RESPONSE OF THE O'FARRELL FAMILY TO SCOPING EXERCISE REPORT

The O'Farrell family is very disappointed with the Scoping Exercise Report. It is regrettable that as a private family we have to issue a press release to deal with outstanding matters arising from a Report which were brought to the attention of Judge Haughton, Helen McEntee and the DOJ and remain unanswered.

The purpose of the scoping exercise was to decide, based on pre-existing reports, whether there is need for further inquiry. It was not part of the Terms of Reference, nor required of Judge Haughton to make findings in respect of Shane and the circumstances of his death. In fact, the Terms of Reference were amended by the DOJ/Office of Attorney General to specifically exclude the trial of Zigimantas Gridzuiska. Notwithstanding this, a victim blaming narrative is adopted which is regrettable and offensive where Shane has no voice.

We cannot understand a conclusion that no inquiry is recommended where Judge Haughton was not provided with, nor did he request the underlying GSOC statutory reports which form part of the terms of reference and appear essential to the exercise. Further, we cannot understand that no inquiry is recommended where the Report acknowledges that Zigimantas Gridzuiska did not serve a custodial sentence due to the "*misplacing*" of a Notice of Appeal, where "*it is not clear exactly what documentation was given*" to the Coroner and where is appears to acknowledge that Zigimantas Gridzuiska was an informer - the Report states *"confidential documents do exist at GNCSIS[1]".*

Notwithstanding that it was not required by the Terms of Reference, page 1 of the Report contains an incorrect statement in relation to Shane's purported position on the road on 2 August 2011. This error was raised with the DOJ who did not provide any clarity. We subsequently learned through FOI that Judge Haughton was permitted, without notice to the family, to correct his Report. In what (unusually) is the only citation in the Report, the error is amended and incorrectly cites a Garda Forensic Collision Report as the evidential source. This is incorrect. In fact, we learned in April 2023 that the evidence relied on for this amendment is oral evidence given by a Garda during the criminal trial. This amended figure is strongly disputed and there were no witnesses to the collision. The Trial was solely concerned with determining the guilt of Zigimantas Gridzuiska and this evidence was not tested by any party representing Shane's interests. We further note that the proposed amendment of the error was only accepted by Judge Haughton '*subject to'* the words '*when the collision occurred'* being added – Judge Haughton has conflated a mark on the road with the point of collision, these are two entirely separate matters on which no conclusions can be made, not least in a scoping exercise. We cannot understand this level of scrutiny over Shane's actions, which were not required by the Terms of Reference when compared to the lack of scrutiny of matters within the Terms of Reference and of Zigimantas Gridzuiska – the first three pages of the Introduction is dedicated to criticism of Shane while four lines refer in a cursory way to Zigimantas Gridzuiska's criminality.

We refute any claims by Government that the length of the Report equates with completeness. The Report does not answer the fundamental question or explain how or why Zigimantas Gridzuiska was at liberty on 2 August 2011 in circumstances where for a period of two years, he had repeatedly committed offences on bail and breached bail conditions imposed upon him in both the District and Circuit Courts, and where members of An Garda Siochana were aware of these breaches.

Shane's case raises serious issues about the criminal justice system around bail, previous convictions, Coroner's Inquests, the effectiveness of GSOC and transparency around the use of informers by members of the Gardai. There are clear legal issues which remain unresolved. Our family deserves answers, accountability and closure. We want the Government to commit to what the Oireachtas resolved to do: have a full public inquiry. Everything else has turned out to be inadequate and has only added to the pain for our family. The available State processes have failed to carry out an effective investigation of the true and full circumstances of Shane's unlawful killing and this requires the step of establishing a public inquiry.

[1] Garda National Crime & Security Intelligence Service which is responsible for "*dealing with intelligence in relation to both terrorism and organised crime*."

An Appendix to the Report is a response to our letter of 16 March 2022. It does not seem fair or complete to publish a reply to a letter while omitting the original letter. To redress this, we are publishing our letter of 16 March 2022 with this statement as a record of the serious issues raised by our family which remain unaddressed.

The DOJ has not responded in any meaningful way to serious issues raised in our correspondence. This is regrettable and does not appear in line with the State Litigation Principles recently published by the Office of the Attorney General.

Comments on the Report

The terms of reference asked Judge Haughton to consider the outcome or reports of investigations or inquiries that have already taken place, with a particular emphasis on the *reports* of the investigations carried out by GSOC and the IRM. It appears that Judge Haughton was not provided with the statutory GSOC reports which are within his terms of reference (nor did he request them), nor was he provided with the report of the IRM which the DOJ refused to waive privilege over.

We note the DPP considered matters raised with her office as outside the Terms of Reference, "When my initial views were put to the DPP **she declined to comment as the matters were outside my Terms of Reference but making it clear that they were not accepted**." (pg 101)

The family cannot understand a decision that no further inquiry is required where the following are the conclusions of the Report:

1. **Bail** The Report states:

   "*I do not believe that there are any circumstances in the context of the granting of bail, objections to bail, applications to revoke bail or the monitoring of compliance with conditions of bail which arise from the death of Mr O'Farrell which warrant further investigation or inquiry beyond those already carried out either generally or in relation to the systems and procedures for the sharing of information between An Garda Siochana, the Courts Service and other relevant State bodies operating at the time of Shane O'Farrell's death*."

   We cannot understand this conclusion when one looks at Zigimantas Gridzuiska's pattern of offending on continuous bail before killing Shane. On the evening in question, Zigimantas Gridzuiska was on bail for at least 6 offences and had committed at least 30 offences while on bail as a result of which he was brought before various District and Circuit Court over a two year period, yet continued to be given bail.

   The State has acknowledged that Zigimantas Gridzuiska was on bail for multiple offences on the evening in question. The GSOC Report also confirms that there were failings, and that orders/outstanding bail was not brought to the attention of judges. The GSOC Report concluded that certain Judges dealing with Zigimantas Gridzuiska's case were not informed by the Gardaí /the prosecution that Zigimantas Gridzuiska was in breach of his bail conditions. Three Gardaí involved were the subject of disciplinary proceedings following the conclusion of the GSOC investigation. Two of these gardai then brought judicial review proceedings and successfully obtained consent orders from the Garda Commissioner (there was no hearing of the proceedings). They appear to have succeeded on the basis that they were not properly trained or legally required to check the "court outcomes" tab on the Pulse system and as such not required to bring previous court outcomes to the attention of the court. This is not addressed in the Report and warrants further inquiry.

2. **GSOC:** Despite taking 6 years, the summary GSOC Report (s103 "report") did not explain how Zigimantas Gridzuiska came to be at liberty on 2 August 2011. The s103 GSOC "report" is not a statutory report but rather a summary document used to update the family. GSOC has refused to provide the family with the statutory s101 Report upon which the investigation was based. It also appears that Judge Haughton was not provided with the s101 Report despite it forming part

of his terms of reference, nor did he request it. We do not understand how this amounts to a consideration of the reports as required by the Terms of Reference.

Judge Haughton states, "***As the law currently stands it would be fair to say that judging the GSOC investigation on the basis of the Section 103 report alone is tantamount to asking a decision maker to decide issues in dispute without hearing the evidence.***" (page 254). Considering he did not request the statutory s101 Report and has only seen the section 103 "report", we do not understand how he can conclude that the GSOC investigation was satisfactory and that there are no issues warranting further investigation – in his own words this is asking him as "***a decision maker to decide issues in dispute without hearing the evidence"*** .

The s103 GSOC report is a highly unsatisfactory document which contains a number of material errors, inaccuracies and omissions. It remains unclear how or upon what basis GSOC reached the findings set out. GSOC did not properly investigate certain critical issues which remain unanswered:

- Why Zigimantas Gridzuiska was not in custody on 2 August 2011 despite being in continuous breach of bail?

- Did members of AGS drug squad properly exercise their discretion in permitting the car Zigimantas Gridzuiska was travelling in an hour before killing Shane, to continue to be driven considering the information that they had or ought to have had concerning that car and its occupants?

- What was the basis of the stop and search by plain clothed gardai on the evening Shane was killed, was Zigimantas Gridzuiska acting as an informer?

  Zigimantas Gridzuiska was not driving his car at the time of the stop and search. The individual driving the car was not insured to drive it, the car was not taxed or NCT'd yet gardai permitted him to proceed.

The conclusion that it is understandable that the family are aggrieved at not being provided with the section 101 Report and that "*ultimately any changes are for the legislature*" (page 11) is not satisfactory.

3. **IRM:** The family's complaint is that by refusing to publish the terms of reference for the IRM, and by misrepresenting the nature of the IRM process, the relevant authorities misled the family, the public and the Dáil.

The Report refers to the family's complaint yet doesn't deal with this complaint in any way and does not discuss the IRM report itself but rather focuses on peripheral matters.

Of note is that "*notwithstanding the fact that the Terms of Reference required [Judge Haughton]" to "take into account the outcome of the Independent Review mechanism*;"(p 209), the DOJ refused to provide Judge Haughton with a copy of the IRM report, or to waive privilege over the report. It was provided to him by the family. Judge Haughton noted in correspondence to the family that the report "*makes interesting reading"* but it is not considered in the Report.

Further, the terms of reference of the IRM (which have never been published) are not set out in the Report and Judge Haughton does not say if he saw or is aware of them. It is difficult to understand how he can consider the family's complaint which centres on the terms of reference, without having sight of the terms of reference. Rather this chapter focuses on peripheral issues, rather than considering the family's complaint. The Report concludes that "*The O'Farrell Family has expressed many reasons to be dissatisfied with the process itself and the result*" (page 223) - however the IRM report itself is not considered.

4. **Informer**: The O'Farrell family has repeatedly asked State bodies whether Zigimantas Gridzuiska was formally or informally providing information to the Gardaí. This has not been denied by DOJ or the Gardai. This arises in the context of what must be considered unusual circumstances where Zigimantas Gridzuiska was repeatedly on bail and where he was the subject of a stop and search by plain clothes members of the Garda drug squad an hour before Shane was killed. This was raised with GSOC and was not addressed in their s103 report.

   The family also raised this with Judge Haughton. It is not considered in the Report save one statement from the Gardai who have acknowledged that *"confidential documents do exist at GNCSIS[2], but they are being withheld as they are not relevant to the scoping exercise due to the timelines involved"*(page 319). No clarity, precision or explanation has been forthcoming in relation to this despite raising this directly with the Minister for Justice and DOJ.

5. **Courts Service:** The family note the apology from the Courts Service: "*The Courts Service accepts that there were failures in its practices and its procedure highlighted in this case"* (p197) and the Department of Justice state "*it appears that this very regrettable error occurred through human error."*(p197)**.** These acknowledgments do not address an important issue. The official record (relied on by the Court) stated that Zigimantas Gridzuiska was convicted of the offences and had in fact served the imposed sentence. Various decisions were made in part on the basis of this record. However, the record was simply incorrect. That is an extraordinary situation and is one which warrants further investigation.

   The second issue which arises is in relation to a report commissioned into the error. The family had raised the unserved sentence of Zigimantas Gridzuiska for a number of years - "*In the course of researching the entire history of Zigimantas Gridziuska's involvement with the Courts, the O'Farrell family discovered in August 2015 that these sentences were never served.* ***There appeared to be no record as to why this had occurred***."(p15, p177) Despite having asked a number of State bodies about this for a number of years, this information was not provided to the family but was subsequently provided to RTE Investigates. Once this information became public, the Courts Service produced an internal report for the Minister (December 2017). Despite direction from the AG that the DOJ provide the family with this report, and terms of reference for an Independent Review by a senior counsel into the matter, this did not occur, rather the family learned of the fact of the report years later through an FOI. Only then was the report produced for the Minister provided to the family by the DOJ (January 2020).

6. **Coroner's Inquest:** The family's complaint in respect of the Inquest is that incomplete statements were not provided to the Coroner by the Gardai. Statements provided by the Gardai to the Coroner excluded relevant information where sentences had been removed (not redacted). There is a contest on the facts in terms of the recollections of the Coroner and the Gardai.

   How the Gardai and Coroner interact is a matter of public interest. Serious issues are raised where full and complete statements are not provided to the Coroner. The Report accepts that full statements were not provided. It is unclear why the evidence of Gardaí and the Coroner doesn't need to be tested where the Report states that it is contradicted. The reliability of "recollections" is of course a question of fact that cannot be determined in a scoping exercise. Incomplete statements were provided and the family cannot understand a decision that no further inquiry is required when one considers the following conclusions in the Report:

   > "*For these reasons* ***in my view neither relevant nor vital information was withheld from the Coroner*** *or the inquest Jury about the 6th July 2011* ***although it is not clear exactly what documentation was given to her*** **[the Coroner].**" (p150)

[2] Garda National Crime & Security Intelligence Service which is responsible for "*dealing with intelligence in relation to both terrorism and organised crime*."
https://www.garda.ie/en/about-us/our-departments/garda-national-crime-security-intelligence-service1/

…

There is <u>an understandable degree of confusion and lack of recollection as to what precisely occurred</u> (p8)

…

*It would certainly have **been best practice if the full original interviews had been given** to the Coroner (if that is not what happened) and the PULSE error explained**. <u>The recollections of the Garda and Coroner do not coincide.</u>** The fact that the correct statements were on the "Garda File for Coroner" in the possession of GSOC supports the Garda recollection but is not determinative.*(p151)

….

It does not follow that simply because there are differences of recollection or indeed conflicts of facts in any case that there must be a Statutory Inquiry or Commission of Investigation. The issue has to be serious enough to warrant same in the public interest. *There is a difference of recollection which is understandable with the passage of time.* (p154)

…

<u>It is however in the public interest</u> that the difficulties identified by the various reports referred to above be addressed by the legislature to avoid similar problems arising in the future.(p22, 155)

It either is or is not a matter in the public interest and the Report seems to accept that it is.

7. Excusing the State: Throughout the Report, State bodies are continuously excused from any accountability. A sample is set out below:

a. *"A number of complaints against Gardaí made by the O'Farrell Family have centred on suspended sentences. In assessing these complaints, one would have to bear in mind the persistent difficulties with the legislation and the comments set out in the case extracts above. <u>Any disciplinary response to criticism or complaints must be proportionate and have regard to the fact that Gardaí are not trained lawyers</u>. If the legislature provides complex and defective legislation <u>one needs to be slow to blame those at the coalface when errors occur, and things go wrong</u>. One cannot build a Palace with broken tools*." (p 119)

b. In relation to the mistake made during sentencing of Zigimantas Gridzuiska: "*<u>It was a classic case six Homers nodding in unison. **Two sets of lawyers and two judges made an honest mistake nothing more.**"</u>* (p119)

c. In relation to the criminal trial of Zigimantas Gridzuiska, the family complained that the court had been led to believe that an hour before Shane was killed, Zigimantas Gridzuiska was stopped at a checkpoint, when in fact he had been stopped by plain clothes Gardai/members of the Drug Squad in a "stop and search". It is clear that the Trial Judge shared the family's view that the presentation of the evidence at trial was to the effect that Zigimantas Gridzuiska was stopped at a checkpoint. Indeed the judge expressly referred to and relied on that conclusion when making the Direction to the jury to acquit Zigimantas Gridzuiska. The Report recognises this expressly - "*the Judge in giving his decision on the application for the direction referred to the vehicle being "stopped at a checkpoint" <u>which was a misunderstanding on his part</u>*".(p106) which is in contrast to the treatment of the O'Farrell family's complaint which is described as being "*completely baseless and the anthesis of what occurred*" (p105)

d. In respect of the Coroner "*There is <u>an understandable degree of confusion and lack of recollection as to what precisely occurred</u>"* (p8)

e. In respect of the Courts Service, "*<u>Human error can happen in the best run offices</u>*."(p184) This is so notwithstanding that "*this proposed review of the loss of a Notice of Appeal by the Courts Service appears to have suffered much the same fate in the Department of Justice and*

Equality. The documents were not sent to Mrs. O'Farrell and she did not receive same until February 2020 and only through a Freedom of Information procedure" ….. "Once again, the documents were not sent to Mrs. O'Farrell notwithstanding the Minister had signed off on the Family being sent the documentation" …. "Eventually in February 2020 and only following the FOI request the documents were sent to Mrs. O'Farrell."(p193) ….

Despite concluding that "*There is no doubt that key officials were aware of the circumstances*"(p195) the Report states, "*The misplacing of the Notice of Appeal is an understandable human error. The follow-up on its discovery was inadequate and unacceptable. The O'Farrell family was entitled to expect better from both organisations*"(p195)

- Judge Haughton states, "*This exercise was limited to perusing documents and responses to queries arising therefrom and contact with the O'Farrell family. **I did not interview any individuals** while conducting the scoping exercise **however some queries that arose, particularly in relation to Garda matters did involve interviews with serving and retired Gardaí** arranged through a Garda liaison team*". (p17) This position is not consistent. The names and rank of the Gardaí interviewed by Judge Haughton should have been set out by him as well as the reason why they were interviewed, and the information provided by them.

- We are unclear why the results of our Freedom of Information request, spanning four years, was provided, unsolicited and without our consent, to Judge Haughton by the DOJ. The DOJ employee who provided him with the documents was unable to explain why she had done this.

- The Report states that Judge Haughton informed the family that he was on the Board of the Courts Service. This is incorrect. We have reviewed the transcripts of the meetings that took place between Judge Haughton and our family as well as our correspondence and can find no evidence of this being communicated. We have repeatedly asked the DOJ to tell us when this was raised and when we allegedly agreed to it, but this has not been forthcoming. This issue remains outstanding.

- Internal emails within the DOJ suggest communication between the DOJ and Judge Haughton. When this was raised with the DOJ the response was that these communications occurred prior to the finalisation of the Terms of Reference. This is not the case as is self-evident in the emails.

- We note Zigimantas Gridzuiska's name is anonymised in the Report. Shane's name appears over 500 times.

Ends

Editors Notes

It is important to recall the facts that gave rise to Judge Haughton's Scoping Exercise. They are as follows:

- At the time he killed Shane, Zigimantas Gridziuska had 34 previous convictions (across 3 jurisdictions) and had been on continuous bail since 28 August 2009 – a period of almost two years.
- On the evening in question, Zigimantas Gridzuiska was on bail for at least 6 offences, had committed at least 30 offences while on bail as a result of which he was brought before various District Courts and the Circuit Court on numerous occasions.
- During those hearings, the Judges dealing with his case were not informed by an Garda Siochana/the prosecution that Zigimantas Gridzuiska was in breach of his bail conditions
- In January 2011 Zigimantas Gridzuiska appeared before the Circuit Court on theft offences where Judge O'Hagan adjourned the case for one year and continued Zigimantas Gridzuiska on bail on the condition that he stay out of trouble and did not commit any further theft offences. The court said "*If he does get into trouble again, it will come straight before me, anywhere on*

the Circuit, wherever I may be…I can assure you, Zigimantas Gridzuiska, ***if you do mess this one up and you do get convicted, you will be going to prison; not you might, you will be going to prison****"*

- Zigimantas Gridzuiska committed 11 offences, between this Order and killing Shane and on no occasion did An Garda Siochana return him to Judge O'Hagan.
- Zigimantas Gridzuiska then committed two road traffic offences in January and April.
- Zigimantas Gridzuiska appeared before Judge Clyne in the District Court in Ardee on 9 May 2011 for theft offences when he was given a four-month jail sentence which was suspended for two years. He also entered a bond to keep the peace. Judge Clyne was not informed of the conditions of the adjourned sentence from Judge O'Hagan in January 2011 and no effort was made by the Gardaí to re-enter Zigimantas Gridzuiska's case at any stage before Judge O'Hagan, following the pleas of guilty before Judge Clyne. The pleas of guilty in these cases were not just only breaches of the Order made by Judge O'Hagan in January 2011 but were breaches of the bail bonds arising from 2010 which were extended in January 2011.
- Had Judge Clyne been informed of Judge O'Hagan's order and the fact that Zigimantas Gridzuiska was on bail and had breached his bail conditions when he committed the offences, Zigimantas Gridzuiska would have received an immediate custodial sentence and would not have been free on 2 August 2011 when he killed Shane.
- Zigimantas Gridzuiska committed a further theft offence on 25 May 2011.
- On 14 July 2011, less than three weeks before he killed Shane, Zigimantas Gridzuiska committed three theft related offences in Newry and appeared before Newry Magistrate's Court.
- The fact that Zigimantas Gridzuiska was outside the jurisdiction was a breach of his bail conditions as set in Cavan in December 2010 and the bail conditions set in Carrickmacross District Court on 16 February 2011. The fact that he committed a criminal offence was a breach of the bond signed by him in Ardee District Court on 9 May 2011 and a breach of the conditions of the order of Judge O'Hagan in January 2011.
- This information was communicated to An Garda Siochana by the PSNI, and a fax was sent from the Gardaí to the PSNI.
- When Zigimantas Gridzuiska was released from custody in Northern Ireland, no application or action was taken, and no steps were taken to bring the matter before any of the four courts he was on bail from.
- There were also two occasions a sentence was imposed but not served. In the first the notice of appeal was filed away in "error" by Courts Service personnel and the sentence for four counts of possession of heroin was not served. In the second instance, due to an error by Gardai in labelling evidence bags, a sentence for possession of heroin was imposed in the District Court was overturned. It is curious that Zigimantas Gridzuiska never served any time in custody despite having a number of previous convictions on the evening he killed Shane.
- Had the appropriate steps been taken, and had the law been applied we believe Zigimantas Gridzuiska would have been in custody and could not have killed Shane.
- An hour before Shane was killed, Zigimantas Gridzuiska's car was stopped by plain clothes members of the Garda drug squad. The basis for this stop and search remains unclear.

The family consider that these are very serious matters of public importance which warrant further investigation.

It remains the family's position that no adequate inquiry or investigation has been conducted into the numerous opportunities that members of An Garda Síochána/prosecution had to notify successive Judges in the District Court and the Circuit Court of the multiple and frequent breaches by Zigimantas Gridzuiska of his bail conditions in circumstances where it is clear that had they done so, Zigimantas Gridzuiska would have been in custody on the evening of 2 August 2011 and could not have killed Shane O'Farrell. The family also consider that Zigimantas Gridzuiska should not have been permitted to proceed after the stop and search by Gardai an hour before killing Shane.