mr Ian McGrail ceasing to be Commissioner of Police in June 2020 by taking early retirement."* ("**Inquiry Mandate**").
3. Additionally, they should be read alongside the RGP's Opening Submissions and the RGP's Opening Oral Submissions dated the 9 April 2024 (Transcript Day 2 Pages 1-39). **Annex A.**
4. They are split into: **Part A: Introduction; Part B: RGP's Evidential Conclusions and Observations; Part C: RGP's Conclusions on Statutory Framework; Part D: RGP's Suggested Recommendations; Part E: RGP's Concluding Remarks.**
5. The RGP submits that it would best assist the Chairman by explaining in **Part B**, in brief terms what it believes that the evidence given in all the written

witness statements, and during the 19 days of oral evidence (“April Hearing”) has suggested, or perhaps even borne out. The RGP does not believe that it is helpful to the Chairman for it to forensically try and persuade the Chairman by detailed reference to all the evidence that he presided over. It was evident to all, from the April Hearing that the Chairman had a very detailed grasp of the evidence and took very careful notes, repetition does not make evidence more persuasive. The RGP will then suggest the Chairman considers these evidential, or factual observations in light of the RGP’s views on the proper interpretation of the Constitution and Police Act addressed in **Part C**. Finally, and most importantly for the RGP in **Part D** it invites the Chairman to make specific recommendations whose sole purpose is to ensure that the lessons that are learnt, translate to steps and particularly practical actions and measures that will go a long way (the RGP believes) to guarantee that the Rule of Law prevails in Gibraltar, and importantly that the independence of the RGP can never be compromised in the future.

Part B: RGP’s Evidential Conclusions and Observations

Headline Observations.

6. The RGP and its individual officers have acted throughout the Inquiry and the events that were subject of consideration by the Inquiry in good faith, in accordance with its Policing Obligations and Code of Ethics (as further detailed in its Opening Submissions: **Annex A**) including when reacting to errors and or omissions by the RGP and any individual officers.
7. A wrongful process and procedure to bring about the removal of a serving Commissioner of Police (“**COP**”) in an unlawful manner (in breach of the Constitution 2006 (the ECHR) and Police Act 2006 and the rules of natural justice or fairness) was engaged in, irrespective of whether confidence in Mr McGrail had been irretrievably lost as suggested, or for the reasons given, or alternatively the reasons suggested by Mr McGrail. Those with Constitutional responsibilities to act as a check and balance on the executive failed to do so adequately or at all. There was an individual and collective failure to uphold the Rule of Law by safeguarding the Independence of the GPA or the RGP.

8. The GPA never lost confidence in Mr McGrail as a serving COP for the reasons suggested in their May 2020 letters to Mr McGrail, or at all, simply concluded that his position was untenable because the Chief Minister and Interim Governor had indicated they had lost all confidence in Mr McGrail as a serving COP for reasons that the GPA did not investigate, or know to be true or false.
9. The GPA therefore (whilst acting in good faith) failed to uphold the Rule of Law by safeguarding its own independence, and the independence of the RGP by properly resisting attempts by the executive to wrongfully exercise their powers (or perceived powers) without adherence to the provisions of the Constitution (the ECHR) the Police Act, and the rules of natural justice or fairness namely through any proper or fair process.
10. The RGP submits that there has appeared to have been a regrettable and substantial deviation by numerous parties to the important Nolan Principles referred to in the RGP's Opening Submissions that apply to public office holders¹.

Observations on Issues

11. Some brief overarching comments germane to all issues. The RGP maintains in this Inquiry that at all material times it has understood and complied with its Policing Obligations and has subscribed to ethical policing and Code of Ethics (as further detailed in its Opening Submissions)² and has never deviated from those obligations and principles so as to ensure the highest standards of integrity, probity and independence of policing in Gibraltar and as per section 44 of the Police Act, namely in summary to preserve the peace and prevent and detect crime and other infractions of the law without fear or favour whilst retaining public trust and confidence.
12. Whilst not infallible and immediately recognizing possibilities of improvement, the RGP involvement in all of the investigations and matters identified in the *Issues* has attempted to act with utmost professionalism, even where errors

¹ Transcript Day 2 9 April 2024 page 5-7 RGP Opening Submissions.

² Transcript Day 2 9 April 2024 page 4-5 RGP Opening Submissions

or omissions may have been made, by any individual officer, or officers or the organisation.

13. The RGP does not wish for the reasons given above to comment on every issue in forensic detail with reference to all specific evidence, however, in so far as what would appear to be the central issues it simply makes several observations mostly evident from the Agreed or Undisputed Facts or where in its opinion the evidence appears to have overwhelmingly (often without contradiction) made a position clear:

13.1 **Issue 1 – Airport Incident:**

13.1.1 The RGP had made it clear throughout that it considered this matter irrelevant. The primary reason is that this matter predates Mr McGrail's tenure as COP. Secondly the RGP's conduct was entirely vindicated at the highest level in the UK and in Gibraltar (both Airport incident and subsequent arrests) including the recognition by Rear Admiral A D Radakin (on behalf of the Joint Forces Command) in a letter on the 8 March 2017 to the then COP E Yome apologising to the RGP that the RGP had acted correctly. On 9 March 2017, a member of Foreign and Commonwealth Office staff emailed FP (copying ML, NP and Lt Gen Davis) stating: *"I just went to update Sir Alan Duncan [Secretary of State of the FCO] in relation to the events of 8 February and beyond. The Minister was very happy that we appear to have reached a good outcome. He asked me to pass on his personal gratitude to you, and the Commissioner of Police, for helping us get to this point."* On 10 March 2017, Lt Gen Davis sent an email to Mr Yome (copying FP and ML) offering *"deep gratitude to [Mr Yome] and [his] Police Officers for the efficacy and manner in which the RGP has conducted this investigation... in short a very tough job, very well done"*. A position echoed by the Chief Minister.

13.1.2 The suggestion now in contradiction, by both the Chief Minister and the Interim Governor is that the arrests that followed the Airport Incident was unnecessary or conducted in a less than diplomatic manner. This was investigated by the GPA and there were no negative findings. If that GPA investigation was flawed

because the MOD personnel were not interviewed, then one cannot ignore that the GPA requested an independent Inquiry, and it was not in their gift to call the same. The evidence was that this did not proceed because the MOD and Government did not want it to proceed for diplomatic reasons. The RGP officers (including Mr McGrail) cannot be blamed for the GPA section 19 Police Act process (if flawed) or the failure to carry out an independent Inquiry which was a recommendation of the Governor communicated by Mr Pyle and adopted by the GPA³.

13.1.3 Moreover, should there have been any issue (or residual issue) the appointment/selection process for the appointment by the Governor on the advice of the GPA of Mr McGrail (in May 2018) was the moment and appropriate forum for the matter to have featured. It did not and was not even raised by Mr Pyle who played an important role in the selection process.

13.1.4 Whatever one's views of the RGP methodology (which may be made to sound dramatic, but it asserts was standard) in this operation, it would defy natural justice to criticise this operation (that occurred 7 years ago) through the prism of hindsight as a basis for criticising the RGP (certainly without a detailed hearing and the adducing of evidence).

13.1.5 However, notwithstanding the RGP's view that this issue should be irrelevant to the Inquiry Mandate, regrettably it is not, because what this Incident does do (alongside others) is inform the Chairman, as to Mr Pyle's pre-disposition (evident in May 2020): against Mr McGrail and the RGP; preferring and giving more weight to information given by MOD personnel over locals (without any objective evidence, and or informed investigation) relying far too often on rumour and anecdotal golf course, or restaurant chatter. This came across loud and clear in his evidence. ⁴Mr Pyle's self-confessed deep ambition for non-Gibraltarian management is of some concern (and perhaps has been open to manipulation).

³ Transcript Day 19 May 2024 page 19

⁴ Transcript Day 19 9 May 2024 page 30-35

Whilst the RGP has no issue with seeking talent from outside Gibraltar, the appointment of a non-Gibraltar based person as COP where suitable local candidates are present should be at least viewed with a little caution. The best person for the job is the mantra that should be adopted, without regard to place of origin. Additionally, Mr Pyle has shown a willingness to over dramatize uniformed and un-investigated explanations and events, reaching unsubstantiated, but serious conclusions and making very serious, erroneous accusations. Moreover, in doing so he often employs (or at least adopts) emotive and descriptive references ("*Life on Mars*", "*Sweeney*").

13.1.6 This pattern he has subsequently repeated on Issue 3, ("*Miami Vice*", "*Weaponised*,") with an apparent willingness to convert possible individual errors (subject to due process: namely a second Coroner's Inquest) into extraordinary suggestions of RGP organisational recklessness and discriminatory operational and prosecutorial treatment by the RGP and OCPL/DPP (towards non-Gibraltarian deaths).⁵ It is important to record that this matter was investigated by the Metropolitan Police at the invitation of the RGP and no action was taken due to jurisdictional advice by the DPP not because of any disinclination by the RGP. The RGP takes the opportunity to highlight the insensitivity of this approach. Words really do matter. The tragedy for the deceased and family (Spanish and Portuguese) in this incident is real, irrespective of their nationality. The impact on the involved officers who have faced a finding of unlawful killing by a Gibraltarian Coroner, upheld by a Gibraltarian Supreme Court Chief Justice and overturned by English Gibraltar Court of Appeal judges, is both raw and current. The possible consequences of reactions towards the said officers or RGP from local Spanish Organised Crime Gang ("*OCG*") to whom the deceased belonged "*the Castanitas*" cannot be ignored.

⁵ Transcript Day 19 9 May 2024 pages 50-52, 53-58.

13.2 **Issue 2 – Assault Investigation:**

13.2.1 In this matter that again predates Mr McGrail’s tenure as COP (so the RGP consider irrelevant) the RGP’s conduct in investigations was entirely vindicated a position recognised by the Chairman⁶.

13.2.2 The RGP maintain that this also should be irrelevant to the Inquiry Mandate, but now assumes some relevance, as once again as evident from Mr Pyle’s evidence, it demonstrates his predisposition towards anything that appears to contradict Mr McGrail; his giving of unnatural weight and importance to MOD personnel views in the face of alternatives; and his lack of thoroughness, or desire to make an informed and cautious assessment, before reaching conclusions.

13.3 **Issue 3 – Incident at Sea:**

13.3.1 In so far as Operation Kram, Issue 3 the RGP reacted to a difficult and tragic situation in a thoroughly professional manner in accordance with its Policing Obligations and RGP Policing Policy. This is an ongoing matter: the Gibraltar Court of Appeal has heard the appeal brought by the relevant retired police officers on the Judicial Review of the inquest directions on Wednesday the 13th of March. It has in its judgment of the 19 of April 2024 rejected the findings of the Gibraltar Coroner of unlawful killing and the decision of the Gibraltar Chief Justice in the Supreme Court to uphold this finding. This will now result in another inquest.

13.3.2 As explained above the RGP regrets that Mr Pyle has been somewhat careless, or even reckless with his language when expressing his views on Issue 3, but it does fall into his modus operandi and underlines his predisposition, at the material time to welcome, or accept criticism against the RGP (without testing it) as well as information against McGrail in particular. More specifically if such criticism finds its roots in MOD sources.

13.3.3 On the fundamental issue that the Interim Governor suggested in his evidence as to whether Mr McGrail misled him on the precise

⁶ Transcript Day 19 9 May 2024 pages 43.

location of collision, the RGP has no basis to understand why Mr McGrail, or indeed any RGP officer, would be motivated to do so. Of some surprise to the RGP was that at no point was this concern about clarity mentioned to Mr McGrail or other RGP officer or the GPA.

13.3.4 However, the RGP accepts that this is a matter for Chairman based on the evidence provided whilst insisting that the RGP as an organisation would not knowingly or recklessly mislead any Governor, GPA, or Chief Minister, nor have reasons or motive to do so. Such behaviour would fly in the face of its Policing Obligations or its Code of Ethics.

13.3.5 The RGP is surprised this matter was not raised with the RGP soon after the 8 March 2020, or with the GPA or any other person.

13.4 **Issue 4 – HMICFRS.**

13.4.1 9 April 2020 HMICFRS Report following the 2019 (backwards looking) audit the RGP recognized that it needed to make improvements, which it has made, and are recognized in the April 2022 and HMICFRS Report. The RGP continues to try and maintain the highest levels. [From extract from the 2022 HMICFRS report:

“We are pleased to report that the RGP has made good progress since 2020. The force’s senior leadership team has prioritised addressing our recommendations and AFIs. This is part of its efforts to improve the force’s effectiveness, efficiency and legitimacy. [...] the work they have done to address our recommendations and AFIs has significantly improved the effectiveness and efficiency of the force in many areas.”]

13.4.2 The RGP notes that it appeared that all parties namely the Interim Governor, the Chief Minister, the Minister for Justice and the GPA were willing to work with the senior RGP management team including Mr McGrail certainly until May 2020.⁷

⁷ Transcript Day 18 8 May 2024 page 140-141

13.5 Issue 5 – Conspiracy Investigation

13.5.1 On issue 5, more specifically known as Operation Dehli, the unchallenged evidence is that the RGP conducted a thoroughly professional investigation in accordance with its Policing Obligations as recognized in previous preliminary hearings by Government Parties on the following terms “...*the thoroughness, professionalism and forensic astuteness with which the RGP conducted the investigation has not been subject to any criticism.*”⁸

13.5.2 The Investigation by the RGP was conducted by SIO Paul Richardson and OIC Mark Wyan (not Mr McGrail) both recognized in evidence by DPP Christian Rocca KC as “good officers”. The investigation was recognized as “thorough” and professional. The RGP were well aware of its sensitivities and at COP McGrail’s instigation the DPP/OCPL were consulted in relation to the NDM.⁹

13.5.3 The evidence leaves beyond doubt (NDM, Charging Report sent to the DPP on the 1 April 2020 by email, zoom call of the 8 April 2020 between DPP Mr Rocca KC, Crown Counsel M Zammit, SIO Paul Richardson and OIC Mark Wyan) that a search warrant and an interview under caution were not only clearly operational decision, only the purview of the RGP, but well-advertised next steps and known. It was also clearly known that these operational steps would be very likely challenged by Mr Levy KC and Hassans Law using its substantial resources.

13.5.4 At no time prior to the 12 May 2020 did the DPP Mr Rocca KC, or OCPL indicate that the RGP should not take these steps. The AG accepted that this information was clearly in front of the DPP and OCPL and no such instruction was given by them.¹⁰

⁸ Transcript 5PH line 8-14 27 October 2023

⁹ Transcript Day 10 19 April 2024 page 181-186.

¹⁰ Transcript Day 12 26 April 2024 pages 202-205.

- 13.5.5 All witnesses (including the Chief Minister and AG) accepted, indeed some such as the DPP Mr Rocca KC insisted, that operational decisions are the RGP's, and can only be made by the RGP, and specifically the relevant officers (SIO Paul Richardson and OIC Mark Wyan) without any interference whatsoever.
- 13.5.6 The Stipendiary Magistrate granted the search warrants and an amendment thereof ("Search Warrants") on the 6 and 7 May 2020 (respectively) following a 1–2-hour hearing ("SW Hearing"). Sergeant Paul Clarke presented the 38-page Information ("Information") in the presence of SIO Paul Richardson and DI Goldwin that satisfied the Judge on all aspects.
- 13.5.7 The RGP submits that it would be entirely inappropriate and unjust for the Chairman to express any views on whether the application for the Search Warrants could have been better presented, let alone a suggestion it could have been defective or in any way flawed.
- 13.5.8 Firstly, and primarily because it is irrelevant (or at least not necessary) to the Inquiry Mandate, the fact is the Search Warrants were granted and any challenge could have been made by Mr Levy KC, by Judicial Review within 3 months and were not, despite a legal team that included expertise locally and Counsel from UK Chambers.
- 13.5.9 Secondly because this Inquiry is simply not the forum for such a discussion and conclusion. The RGP would need to prepare and address the matter in detail. In the recent decision on the 19 April 2024 of the Chief Justice in the Supreme Court in *The King on the application of (1) Verralls Legal Limited (2) Christopher (3) Jasmin Miles and (1) The COP (2) The Magistrates Court 2021/Misc/040* ("Miles JR") (following 5 days of hearing) the challenge to a search warrant against a Barrister's office and home (where a production Order was an alternative) was dismissed. The Chief Justice relying on numerous leading, persuasive and binding English authorities concluded that Mr C Pitto the same Stipendiary Magistrate as in this matter, was entitled to rely on the details in the Information

(far briefer than in this case,8 pages) and conclude despite the Stipendiary Magistrate not giving reasons, that on an objective basis he had the requisite belief that an indictable offence had been committed, and the risk of evidence being destroyed, altered, defaced, or concealed existed. This demonstrates the importance of a separate and dedicated process before any determination should be made.

13.5.10 Thirdly, because in their evidence Mr Levy KC, his counsel Mr Baglietto KC, and quite alarmingly the Chief Minister,¹¹ all menacingly signaled that the RGP and presumably current and past officers are likely to face legal actions (given the 3-month time limited for Judicial review expired 11 August 2020) probably for the Tort of Misfeasance.

13.5.11 The RGP welcomes the indication given by CTI in his oral Opening Submissions (notwithstanding paragraph 81a of his Opening written submissions) that the Chairman is not minded to make a determination on this¹². This does not preclude the Chairman from concluding that the RGP would benefit from legal support even at the stage of applying for search warrants, or production orders, something the RGP welcomes and gave evidence to that effect.

13.5.12 SIO Paul Richardson and OIC Mark Wyan attended the offices of Hassans Law on the 12 May 2020 and Mr Levy KC met them there in due course. In accordance with their operational plan (to be as discrete and respectful as possible) in exchange for the voluntary release of Mr Levy KC's devices (iPhone after approximately 9 hours) the Search Warrants were never actually executed.

13.5.13 Mr McGrail communicated by WhatsApp with the AG Mr Llamas KC and the Chief Minister only in their professional capacities (given reputational risks) at 12:35 explaining the events that were unfolding as a matter of courtesy.

¹¹ Transcript JL: Day 8 17 April 2024 page 165,241,247: LB: Day 9 18 April 2024 page 204-206; FP Day 16 6 May 2024 page 182-184.

¹² Transcript Day 1 8 April 2024 page 191.

- 13.5.14 Mr Picardo KC initial response by WhatsApp, in immediate response, was to thank Mr McGrail for the courtesy, express the view that he thought it was a bad decision, but explained that given his personal relationship with Mr Levy he would not comment further.¹³
- 13.5.15 Almost immediately after Mr McGrail was then summoned to the Cabinet Room to a meeting with both the Chief Minister and the AG. At that meeting it is not disputed that the Chief Minister criticized Mr McGrail and the RGP actions angrily (“**12 May Meeting**”).
- 13.5.16 The Chief Minister accepted, in evidence that he had not spoken to DPP Mr Rocca KC, Crown Counsel Mr Zammit, SIO Paul Richardson, OIC Mark Wyan or Stipendiary Magistrate and had no evidential knowledge of the basis for the RGP suspicions and beliefs that Mr Levy KC was a suspect and that the executive action taken was necessary.¹⁴
- 13.5.17 The RGP does not think it is necessary to chronologically set out Mr Picardo KC involvement thereafter (others will) but it seems undisputed that he became intrinsically involved together with Mr Levy KC and Mr Baglietto KC in attempts to challenge the RGP’s actions including procuring the return of the devices belonging to Mr Levy KC.
- 13.5.18 It is also undisputed that Mr Picardo KC did not hesitate in communicating confidential information obtained from the RGP or AG to Mr Levy KC (a criminal suspect) Mr Baglietto KC (a criminal suspects lawyer) and to whoever would listen to him, namely the public at large. This sharing of information extended extraordinarily to information that was legal advice given (or erroneously perceived by him to have been given) by the OCPL or DPP to the RGP and received by the Chief Minister in that capacity.

¹³ Transcript Day 16 6 May 2024 page 165-166.

¹⁴ Transcript Day 16 6 May 2024 page 169, Day 17 7 May 2024 page 63-65. .

13.5.19 Such an approach to confidentiality really causes concern for sensible future confidential engagement by the RGP with the executive and particularly with the Chief Minister or Government who has obligations and duties under the Police Act.

13.5.20 On the 12 May 2020 and during the next few days the AG engaged with Mr Levy KC and Mr Baglietto KC. Mr Baglietto KC communicated his client's concerns to the AG on the 12 May 2020 and threatened then and in subsequent email/letters immediate legal action.

13.5.21 The AG acknowledges that he had no evidential knowledge, very limited criminal experience,¹⁵ but took it upon himself to engage in a capacity that appeared to the RGP to reflect that of interlocutor/negotiator/facilitator between Mr Baglietto KC and the RGP. The AG perceived a normal legal challenge to executive action like a production order, or a search warrant or an arrest as a "*Crisis*", because it was Mr Levy KC who was the suspect, using similar emotive words in evidence to describe the Hassans Legal challenge, when all it should have been (in the RGP's view) is the exercise of rights enjoyed by any citizen (public law rights) to challenge executive action. It should have been met with a well-resourced response, particularly given it was foreseen and forewarned.

13.5.22 On the 13, 15 and subsequently the 20 May, meetings were held (with participants varying to some degree but including the AG Mr Llamas KC, DPP Mr Rocca KC, Solicitor General Mr Devincenzi, COP McGrail and, SIO Paul Richardson and OIC Mark Wyan) to on the face of it, address the foreseen Hassans Legal challenge to their executive action.

13.5.23 The RGP perceived these meetings to be facilitation, negotiation, problem solving and dealing with the Hassans Legal challenge, in a manner that would not be described as normal

¹⁵ Transcript Day 11 25 April 2024 page 172: Day 12 26 April 2024 page 202-209.

practice, rather highly unusual and not appropriate.¹⁶ The RGP intended executive actions, namely a search of the devices belonging to Mr Levy KC held by the RGP, were not as a result conducted and there was no interview under caution. Instead Mr Levy KC was allowed to give a statement after being forwarded about the subject matter in some detail and not under caution.

13.5.24 The RGP accept that they ultimately agreed to the variations in how to deal with Mr Levy KC, as they evolved from those meetings, but maintain that they were subjected to some pressure, or if not to pressure, at the very least influence.

13.5.25 The RGP recognized that some support (by the AG and DPP) was given but crucially that they did not receive adequate support, or a level of support that they felt adequately protected. They felt they did not have their own independent counsel. The RGP do not criticize the DPP but cannot consider the AG's role in the same light.

13.5.26 The RGP contrast this case with others such as the Miles JR where their executive action (where legal challenges were also anticipated) was supported legally, so that any legal challenge in a Court of Law was faced down with a legal team, be it the DPP, the OCPL, or outsourced to external counsel.

13.6 **Issue 6 – Federation Complaints.**

13.6.1 The RGP like the GPA were not aware of any GPF complaints.

13.6.2 The RGP does not consider suggestions of informal complaints made via anecdotal sources, or via consideration of newspaper (Panorama) reports as suggested by Mr Pyle could, or certainly should be relevant and if they were given relevance by Mr Pyle, as he seemed to suggest, they speak to his disposition previously discussed.

¹⁶ Transcript Day 12 12 April 2024 pages 195-203.

13.7 **Issue 7 – Alcaidesa Claims**

The RGP suggests these must be irrelevant. This matter that also predates Mr McGrail's tenure as COP the RGP understood the issues here and addressed any perceived failings with a thorough and professional internal investigation.

13.8 **Issue 8-Issue: 29 May Letter, Issue 9 Section 13 Issue. Issue 10. the GPA Process**

13.8.1 The RGP submits that these three issues can be addressed collectively.

13.8.2 The RGP was not in the 12 May Meeting, so it is for the Chairman to determine this matter, but the RGP observes that the nature of the angry interference in operational matters in the 12 May Meeting should not have happened and inevitably created a breeding ground for possible misunderstanding.

13.8.3 Irrespective it is clear that the position if as described by Mr Picardo KC was corrected and recognized as such by the DPP in his conversation with the AG and by the 13 May 2020 meeting rectified and advised to the Chief Minister thereafter (and before the 15 May 2020 engagement with Mr Pyle or the 18 May 2020 meeting with Mr Pyle and Dr Britto).

13.8.4 The RGP cannot understand why there was no further engagement by the Chief Minister with the then COP Mr McGrail, to try and resolve issues, between then and the 9 June 2020.

13.8.5 Of specific concern to the RGP is that there appears to have been no process, or proper process adopted by either the Chief Minister or the Interim Governor in the steps taken after the 15 May 2020 to address their perceived concerns with the Mr McGrail, the most senior officer of the RGP, to try and resolve issues. Both have powers under the Police Act (section 15 and 12 respectively) to engage with Mr McGrail (on this matter) and neither chose to engage those, or other less formal methods.

- 13.8.6 The Chief Minister could (as he did in relation to the Kram: Incident at Sea Issue 3) have exercised his section 15 Powers to enquire as to the suitability of the methodology employed in the Operational Delhi Issue 5, or similar actions involving Lawyers (given his apparent concerns) and reputational consequences to have procured sufficient detail, before forming any views, or reaching any uninformed conclusions adverse to the RGP handling of this matter. The response to the Section 15 Letter in Operation Kram took 7 days to be received and there is no reason to believe that a similar timescale could not have been adopted.
- 13.8.7 Even if as they both have suggested they had lost confidence in a COP, in this case Mr McGrail for reasons they explain (a matter for the Chairman) then the RGP believe that either inviting the GPA to utilize their section 34 powers or resorting (even if possible) to section 13f, without any constructive engagement is most worrying.
- 13.8.8 The process which was chosen given the overwhelming evidence (including that of both Mr Picardo and Mr Pyle) the RGP suggests was borne out of a desire to remove Mr McGrail without any adherence to the Police Act, or without regard to the importance under the Constitution to respect the independence of the GPA, and thereby the RGP.
- 13.8.9 Taken even at its highest, and assuming Mr Picardo KC and Mr Pyle, versions of events are to be accepted, or preferred, they were complainants (albeit interested and probably conflicted).
- 13.8.10 It was incumbent, the RGP submits, for them to have reduced their complaints to writing, communicated those complaints formally to the GPA and allow the GPA appropriate time, space and independence to consider the complaints. The GPA could then have properly engaged with the section 34 process. All parties appear to agree that this should involve a process that is neither predetermined, nor inevitable, and should subscribe to the

Constitutional, ECHR rights to a fair hearing (that every person should enjoy) or those at least identified in section 34 itself.

13.8.11 None of that happened although there was a fig leaf pretense at subscription to a process in some of the language used in the GPA letters (drafted largely by Mr Picardo KC) for Dr Britto.

13.8.12 The RGP believes Dr Britto (who they respect) but who shy's away from confrontation was treated unfairly, by both the Chief Minister and the Interim Governor (who know Dr Britto well) in the meeting of the 18 May 2020 and thereafter.

13.8.13 To advise a person of that disposition that they must do "their duty" or else section 13f powers (to force the COP to resign) would probably be employed, was tantamount to an order that they knew, or should have known may well have resulted in the outcome they desired, namely the removal of Mr McGrail under section 34. Indeed, it is undisputed that it would have happened had the subsequent meeting of the GPA been quorate.

13.8.14 Evidence was heard from the former Chairman of the GPA, Mr Goncalves of the importance of independence of the GPA and RGP.¹⁷ Equally Mr Lavarello gave evidence that the GPA role included preventing undue influence on the RGP from the Chief Minister or the Governor. The latter gave evidence that had the full facts been known to the GPA, the outcome may have been very different.

13.8.15 Add to the process adopted, the haste that was encouraged by the Chief Minister and Interim Governor (of 7 days) and it is difficult to imagine (for the RGP) a more flawed and unfair process.

13.8.16 The RGP submits, as it did in its opening submissions, that that once section 34 process was discontinued for procedural failings the Interim Governor did not have the power under 13f available to him. The decision by the GPA not to exercise powers under

¹⁷ Transcript JG: Day 14 28 April 2024 page 109: EL: Day 14 28 April 2024 page 234

section 34, whether for procedural reasons or otherwise, cannot constitute a default. By analogy, if one is tried and acquitted, albeit for procedural reasons, it is not a default. In this case the GPA did not fail or refuse to exercise or discharge a power, they did so wrongly.

13.8.17 If they believed in the complaints, they could have restarted the process correctly, albeit cured any perceived bias by alternative methods, including appropriate impartial delegation. They did not. It was not Constitutionally open to them to disengage and look the other way, nor could the Interim Governor exercise his powers under section 13f.

13.8.18 However, even if the RGP is wrong in this analysis, the Interim Governor could not avoid a fair process and Mr Pyle appears, at least in his oral evidence, to accept that such a fair process should have been afforded to Mr McGrail (as he insists should have been afforded to MOD personnel in the GPA process post Airport Incident). It was not.

13.8.19 If Mr Pyle felt that he was already biased and compromised and could not have afforded such a fair process to Mr McGrail, then the solution was obvious. He should (in keeping with his obligation to defend the Rule of Law) have invited Mr McGrail not to come to any precipitous decision to retire, and await Sir David Steel, the new Governors arrival, a few days later. He would have been well placed to consider the complaints afresh with unencumbered perceptions and with the benefit of a fair process.

13.8.20 If the version of the 12 May Meeting and events that followed preferred by the Chairman, is that of Mr McGrail, then the RGP's submission on process should resonate even more.

13.8.21 The GPA also failed, albeit the RGP accepts without any improper motive. It was put in a very difficult position and its (gentle and kind but) submissive leadership did not lend itself to ensure that its Constitutional purpose of independence could be served.

Part C: RGP's Conclusions on Statutory Framework

14. In the context of analysis of Part B and Part D (Recommendations) the RGP submit a clear understanding of the relevant parts of our Constitutional Order 2006 and the Police Act; in that particular order is required. The order and primacy are very important, because nothing that strays from the Constitution or that Constitutional intent and expression, should be permissible. Therefore, the Police Act, steered and underpinned by our Constitution rightly sets out the various roles of all the relevant actors, the Governor, the Government, the Chief Minister, the GPA and the RGP specifically therein the COP. It also sets out the process for the appointment/removal of a COP (in addition to the other ranks in the police force, including police officers). These themes are addressed in the RGP's Opening Submissions but at the risk of repetition the key provisions are repeated.

15. The Constitution section 47:

"Governor's special responsibilities

47.-(1) The Governor, acting in his discretion, shall be responsible in Gibraltar for the conduct (subject to this Constitution and any other law) of the following matters –

(a) external affairs;

(b) defence;

(c) internal security, including (subject to section 48) the police;"

16. The Governor is responsible for internal security but subject to the GPA role as per section 48.

"Gibraltar Police Authority

48.-(1) There shall be a Police Authority for Gibraltar, composed in such manner and having such functions as may be prescribed by a law enacted by the Legislature consistent with this Constitution; and subject to the provisions of any such law such Authority shall be independent in the exercise of its functions."

(2) The Police Authority established under this section shall be a body corporate to be known as the Gibraltar Police Authority.

(3) The Commissioner of Police shall be appointed by the Governor acting in accordance with the advice of the Gibraltar Police Authority, provided that the Governor may disregard the advice of the Gibraltar Police Authority in relation to any person where he judges that accepting that advice would prejudice Her Majesty's service.

17. It is essential to emphasise that section 47 of the Constitution provide for internal security to be reserved to the Crown, acting through the Governor, and subject to the establishment of a Gibraltar Police Authority that shall be independent in the exercise of its functions.
18. It is expressly stated that the appointment of a COP is reserved to the Governor acting in accordance with the advice of the GPA (that he/she can only disregard if judged to prejudice His Majesty's service). This is further reflected in section 32 of the Police Act. The power to appoint the Assistant Commissioner of Police ("**ACOP**") is also vested in the Governor as per section 36 on advice of the GPA. The power of appointment of Police Officers is vested in the COP, with the approval of the GPA. The primacy of the independent GPA should resonate loudly.
19. This Constitutional balance that must be carefully guarded at all times, to safeguard the Rule of Law. Whilst this question is for the Chairman to determine, it is of fundamental importance to the RGP that the clarity (that the RGP recognise) in the Constitution and the Police Act, surrounding the independence of the RGP and its overseer (the GPA) is also expressly recognised.
20. It is the RGP's position (that should be non-contentious to all CPs) that the Police Act must be strictly followed so as to ensure, that at all times, the independence of the RGP can never be compromised, or in any way threatened by anybody (including perhaps most importantly, any Governor or any Government). Moreover, that there should be clarity: that any executive, namely the Government, does not and cannot have any responsibility or operational role, or involvement in the carrying out of the Policing Obligations.

21. The RGP is answerable to the GPA under section 5 of the Police Act:

Responsibilities and powers of the Authority.

5. The responsibilities and powers of the Authority are as follows –

(a) to secure the maintenance of an efficient and effective police force for Gibraltar within the financial resources available to it and on a value for money basis;

(b) to ensure high standards of integrity, probity and independence of policing in Gibraltar;

(c) to provide information on police issues to the community;

(d) to establish, operate and supervise the process for investigating complaints against police officers under this Act;

(e) to provide a mechanism for enhanced police accountability through a process of consultation with the community;

(f) to ensure value for money in policing;

(g) to draw up and publish an Annual Policing Plan and an Annual report, in accordance with sections 8 and 10 respectively;

(h) to submit to the Minister for public finance, in accordance with the form, procedures and timetables established by the Government generally in relation to the preparation of its budget, an annual budget bid for the Force; (i) to hold the Commissioner to account for matters which are the responsibility of the Authority.

22. Section 11 and 12 vest ultimate responsibility on the Governor (but subject to Constitutional safeguards):

Governor's Responsibilities.

11. The Governor shall have overall, ultimate responsibility for –

(a) the integrity, probity and independence of policing in Gibraltar; and

(b) the policing aspects of national security including internal security.

Governor's powers.

12. The Governor shall have power to –

(a) hold the Authority to account for any matter to which section 11 relates;
(b) hold the Authority to account for the professional standards of the Force;
(c) call for and hold meetings with the Chairman, the Commissioner and other senior officers of the Force to discuss matters under his responsibility or in respect of which he has powers under this Act.

23. However, these sections must be read in light of section 48 of the Constitution and the reference to independence of the GPA (in exercise of its function).
24. This is clearly borne out by section 13 of the Police Act that makes it clear that the Governors powers require a default by the GPA.
25. Only in default powers shift to the Governor under section 13 of the Police Act.

Governor's powers in default by Authority.

13.(1) The following powers are exercisable by the Governor where the Authority has failed to discharge or perform a responsibility imposed on the Authority under this Act—

- (a) to require the Authority to provide a report on any policing matter;*
(b) to direct the Authority to submit the Force to an inspection by an appropriate inspectorate;
(c) to direct that an inquiry into policing in Gibraltar be made;
(d) where an inspection or inquiry under this section identifies any shortcomings, to direct that, within the financial resources available to it, the Force take appropriate remedial action;
(e) where in the opinion of the Governor the integrity, probity or independence of the police has been compromised or is at risk, to direct the Force to take appropriate action to remedy the situation or avoid the risk;
(f) to suspend from duty, or call for the resignation of the Commissioner.
- (2) The Governor will keep the Chief Minister informed of any exercise by him of a power under this section and shall provide to the Chief Minister a copy of any report produced as a consequence thereof.*

26. Operational responsibility of the RGP is vested only in the COP as provided in sections 18 and 33 of the Police Act.

Powers and duties of the Commissioner.

33.(1) The Commissioner shall, subject to the provisions of this Act, have command, superintendence, direction and control of the Force, and shall be responsible for the efficient administration and government of the Force and for the proper expenditure of all public moneys appropriated for the service thereof.

27. The Government's role exercised by the Chief Minister (under the Police Act and the Constitution) is strictly prescribed under sections 4 (contribution to composition of GPA), and 14,15 and 34 of the Police Act, as therein limited (primarily although acceptedly not totally financial oversight).

Government's Responsibilities.

14. The Minister with responsibility for public finance shall decide, and seek the appropriation of the Parliament for the grant of both recurrent and capital expenditure to be made for the Force and policing in Gibraltar in respect of any financial year.

Powers of the Government.

15.(1) The Chief Minister may exercise the following powers on behalf of the Government—

(a) to require factual or assessment reports from the Force or the Authority on any policing matter: Provided that there may be withheld from any such report any fact disclosure of which is likely to prejudice the effective operation of the Force or the confidentiality of any information which the Force is bound to maintain;

(b) to hold the Force and the Authority to account for the cost effectiveness and efficiency of the Force within its allocated budget;

(c) to hold the Force and the Authority to account for those parts of the Annual Policing Plan which do not relate to National Security;

(d) to call for and hold meetings with the Chairman, the Commissioner and other senior officers of the Force to discuss matters under the Government's responsibility or in respect of which it has powers under this Act.

(2) The Chief Minister will keep the Governor informed of any exercise by him of a power under this section and shall provide to the Governor a copy of any report produced as a consequence thereof.

28. Section 15 should be read in context of 14 but more importantly section 47 and particularly 48 of the Constitution. As an example note that even in exercise of any powers under section 15 (a) by the Chief Minister, if the COP does not wish to disclose to the Chief Minister any fact because in his opinion: disclosure is likely to prejudice the effective operation of the Force or the confidentiality of any information which the Force is bound to maintain, he need not to, moreover even in any other disclosure the Chief Minister has to report this exercise to the Governor.
29. The RGP submit what this should lead the Chairman to, is the conclusions that whilst the Government have a role as does the Chief Minister, it was always intended to be very limited, very prescribed and cannot offend the primacy and independence of the GPA as per section 48 of the Constitution.
30. It should not be ignored that these provisions also limit (quite rightly) the powers of the Governor and reserve them to only interference in a default situation (none of which arose, the RGP say when the material facts are considered).
31. In simple terms our Constitution and Police Act envisaged the primacy of the COP on operational matters and the primacy of the GPA in every oversight respect, not a Governor, not an elected Minister, or Government.
32. The power to remove a COP is rightfully a power of last resort and enshrined in section 34 of the Police Act.

Removal of Commissioner.

34.(1) The Authority acting after consultation with the Governor and the Chief Minister and with the agreement of either of them, may call upon the Commissioner to retire, in the interests of efficiency, effectiveness, probity, integrity, or independence of policing in Gibraltar.

(2) Before seeking the approval of the Governor and the Chief Minister under subsection (1), the Authority shall give the Commissioner an opportunity to make representations and shall consider any representations that he makes.
(3) Where the Commissioner is called upon to retire under subsection (1), he shall retire on such date as the Authority may specify or on such earlier date as may be agreed upon between him and the Authority.

33. The power to remove a COP is only vested (save in default) in the GPA and after a careful process as therein prescribed, and only in defined circumstances “...*in the interest of efficiency, effectiveness, probity, integrity, or independence of policing in Gibraltar*”. There is no provision in the Police Act or the Constitution that allows for removal of the COP because the Governor or the Chief Minister, “*has lost confidence in the COP*”. It is the GPA that must lose confidence, if the words “lose confidence” are code for a belief that *in the interest of efficiency, effectiveness, probity, integrity, or independence of policing in Gibraltar* the COP should be called to retire. It is the GPA and only them who can do so, unless they have refused to address issues.
34. The Governors powers (reserved to default under section 13) in order to ensure he/she meets their obligations under section 11 (“*the overall, ultimate responsibility for-integrity, probity and independence of policing in Gibraltar*”) do not (certainly in any first instance, without evident default of the GPA) include the right to determine the serving COP’s tenure.
35. The decision not to exercise powers under section 34, whether for procedural reasons or otherwise cannot, as explained, constitute a default.
36. Section 13 and 34 interplay is fundamental. If a COP, on his own volition (for self-interest or incompetence) or encouraged by others ignores crime in Gibraltar, and this is brought to the attention of the GPA by a complainant. be it any third parties (including the Governor, or Government) or also of the GPA of their own volition, and they do nothing, that is a default. That would be a failure to discharge or perform a responsibility under section 13.
37. The proper label to put on Mr Picardo KC and Mr Pyle in their respective roles was that of complainants (albeit interested parties clearly, and now that we

have heard the evidence probably conflicted). This label was recognised by Counsel for Government parties in his re-examination of Mr Pyle.¹⁸

38. It is the RGP's position that it is evident that both Mr Picardo KC and Mr Pyle somewhat confused and muddled their roles and responsibilities, with that of the GPA, it appears even advised by the AG. Whether, intentionally, or inadvertently, whether with pure motive, or not (as suggested by Mr McGrail) is a matter for the Chairman, not the RGP.
39. Neither Mr Picardo KC and Mr Pyle (absent a default) could exercise the powers, or role they exercised, threatened, or set about exercising.
40. The failure of the GPA to assert itself (irrespective who is responsible) cannot change the Constitutional and Statutory position. The RGP submits that there can be no softening of these safeguards, no blurring of roles and responsibilities.
41. Moreover consultation, cooperation with the executive by RGP (for good reason) should be encouraged even if in the practice (in good faith) it may have gone further than that readily envisaged in the Police Act. However such practice cannot diminish adherence to the relevant provisions of our Constitution, and the Police Act, specifically independence which must remain paramount.
42. The GPA must empower itself, must recognise its own important role, not just in law, but in practice.

Part D: RGP's Suggested Recommendations.

43. The RGP submits, that against this statutory backdrop, the Chairman should consider **Part B: RGP's Evidential Conclusions and Observations.**
44. Should the Chairman accept the RGP's analysis, or even part thereof, then the Chairman may wish to consider what the RGP suggests are constructive

¹⁸ Transcript Day 19 9 May 2024 Page 262

specific recommendations. These would then translate to steps and particularly practical actions and measures, that will, the RGP submits, guarantee that the Rule of Law prevails in Gibraltar. Importantly it would safeguard the integrity of the independence of the RGP and the GPA (as envisaged by section 48 of the Constitution) and ensure it is preserved.

45. As a first recommendation it is suggested by the RGP that the Constitution and Police Act are followed by all relevant stakeholders, in both spirit and practice. This may seem obvious but whilst there is always room for improvement, and aspects of the Police Act could be evolved, it is a very carefully considered statutory landscape, that has built into it, checks and balances, following a negotiated settlement between Gibraltar and the UK in 2006. In legislative terms there is much to celebrate, but as in the case of any law, it is only as good as the investment made by stakeholders (Governors, Governments, Attorney Generals, GPA, RGP and public) in ensuring it is adhered to, in both spirit and to the letter.

46. More specifically:

Role of the Gibraltar Police Authority

46.1 Recruitment of the GPA members should have regard to the wide-ranging issues and requirements and challenges of modern policing, it should be jurisdiction specific and should include the necessary skills and experience (in addition to integrity and attitude) to ensure there exists a balanced Police Authority. This should include at least one member who has senior policing experience of not lower than the rank of Superintendent.

The COP should be consulted (only) in respect of any appointment of a member or Chairman in good time before such an appointment, to be able to make any observations in writing to the appointors.

46.2 All GPA members should be carefully screened (to avoid any possible conflicts) and be able to commit to time requirements. No person currently an employee/consultant or other role in the Public Sector or any company owned and or controlled by the Government should

serve on the GPA. Additionally, the Deputy Governor should only sit as an ex-officio member of the GPA.

- 46.3 GPA members generally must be able to dedicate sufficient time and resources to ensure informed decision making at all times. All members of the GPA should be remunerated. As an example, members of the Gibraltar Financial Services Commission are remunerated (as explained by Mr Lavarello in his evidence) in the annual sum of circa £20,000.
- 46.4 Recruitment and selection of the Chairman of the GPA should have regard to additionally necessary characteristics, experience and skills required, including leadership, and the required character traits that are likely to assist with resisting any pressure from the executive, the RGP, or other parties that could impact the independence of the GPA and the RGP.
- 46.5 Recruitment and selection of the Chairman should involve input and consultation from existing members of the GPA and COP.
- 46.6 Any proposed Chairman of the GPA should ideally have had some experience of having been on the GPA for a period. He or She must be able to commit sufficient time to Chair the GPA. He or she should be remunerated accordingly. As an example, the Chair of the GFSC is paid circa £30,000/annum.
- 46.7 All GPA members should undergo a thorough suitable induction and training programme (including clear understanding of the separation of powers) within the first 3 months of being appointed, to include a clear understanding of what the role involves, an understanding of the Constitution and the Police Act.
- 46.8 The Chairman of the GPA should be offered and encouraged to attend an appropriate management and leadership course prior to his or her appointment.

- 46.9 Ongoing CPD (continuous professional development) should be offered, and members should be encouraged to attend a course at least once in any 3-year period.
- 46.10 The GPA should have the necessary administrative resources including a full-time person who can serve as Chief Executive Officer as is the case with other similar authorities in Gibraltar such as the Legal Services Regulatory Authority or the GFSC.
- 46.11 The GPA should have clear guidance notes and encouraged to be proactive in discharging its functions.
- 46.12 The GPA should keep careful records and minutes of all formal meetings and careful notes of any informal meetings (or conversations) that relate to any GPA or RGP business. This should include any meetings between the GPA or any of its members with the Governor, or the Government and any Minister thereof, including the Chief Minister and the Minister for Justice (or other appointed Minister with responsibility for policing). Additionally, any meetings with the Gibraltar Police Federation and/or any third parties including complainants (even informal ones) should be recorded.
- 46.13 The COP should attend GPA meetings as a non-voting member unless there is in the opinion of the Chairman a conflict so as to enhance and improve communication between the GPA and the RGP.
- 46.14 All GPA members should be given complete and comprehensive board packs at least 5 clear days in advance of any meeting (unless impracticable due to urgency) so as to ensure informed and detailed discussion of all matters.
- 46.15 The COP must ensure that all required information on any policing matter or related matters including budgetary issues to be discussed by the GPA are provided in a timely fashion so as to assist with GPA meetings.

- 46.16 The GPA should have all necessary independent financial resources including legal resources sufficient to be able to deal with any matter that is within remit.
- 46.17 The GPA should have fiduciary oversight of RGP funding. The GPA should be responsible for governance of the RGP funding grant and the route into Government via the Minister for Finance for additional funding when required.
- 46.18 In order to assist the GPA, the COP will be responsible for providing detailed budgetary information as envisaged by the Police Act well in advance (not less than 14 days) of any meeting with the GPA to discuss Annual Budget requirements or any exceptional additional requirements.

The Role of Government

47. Currently there is no clarity under the Police Act as to what precise role any Minister other than the Chief Minister has. The Minister for Justice has no statutory role under the Police Act. Legislative changes should be considered to formalise the Minister for Justice role (given the additional oath he or she takes upon assuming office) as the Minister for responsibility for Policing in the alternative to references to Government as appropriate.
- 47.1 Minister for Justice role as the Minister for responsibility for Policing, on the current basis, creates inefficiency as requests for funding or resourcing must be referred to the Chief Minister as Minister for Finance. Consideration should be given to changing the funding model to ensure independence on operational basis from Government, whilst retaining accountability (such as the model suggested reference the GPA).
- 47.2 Currently Government approval under the Police Act is required for various matters which have an impact on the operational independence of the force. Section 30(1) Composition of the Force, Section 47 Engaging in trade or business, Section 66 Enlistment of special constables, Section 70 Establishment of Police Reserve and Section 74 Employment of Civilians.

- 47.3 The requirements by the RGP to seek *“approval of the Government”* continuously causes independence and operational issues as it is variously interpreted. Consideration should be given to amending the Police Act to substitute *“approval of the Government”* with *“approval of the GPA”*.
- 47.4 The RGP recognises that the Government is accountable to the taxpayer and but highlights that the GPA is under section 5 (a) responsible to: *“secure the maintenance of an efficient and effective police force for Gibraltar within the financial resources available to it on a value to money basis”* and (f) *“to ensure value for money in policing”*. Consideration should be given to amending the Police Act additionally in all financial aspects to substitute *“approval of the Government”* with *“approval of the GPA”*.
- 47.5 It is the RGP preference that a new funding model to establish its operational independence from government is found.
- 47.6 This should also be welcomed by the Governor who has ultimate responsibility for the independence of policing both under section 11 and 12 of the Police Act and under Section 47 and 48 of the Constitution.
- 47.7 The RGP funding model should be by way of annual government grant accounted for on an accrual’s basis with oversight by the GPA. This would not be unique as the Gibraltar Regulatory Authority, the Gibraltar Port Authority, the Borders and Coastguard Agency, the Gibraltar Financial Services Commission and Gibraltar Broadcasting Corporation, amongst others, are funded in this way.
- 47.8 The GPA would play a governance and fiduciary role in such a model.
- 47.9 The RGP believes that the flexibility that such a model would provide would deliver increased value for money, whilst enabling the RGP to better respond to demand, threats, and of fundamental importance it would reinforce the necessary operational independence of the Force.

Appointment and Removal of Commissioner of Police and Assistant Commissioner of Police.

48. Section 34 of the Police Act that addresses Removal of Commissioner should be reviewed to introduce legislative safeguards and to ensure a fair process, that is compliant with the Constitution, the ECHR, the rules of natural justice. This could be done by legislative changes to section 34, and or guidance for processes and procedures which should include safeguards. These may include the following, or similar ones:

- 48.1 A requirement that unless urgent and unavoidable, or a matter of extraordinary seriousness, akin in employment terms to Gross Misconduct, other methods should be employed by the GPA in respect of complaints against the COP (or it is suggested the Assistant Commissioner of Police (“ACOP”)) before considering the exercise by the GPA of its section 34 powers. This can include under section 5 (i) of the Police act utilising its powers *“to hold the Commissioner to account for matters which are the responsibility of the Authority”*. This should be read in conjunction with the COP obligations under section 16,17,18 and 19 and the exclusion of the COP or ACOP from the complaint’s procedure under section 16(5) should be removed.
- 48.2 All and any complaints should be in writing and provided to the COP or the ACOP with any accompanying evidence in good time to allow the COP (or ACOP) a fair opportunity to investigate and make representations in response. The COP (or ACOP) should have opportunities to address the GPA sufficiently orally and in writing to allow the GPA to be able to fairly consider the complaints made.
- 48.3 The response of the GPA to any complaints and any fair process that follows (should be in writing as well as oral) and should at all times be proportionate and give fair and ample opportunity to the COP or ACOP to rectify and resolve any issues (save in situations akin to gross misconduct) and be escalatory in nature, namely envisage warning letters, unless of course so serious that there is no alternative but to take immediate action.

- 48.4 Should all reasonable measures have failed, or not be capable of succeeding, then the exercise of Section 34 should be followed, but subject (at all times) to the requirements of natural justice both procedurally and substantively and pending the process, consideration should be given to suspension (without presumptions or consequences) or interdiction.
- 48.5 Any COP facing a Section 34 process should have independent legal advice whose costs should be borne by the RGP.
- 48.6 The term “*loss of confidence*” in a COP is not found in the Police Act nor specifically in Section 34 and if thought that it is code for the provisions of Section 34, namely that the call for the COP to retire is: “*in the interest of efficiency, effectiveness, probity, integrity, or independence of policing in Gibraltar,*” this should be properly defined.
- 48.7 Given the role of the Governor and the Chief Minister in section 34, even after the GPA form the view that the COP should retire (after due process) the COP should be given an opportunity to make representations and engage with both of them. They should not give their approval until they have had the benefit of all relevant information before the GPA, and any additional information they require, or the COP considers relevant. The COP should be properly heard in relation to the matters complained of and entitled to legal representation at the cost of the RGP.
49. The Governor powers under Section 13f of the Police Act to remove a COP by suspension or calling for a COP to retire should only be exercised in the event that the GPA refuse to discharge their powers to hold a COP to account or to take the measures identified above and cannot be employed instead of or because the Governor does not consider the GPA have reached the result desired by him. This is particularly the case in the context of a reasoned decision by the GPA not to engage in a Section 34 process.
50. Any exercise of the powers by the Governor under Section 13f must nevertheless be subject to all the rules of natural justice and include the right to proper legal representation.

51. In order to safeguard the independence of the COP and accountability as head of an organisation for errors committed by its officers, should the powers envisaged in section 34 or 13f of the Police Act be exercised the departing COP (or if extended to the ACOP the ACOP) should enjoy pension rights equivalent to those that would have been enjoyed by a person with that level of service (without regard to the qualifications that the Pension Act introduces with regards age or service) unless there is a finding against them of misconduct in public office or gross misconduct.

Independence of the RGP

52. Operational Independence is fundamental and should be non-controversial.

52.1 Funding for independent legal advice should be available for the RGP to enable it to comply with its operational obligations under the Police Act.

52.2 Present arrangements require the RGP to seek legal advice from either the OCPL (often refused due to conflict with prosecutions) or the Government Law Offices.

52.3 Such funding should extend automatically to be able to independently seek resources including forensic accounting and legal resources to enable it to comply with its Section 44 obligations.

52.4 These may include receiving advice prior to any executive action and assisting it with executive action such as the making of applications for production orders, search warrants (particularly in complicated or sensitive cases).

52.5 This would also extend to resources and funding to address public law challenges to executive actions such as Judicial Review proceedings.

52.6 As an example, a clear conflict would ensue should the RGP have sought legal advice on the "job-offers" to whistleblowers and the application of the Employment Act in relation to Whistleblowing.

- 52.7 In the context of liability for civil remedies, requiring the authority of the Financial Secretary to settle legal claims undermines the independence of the RGP.
- 52.8 Currently there is possible exposure to individual officers to personal liability. The position should be that the RGP is always vicarious liable where an officer executes his duties in good faith. Consideration should be given to the introduction in the Police Act of a provision similar to Section 88 of the UK Police Act 1996 to place vicarious liability on the COP (and away from individual officers).
- 52.9 The RGP believe that a protocol should be created to ensure that governance of incidents involving death or serious injury following Police contact should be handled by the GPA in a quasi-Independent Office for Police ("IOPC") role. This may require legislative amendments to the Police Act and specifically sections 16-19.
- 52.10 The RGP believe the GPA should have the power to appoint independent investigators and set the required terms of reference. This would secure the accountability that it has been suggested as lacking in Issue 3, the Incident at Sea.
- 52.11 The RGP believe to secure its independence the application of Government General Orders by virtue of Section 65 of the Police Act should be restricted to dealing with officers incapacitated through illness or injury and medically boarded from the force. All other references should be advisory only. Moreover, all decisions currently made by the Director of Human Resources under the applicable Government General Orders should be made by the COP.
- 52.12 The COP should have the power to require the immediate withdrawal of an officer seeking withdrawal by operation of Section 57 Withdrawal from the force.
- 52.13 It should be recognised that the RGP and its police officers are separate from the public service for the purpose of appointment/employment. The continuance of such practices (other than for incapacity through injury) undermines the independence and legitimacy of the RGP. At a

minimum, there should be a statutory prohibition to those undergoing a misconduct process or who have undergone such process which resulted in their dismissal.

- 52.14 The RGP believe the employing of retired or retiring (or serving) police officers, other than those incapacitated and after being medically boarded, in the public service undermines the independence and legitimacy of the RGP. This is especially the case when officers avoid misconduct (currently disciplinary) proceedings. This is important. The purpose of misconduct proceedings include: protecting the public; maintain high standards and deter misconduct; maintain public confidence and the reputation of the force. Having a situation where an officer evades discipline (e.g. incident at sea) and is employed by the Government undermines all three.
- 52.15 Equally, to safeguard its independence the RGP should be totally separate from the Government Service and its support staff (including as an example, its IT resources, ITLD) should be employed by the COP and not the Government Service.
- 52.16 Provisions in the Employment Act should clarify that protections for whistleblowing by police officers are the sole statutory responsibility of the Commissioner of Police or in default the Gibraltar Police Authority.
- 52.17 The RGP requires modern and updated Misconduct Regulations. The COP, ACOP, GPF Chair and GPF Secretary must all be subject to the regulations (a mechanism executed and conducted by the GPA as opposed to the RGP for all other ranks).
- 52.18 The RGP requires Performance Regulations (currently lacking) to deal with lack of efficiency and effectiveness by individual officers.
- 52.19 Finally, the RGP submits that to ensure its independence and the prevalence of the Rule of Law legislative provisions existing in the UK (that previously existed in Gibraltar until the introduction of the Crimes Act 2011) aimed at preventing the undermining of Policing should be considered. Clearly the actions of the GPF to reach out to the

Government and not the COP risked the creation of disaffection amongst police officers.¹⁹

52.19.1 Previously section 53 of the Repealed Criminal Offences Act (Gibraltar) read as follows:

52.19.2 *“Section 53. A person who causes, or attempts to cause, or does any act calculated to cause, disaffection amongst police officers, or induces or attempts to induce or does any act calculated to induce any police officer to withhold his services or to commit breaches of discipline, is guilty of an offence and is liable on summary conviction to imprisonment for three months and to a fine at level 3 on the standard scale”*

52.19.3 In the UK Police Act 1996 the equivalent section reads as follows:

“Section 91 Causing disaffection

(1)Any person who causes, or attempts to cause, or does any act calculated to cause, disaffection amongst the members of any police force, or induces or attempts to induce, or does any act calculated to induce, any member of a police force to withhold his services, shall be guilty of an offence and liable—

(a)on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

(b)on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

(2)This section applies to special constables appointed for a police area as it applies to members of a police force.”

52.19.4 The Rule of Law cannot prevail if there is a risk of knowingly (or inadvertently recklessly) taking action that undermines one of its guardians, here the RGP. It threatens the independence of the RGP.

¹⁹ ¹⁹ Transcript Day 13 30 April 2024 Page 145-150

Part E: RGP's Concluding Remarks

53. The RGP recognises that this Inquiry has come at huge expense to the Gibraltar taxpayer whose servant it is. The Inquiry and the related (and not so closely related) criminal investigations, some which are ongoing, have also drained great resources from frontline policing as COP Ullger made clear in his evidence. It has put considerable stress and pressure on Constitutional relationships.
54. The report that flows from this Inquiry, so long as it is made public (in its entirety) will go a long way to allow all stakeholders, including the RGP and public, to express a view on whether such an Inquiry has served a useful purpose for Gibraltar. The RGP would encourage CTI and ultimately the Chairman to be bold, brave and ambitious, not just on questions of factual inquiry and determination (including possible culpability) but very importantly: recommendations. Lessons must be learned, and the outcome must benefit all. Above all else it must serve the purpose of being a very important (perhaps generational) inquisitorial guide and instrument, to make way for measures that ensure the Rule of Law always prevails here in Gibraltar.
55. Finally, the RGP extends its gratitude to Mr McGrail for calling for this Inquiry, the Government for agreeing to it, and all those (counsel and witnesses) who have participated in it, not least CTI, the Inquiry team and Chairman for allowing the RGP to express its views in this inquiry and participate in the manner they have.

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7 June 2024.