THE COURT OF APPEAL

UNAPPROVED
Appeal Number: 2021/277
Neutral Citation Number [2023] IECA 275

Collins J.
Whelan J.
Pilkington J.

IN THE MATTER OF SECTION 16 OF THE COURTS OF JUSTICE ACT, 1947 (AS AMENDED) - A CASE STATED FROM THE CIRCUIT COURT TO THE COURT OF APPEAL

BETWEEN/

A.B.

APPLICANT

- AND –

HEALTH SERVICE EXECUTIVE

RESPONDENT

- AND –

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

(RE HSE STANDARD OPERATING PROCEDURE, JANUARY 2020)

JUDGMENT of Ms. Justice Máire Whelan delivered on the 10th day of November 2023

Introduction

1. This is a consultative case stated by His Honour Judge John O'Connor, judge of the Circuit Court, pursuant to s. 16 of the Courts of Justice Act, 1947, referring a question of law pursuant to s. 74(1) of the Court of Appeal Act, 2014 for the determination of this Court. The proceedings pertain to the minor child of the applicant, a key issue being whether the respondent (the HSE) validly discharged its functions and duties towards the said minor

pursuant to the provisions of s.8 of the Disability Act, 2005, as amended, and, in particular, whether a diagnosis of any underlying disability in the capacity of the minor concerned, confirming not alone the existence of a "disability" within s. 2(1) as construed in the light of s. 7(2) but also the nature and extent of same, were prerequisites to the proper completion of a statutorily-compliant independent assessment of need pursuant to Part 2, s. 8(7) of the 2005 Act.

2. No determination is made with regard to the merits of the substantive claims advanced by the applicant in the proceedings before the Circuit Court. This judgment is confined solely to a determination of the question raised by the court in the case stated.

3. This Court granted liberty to the Irish Human Rights and Equality Commission (IHREC) to appear as *amicus curiae* at the hearing of the consultative case stated. Helpful written and oral submissions were provided by all the parties before the court.

The Consultative Case Stated

4. For completeness, the consultative case stated as formulated by the Circuit Judge is set in its entirety: -

> *"**A. STATEMENT OF FACTS***
>
> *1. The Disability Act 2005 enacts a statutory process for the assessment of needs of children who are suspected of having a disability. A disability, for the purposes of the Act is defined in section 2 .. as follows: -*
>
> > *'A substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment; [citing section 7(2)(a) and (b) of the 2005 Act].*
> >
> > *and which:-*

(a) is permanent or likely to be permanent, results in a significant difficulty in communication, learning or mobility or in significantly disordered cognitive processes, and

(b) gives rise to the need for services to be provided continually to the person whether or not a child or, if the person is a child, to the need for services to be provided early in life to ameliorate the disability.'

2. The assessment of need process consists, inter alia, of preparation of an 'assessment report' (a report of whether a child has a disability and a resource – Blind assessment of the needs engendered by the disability), and a 'service statement' setting out the health services that will actually be provided to that child having regard, inter alia, to questions such as 'practicability', and budgetary constraints.

3. [The child] is a seven year old ... who has been determined by the HSE to have a disability, and who has an as-yet-undiagnosed condition. [The child's] assessment report records that [the child] has mobility issues and difficulties with communication and language. ... [The child] is hypersensitive to pain and .. has severe problems with emotional regulation.

4. In February 2020, [the child's] parents sought an assessment of need from the HSE under s. 9 of the Disability Act, 2005. The assessment of need was not commenced within three months of the receipt of the application as required by section 9(5) of the Act of 2005.

5. On 15 September 2020 [the child's] parents made a complaint to a Disability Complaints Officer under the mechanisms provided for in the Disability Act 2005, who issued a recommendation that the assessment of need should be completed by 19 December 2020. [The child's] assessment of need was accordingly commenced,

and an assessment report issued on 13 January 2021. [The child's] parents assert that this assessment report is not complete because it does not incorporate a diagnosis whether or not … has ASD.

6. [The child's] assessment report was prepared with input from a psychologist, an occupational therapist, physiotherapist, and a speech and language therapist. On 6 January 2021 these professionals conducted a preliminary team assessment of …. The assessment was performed in accordance with the HSE's Standard Operating Procedure ('SOP') for assessments of need under the Act of 2005 adopted in January 2020. The new SOP treats the question of whether a child's presenting behaviours meets the criteria for a particular diagnosis as a separate matter from the questions of whether the child has a disability (as defined in the Act) and what the nature and extent of that disability is.

7. [The child's] assessment report concludes that [X] has a disability. The assessment report sets out the nature and extent of [the child's] disability as follows:

> *(a) As regards the nature of … disability, that it was in the area of social communication, sensory processing, and emotional regulation.*
>
> *(b) As regards the extent of … disability, I identified a 'significant' impact across a range of activities at home and at school, in terms (sic) emotional regulation, and ability to engage in academic tasks.*

8. The assessment report records [the child's] presentation and identifies some health needs – speech and language therapy, psychology, physiotherapy, etc. It does not incorporate a clinical diagnosis (e.g. of ASD). A diagnostic assessment is identified as a health need flowing from the assessment, as provided for in the SOP:

> *'… based on observation and … parents' reports, … requires further diagnostic assessment.'*

9. On 16 February 2021, the HSE furnished [the child's] parents with a service statement. The service statement does not refer to further diagnostic assessment. It says that '... [the child] requires referral to an interdisciplinary team for Psychology, Speech and Language Therapy, Occupational Therapy and Physiotherapy'. It records that ... was referred to the School Aged Disciplinary Team on 22 January 2021 and ... is due to receive…initial intake appointment which will review and determine intervention in January 2023. According to the service statement, the initial intake appointments will determine what further interventions will be provided and the expected time frame.

10. [The child's] parents are concerned that ... has Autism Spectrum Disorder ('ASD'). They aver that ... autistic trait behaviours are getting worse. [The child's] father averred in July 2021 that since June 2020, ... has been engaging in self-harm and has been expressing a wish to die. None of the clinical or multidisciplinary reporting in [the child's] case raised the question of ASD. After this fact was flagged in an affidavit sworn by the relevant Assessment Officer, [the child's] parents arranged for an educational psychology to swear an affidavit on the 29 April 2021 to the effect that an ASD assessment was warranted.

11. To attach a diagnosis of ASD, the diagnostic criteria set out in the Diagnostic and Statistical Manual 5 (DSM-5) must be met. A variety of different formal diagnostic tools and/or developmental screening tools may be used to assess the presence of behaviours in a child which may assist in arriving at a diagnosis, but that diagnosis will attach only where the necessary criteria are met. According to the HSE, those diagnostic criteria are different from the statutory criteria to determine whether an applicant has a disability within the meaning of the Act.

12. On the basis of his assertion that the HSE has not 'completed' [the child's] assessment of need as required by the Disability Complaint's Officer's recommendation, on 22 February 2021, [the child's] father applied to the Circuit Court under section 22(1)(a)(iii) of the Act of 2005 for an order directing the HSE to implement the recommendation.

B. THE DISPUTE BETWEEN THE PARTIES

13. [The child's] parents argue that …[X's] assessment of need has not been completed, and therefore that the recommendation of the complaints officer has not been complied with. [The] parents argue that, contrary to the recommendation of the Complaints Officer, the assessment has not been completed because it does not address the key question of what [the child's] disability is, and in particular, whether or not … has Autism Spectrum Disorder ('ASD'). They say that given [the child's] presentation, such an assessment was necessary and appropriate, and no assessment of [the child's] needs could be 'complete' without it. [The child's] parents further argue that the assessment cannot be complete because it was not conducted in accordance with applicable HIQA standards which require that the assessment be 'comprehensive' and because, they assert that, contrary to the averment of the Assessment Officer that it does so, the assessment report does not contain a determination as to the 'nature and extent' of [the child's] disability as required by section 8(7) of the Disability Act 2005.

14. The Psychological Association of Ireland, the Irish Association of Speech and Language Therapists and the Association of Occupational Therapists of Ireland have conducted surveys of their members, some of whom have responded, expressing concerns that the new SOP delays comprehensive assessment of the needs of children with disabilities, treating such assessments as services to be provided subject to the

availability of resources. The HSE disputes the relevance of the documentation exhibited by Marion Campbell and, by letter dated March 3rd 2021 (exhibited by L. Jonker in an affidavit dated 28 October 2021), took issue with the approach adopted by the professional organisations.

15. The HSE argues that the assessment is complete and that the assessment report complies with the requirements of section 8 of the Disability Act 2005. The HSE's position is that 'whether or not [the child's] presenting behaviours also meet the criteria for one or other diagnosis is … a separate issue from the question whether the statutory matters that must be recorded in an assessment report are in fact so recorded', namely that [the child] has a disability as defined by the Act, and the nature and extent of that disability.

C. QUESTION TO BE STATED TO THE COURT OF APPEAL

16. Where it has been determined by an assessment officer that an applicant has a disability, can the assessment of need be regarded as complete for the purpose of the Disability Act 2005 if it does not incorporate any diagnostic assessment of the child's disability, whether in determining the existence of a disability, or in setting out the nature and extent of the disability in question".

Legislative overview

5. To consider the case stated in its proper context, it is necessary to identify the key domestic legislative measures and insofar as may be relevant, aspects of the UN Convention on the Rights of Persons with Disabilities which entered into force in respect of the State on the 19th April 2018, Ireland having deposited the instrument of ratification (with reservations and declarations pursuant to Articles 12, 14 and 27(1)), on the 20th March 2018.

6. The Long Title of the Disability Act, 2005 provides:-

"*An Act to enable provision to be made for the assessment of health and education needs occasioned to persons with disabilities by their disabilities, to enable ministers of the government to make provision, consistent with the resources available to them and their obligations in relation to their allocation, for services to meet those needs, to provide for the preparation of plans by the appropriate ministers of the government in relation to the provision of certain of those, and certain other services, to provide for appeals for those persons in relation to the non-provision of those services … and to promote equality and social inclusion and to provide for related matters*."

7. Section 2(1) offers a broad definition of "*disability*"; "*… means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment*."

8. Part 2 of the 2005 Act is directed towards the process for carrying out an independent assessment of needs and, where relevant, service statements and redress and is governed in its operation, *inter alia*, by the Disability (Assessment of Needs, Service Statements and Redress) Regulations, 2007 (S.I. No. 263 of 2007) and the amending regulation S.I. No. 704 of 2021. The minimum statutory requirements for a valid AON is the central issue in the case stated.

9. Where, as here, Part 2 of the Act is engaged, the definition of "*disability*" is to be construed in tandem with s. 7(2) of the Act which provides: -

"*In the definition of 'disability' in section 2, 'substantial restriction' shall be construed for the purposes of this Part as meaning a restriction which -*

(a) is permanent or likely to be permanent, results in a significant difficulty in communication, learning or mobility or in significantly disordered cognitive processes, and

(b) gives rise to the need for services to be provided continually to the person whether or not a child or, if the person is a child, to the need for services to be provided early in life to ameliorate the disability."

This modification is expressly confined to Part 2 of the Act - sections 7 to 24 (inclusive). It clarifies the statutory ambit of "*substantial restriction*" in the s. 2(1) definition of "*disability*". This definition characterises disability not so much in terms of the individual's impairment or underlying condition but primarily in terms of the impact which the impairment has on the capacity of the individual by impinging or restricting the capacity to carry on an occupation, business or profession or to participate in social or cultural life in the State.

10. "Assessment" is defined in s. 7(1) as "*an assessment undertaken or arranged by the Executive to determine, in respect of a person with a disability, the health and education needs (if any) occasioned by the disability and the health services or education services (if any) required to meet those needs*."

11. Section 8, the ambit of which is at the heart of the learned judge's question, makes provision for the independent assessment of need. It provides as follows: -

"(1) The Executive shall authorise such and so many of its employees as it considers appropriate (referred to in this Act as 'assessment officers') to perform the functions conferred on assessment officers by this part …

(2) An assessment officer shall carry out assessments of applicants or arrange for their carrying out by other employees of the Executive or by other persons with appropriate experience.

(3) ...

(4) An assessment officer shall be independent in the performance of his or her functions.

(5) An assessment under this section shall be carried out without regard to the cost of, or the capacity to provide, any service identified in the assessment as being appropriate to mee the needs of the applicant concerned.

(6) Where an assessment officer carries out or arranges for the carrying out of an assessment under this Part, he or she shall prepare a report in writing of the results of the assessment and shall furnish a copy of the report to the applicant, the Executive, and, if appropriate, a person referred to in section 9(2) and the chief executive officer of the Council.

(7) A report under subsection (6) (referred to in this Act as 'an assessment report' shall set out the findings of the assessment officer concerned together with determinations in relation to the following -

(a) whether the applicant has a disability,

(b) in case the determination is that the applicant has a disability -

(i) a statement of the nature and extent of the disability,

(ii) a statement of the health and education needs (if any) occasioned to the person by the disability,

(iii) a statement of the services considered appropriate by the person or persons referred to in subsection (2) to meet the needs of the applicant and the period of time ideally required by the person or persons for the provision of those services and the order of such provision,

(iv) a statement of the period within which a review of the assessment should be carried out."

Regulation 11 of the Disability (Assessment of Needs, Service Statements and Redress) Regulations, 2007 (S.I. No. 263 of 2007) provides that:

"(11) Each assessment report shall specify a date for the review of the assessment and that review date shall be no later than 12 months from the date on which the assessment report is issued."

12. Section 9 of the 2005 Act sets out the procedure governing an independent assessment of need to assess whether an individual may have a disability. Section 9(5) provides: -

"*Where an application under subsection (1) or a request under subsection (4) is made, the Executive shall cause an assessment of the applicant to be commenced within 3 months of the date of the receipt of the application or request and to be completed without undue delay*."

S.I. No. 263/2007, Regulation 10 provides -

"*The Executive shall complete the assessment and forward the Assessment Report to the Liaison Officer within a further three months from the date on which the assessment commenced, save for in exceptional circumstances, when the assessment will be completed without undue delay. In circumstances where the assessment will not be completed within three months of the commencement of the assessment, the Executive shall specify in writing, before the three month deadline has expired, to the individual concerned the reasons why it will not be completed within the 3 month period and shall specify a time frame within which it is expected the assessment will be completed*.'"

13. S.10 of the 2005 Act provides that the HSE is required to "*ensure that the assessment is carried out in a manner which conforms to such standards as may be determined from time to time by a body standing prescribed by regulations made by the Minister …*" Regulation 16 of S.I. No. 263/2007 provides: -

> "*The Executive shall ensure that the assessments are carried out in accordance with the standards for the assessment is determined and approved by the Health Information and Quality Authority*." (HIQA)

The Health Act 2007, pursuant to the terms of which HIQA was established, identifies its functions, *inter alia*, at s. 8(1):

> *"(m) to act as a body standing prescribed by regulations made by the Minister for Health and Children—*
>
> *(i) as set out in section 5(5) of the Education for Persons with Special Educational Needs Act 2004, and*
>
> *(ii) as set out in section 10 of the Disability Act 2005."*

A set of standards for the carrying out of an AON were approved by HIQA following the coming into operation of the Health Act, 2007 which require that such assessments be "*effectively coordinated in order to accurately identify the needs if the person and to achieve a comprehensive report for the person"* whereby an AON was to be *"as simple or as specialised as each person requires"*. The applicant argues that the said HIQA standards offer an interpretative aid to the correct construction of s. 8 and the supervening importance, where considered necessary, of comprehensive AONs accurately identifying the specific nature and extent of a disability which, it was asserted, is the statutory intendment of the 2005 Act.

14. S. 11 of the 2005 Act governs the service statement which falls to be prepared whenever a s.8 assessment report has ascertained that the provision of identified health

and/or educational services are appropriate in light of the relevant needs of an applicant who has been determined to have a disability. Of note is s. 11(2):

> "*Where an assessment report is furnished to the Executive and the report includes a determination that the provision of health services or education services or both is or are appropriate for the applicant concerned, he or she shall arrange for the preparation by the Liaison Officer of a statement (in this Act referred to as 'a service statement') specifying the health services or education services or both which will be provided to the applicant by or on behalf of the Executive or an education service provider, as appropriate, and the period of time within which such services will be provided*."

In the instant case the Service Statement was furnished on the 16th February 2021.

15. Sections 14 and 15 set out the procedures in respect of complaints in relation to AONs and/or service statements and the functions of the Complaints Officers respectively and section 16 governs the Appeals Officer. S. 22 governs enforcement of determinations and s. 22(1)(a) provides: -

> "*If the Executive or the head of the education service provider concerned fails -*
>
> *(i) to implement in accordance with its terms a determination of the appeals officer in relation to an appeal under section 18, or*
>
> *(ii) to give effect to a resolution arrived at under section 19, or*
>
> *(iii) to implement in full a recommendation of a complaints officer*
>
> *within 3 months from the date on which the determination, resolution or recommendation is communicated to him or her or, where the determination, resolution or recommendation specifies a date for the provision of a service, within 3 months from the date specified in the determination, resolution or recommendation for such provision, then, the applicant concerned, a person referred to in section 9(2)*

or the appeals officer may apply to the Circuit Court on notice to the Executive or the head of the education service provider concerned for an order directing him or her to implement the determination or recommendation in accordance with the terms or to give effect to the resolution, as the case may be."

16. Regulation 9 of S.I. 263/2007 identifies the time scale for the completion of the assessment of needs: -

9. *The Executive shall commence the assessment process as soon as possible after the completed application form has been received but not later than three months after that date*."

17. Assessment Officers under s. 8 of the Act are not required to be clinicians. Regulation 13 of S.I. 263/2007 requires that the HSE in authorising an employee to discharge such function:-

"... shall also have regard to the need for such persons to have -

(a) A thorough understanding of the provisions of the Act of 2005, the Act of 2004 and the familiarity of the provisions of the Mental Health Act 2001, the Health Act 2004 and the Health Act 2007;

(b) an excellent knowledge and understanding of disability and service issues;

(c) strong organisational and interpersonal skills;

(d) an ability to work with multidisciplinary teams; and

(e) good report writing skills."

Convention on the Rights of Person with Disabilities

18. Reliance was placed by IHREC on certain provisions of the Convention on the Rights of Person with Disabilities (CRPD) as an aid to construction of the 2005 Act. The State ratified CRPD in March 2018, years subsequent to the coming into force of the 2005 Act.

The relevance of that fact to the statutory interpretation issues under consideration in this case stated will be considered hereafter in light of the relevant authorities and governing principles. It is appropriate to consider key provisions within the said CRPD which, it was argued, may operate as an aid to construction of the statutory provisions. In the CRPD Preamble, recital (e) provides that the States Parties "[*recognise] that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others*". Recital (h) states " *discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person*". Recital (r) "*children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children… recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child*".

19. The purpose of the CRPD is expressed in Article 1 as being: -

> "*… to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*
>
> *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."*

Article 4(4) of CRPD outlines the general obligations of the High Contracting Parties and states: -

> "*Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of persons with disabilities and which may be contained in the laws of a State Party or international law in force for that State.*

There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognised or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognise such rights or freedoms or that it recognises them to a lesser extent."

20. Article 7 CRPD is specifically directed towards children with disabilities: -

"(1) States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

(2) In all actions concerning children with disabilities, the best interests of the child shall be of primary consideration.

(3) States Parties shall ensure that children with disabilities have the right to express their views freely in all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right."

21. Article 24 CRPD is directed towards the education rights of persons with disabilities and provides, *inter alia*: -

"1. *States Parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:*

(a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity …"

22. Article 25 CRPD is directed towards health and provides: -

> "*States Parties recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:*
>
> *(a) …*
>
> *(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities, including among children and older persons*".

UN Convention on the Rights of the Child (UNCRC) and Article 42A of Bunreacht na hÉireann

23. The UN Convention on the Rights of the Child (UNCRC) was ratified by the State on the 28th September 1992 and as such predates the coming into operation of the 2005 Act. As noted above, UNCRC is expressly referenced at Recital (r) of the Preamble to the CRPD. Article 2(1) of UNCRC requires the State to respect and ensure the rights of each child without discrimination, *inter alia*, on the basis on disability. Article 23 of the UNCRC is specifically directed towards children with a disability. By A. 23(2), States parties recognise the right of the disabled child to special care and, subject to available resources, to encourage and ensure the extension to the eligible child or those responsible for their care "… *of assistance for which application is made and which is appropriate to the child's condition and is the circumstances of the parents or others caring for the child*." A. 23(3) of UNCRC posits that assistance provided to the disabled child ".. *shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services,*

rehabilitation services, preparation for employment and recreational opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development."

24. Article 42A.1 of the Constitution provides: -

> "*The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*"

Article 42A ultimately became law on the 28th April 2015. Article 42A(1) is self-executing as the authors of *Kelly: The Irish Constitutional* (5th ed., Bloomsbury Professional, 2018) observe at para. 7.7.205. The relevance of the provisions of either UNCRC or A.42A of Bunreacht na hÉireann to the construction of the disputed sections of the 2005 Act was not argued to any great extent before this Court, however.

Assessment of Need Standard Operating Procedure 2020

25. A necessarily contextualised construction of the question posed by the Circuit Judge focusses on whether the introduction by the HSE on or about the 15th January 2020 of a Standard Operating Procedure (the 2020 SOP), which introduced material changes to the long-established processes and procedures for the carrying out of assessments of need pursuant to Part 2, s. 8 of the 2005 Act by replacing same with a preliminary team assessment (PTA), impermissibly deviated from the requirements of the 2005 Act and relevant Regulations.

26. To fully understand the ambit of the context and issues underpinning the question posed in the consultative case stated and the import of the competing arguments advanced by the parties, it is necessary to consider the extent of changes brought about by the HSE to the operations of Part 2 of the 2005 Act by the provisions of the 2020 SOP. At issue is whether or not the PTA under the 2020 SOP constitutes an assessment as contemplated under

the scheme of the Act - ss. 7 and 8 – and/or whether it creates impermissible barriers or obstacles in the path of individuals (especially children) from accessing a proper determination as to the existence or otherwise of a '*disability*' leading to a statement of need and of services within s. 8(7) within the meaning of the Act.

27. The applicant contends that the PTA does not result in a valid independent assessment of need pursuant to s. 8 of the Act and, further, that the PTA substantially contributes to delays in individuals, particularly children, having access to services identified as necessary. It is asserted that the PTA is in breach of s. 8, particularly in circumstances where s. 7(2)(b), *inter alia,* acknowledges the desirability for services to be provided in early life to ameliorate disability in the case of a child. The PTA process will be considered in greater detail hereafter.

28. As stated, the PTA process was introduced by the HSE by the terms of the 2020 SOP effective from the 15th January 2020. Under the 2020 SOP a distinction is established between the general process for assessment as to whether a child who presents is considered to meet the definition of "disability" and the carrying out of clinical assessments considered to be necessary. Essentially the process ordained under the 2020 SOP involves at Stage 1 a substantially desk-top exercise where the Disability Team decide whether the child can be assessed to have a disability (Clause 7.2 of the SOP). The step of requisitioning the clinical assessment of a child, which was heretofore integral to the determination of whether the child had a disability and the nature and extent of same, now generally only arises at Stage 2 *after* the Assessment Officers are satisfied that the child in question has a disability. This, it is contended by the applicant, results in an impermissible deviation by the HSE from the statutory requirements for a valid Assessment of Need (AON) under s. 8 and an Assessment Report compliant with s. 8(7) of the 2005 Act. It is contended that in general, the

ascertainment of a disability encompasses an assessment leading to a particular diagnosis and a determination as to the nature and extent of any such disability.

29. The 2020 SOP is 109 pages long and was approved on the 24th October, 2019. At para. 2 its expressed purpose is stated to be to "*ensure that there is a consistent approach to managing requests for a statutory Assessment of Need and processing the resulting referrals.*" A brief perusal indicates that the definition of "*disability*" in the glossary of terms and definitions (5.0) does not encompass the specific text in the definition in s. 2(1) of the Act insofar as it pertains to enduring physical or sensory disability, although the Guidance in Appendix IV, Section 2 quotes ss. 2(1) and 7(2) of the 2005 Act .

30. 7.2 of the SOP makes reference to Stage 1 - desktop examination of the application. 7.2.1.a states: -

> "*For the purposes of Assessment of Need, children and young people who are deemed to meet the level of complexity required for a Children's Disability Team are considered to meet the definition of disability. There will be some exceptions to this.*"

7.2.6.a provides: -

> *"Before making arrangements for clinical assessments to be administered, Assessment Officers will be satisfied that there is sufficient evidence to suggest that the child/young person may meet the definition of disability*," (Ref. paragraph 7.2.1)

Section 1, p.77 states that the Act "*does not give a right to access a diagnosis. Diagnostic assessments may be identified as a health need for a child/young person*". Section 2, p.78 states that a Preliminary Team Assessment (PTA) fulfils the team's obligations under the AON.

31. 7.2.6.(c) of the SOP provides that children who meet the level of complexity required for a children's disability team will receive an assessment of need. 7.2.6.g provides: -

"*If a child or young person is allocated to a Children's Disability Team for an Assessment of Need, the team will determine who should undertake the Assessment of Need and will determine the format of this preliminary team assessment*."

32. At 7.3.1.b which deals with Stage 2 assessment "*an assessment of the applicant*" in s. 9(5) of the 2005 Act is "… *taken to refer to the preliminary team assessment i.e. The Assessment Stage - Stage 2*". 7.3.1.(c) provides "*In order to vindicate the applicant's rights under the Act and to measure performance within the system, it is necessary to define the exact time that this stage commences*."

33. The Act makes provision for the timely commencement of assessments at s. 9(5);

"*(5) Where an application under subsection (1) or a request under subsection (4) is made, the Executive shall cause an assessment of the applicant to be commenced within 3 months of the date of the receipt of the application or request and to be completed without undue delay."*

7.3.3.a of the 2020 SOP states: -

"*It is acknowledged that in some cases it may be difficult to determine the appropriate pathway for a child/young person based on the information available at Stage 1. This may arise where limited information about the presenting difficulties is available. It may therefore be necessary to facilitate an appointment with the appropriate health professional to establish more detail regarding his/her presenting difficulties. Such a circumstance may be defined as exceptional and paragraph 10 of the Disability Regulations 2007 (which refers to 'exceptional circumstances' in which an assessment may be delayed) may be invoked."*

This potentially circumscribes diagnostic assessments to cases where there is "*limited information about the presenting difficulties"* - language not found in Part 2 of the Act. The net effect is that Assessment Officers are effectively precluded from requisitioning any

diagnostic assessments even where same are considered necessary to complete an AON Report sufficiently comprehensive to, *inter alia*, identify the "*nature and extent*" of an underlying disability within s. 8(7)(b).

Preliminary Team Assessment - PTA

34. Integral to the SOP introduced in January, 2020 was the replacement of the subsisting process for the carrying out of an assessment to ascertain the presence or absence of disability and consequent AON under s. 8 of the 2005 Act with Preliminary Team Assessment (PTA) mandated by the terms of the 2020 SOP. The PTA henceforth involved a meeting with a number of relevant clinicians for a period of between 1 hour to 90 minutes. Parents attended the meeting and completed assessment forms. No diagnostic assessment took place as part of the PTA. This represented a reversal of the previous approach to the performance of an AON by the HSE where in each case a process of diagnosis was carried out to identify the nature and extent of a child's disability.

35. The PTA mandated by the 2020 SOP operates so as to preclude the professionals who are members of the team (PTA) from carrying out a comprehensive evaluation and assessment of the individual child such as would facilitate identifying with greater clinical precision the nature and extent of any underlying disability.

36. The reasons emerging from the terms of the 2020 SOP for the changes introduced do not appear to be animated by the objective of ensuring a more efficient process for securing a higher degree of accuracy in regard to the nature or extent of any identified disability or greater efficiencies in determining the services considered appropriate to meet relevant needs, under s. 8(7)(b) of the 2005 Act.

37. In practical terms, the PTA approach generally precludes a firm diagnosis given the summary nature of the process which is normally based on engagement with the child, family and carers for on average 60 to 90 minutes. Where issues of concern are identified - based

on reports of parents, carers, professionals and/or cursory observations made by the PTA Team of the child - it must generally necessarily follow that a further diagnostic assessment is required to competently identify the nature and extent of the disability in question and same will inform the process under s. 8(7)(b)(ii) – (iv) inclusive where the services considered appropriate to meet the needs of the relevant child can be determined.

38. It would appear that the introduction *via* the 2020 SOP of the PTA for the purposes of preparing a s.8–compliant AON and preparation of a statement of need where appropriate facilitates a re-engineering of the established AON procedures under Part 2. Hereafter, in the event that implementation of measures specified in the AON/Assessment Report include any diagnostic assessment considered necessary - such as to ascertain whether a child's condition falls within the Autism Spectrum Disorder (ASD) and if so the nature and extent of the disabilities being experienced – such a step would henceforth fall outside the ambit of the s.8 AON. Thus, henceforth a diagnostic assessment would not routinely, or perhaps at all, form any part of the independent AON pursuant to s. 8 of the Act. Instead, it is reallocated to the category of "*services*" or as a recommendation within the Statement of Services identified as appropriate within the Assessment Report prepared by the PTA Team.

39. If a diagnostic assessment hitherto considered integral to carrying out a proper AON under s. 8 is not performed and an Assessment Report is prepared deeming that a child meets the definition of disability contained in the Act (sections 2 and 7(2)), can an Assessment Report which then states that "*future health needs*" include the need for "*future diagnostic assessment*" be said to comply with s. 8 of the Act? S. 8(5) expressly provides that an assessment under s. 8 "*shall be carried out without regard to the cost of or the capacity to provide, any service identified in the assessment as being appropriate to meet the needs of the applicant concerned*".

40. The new approach is understandably attractive to the HSE, not least from a resource perspective. If the diagnostic assessment considered necessary by the AON team can be reassigned from the s. 8 assessment process to the heading of delivery of a "*service*" in the Service Statement provided for pursuant to s. 11 of the Act, the "resources blind" approach provided for by s. 8(5) is not applicable. By contrast, it is clear that the provision of services is resource sensitive, as the long title to the Act itself makes clear. Furthermore, s. 11(4)(c)(i) empowers the Council (National Council for Special Education (NCSE)) in deciding whether or not to comply with any request to take specific action recommended in a Service Statement to have "*regard to the resources available to it ...*". The principle in s. 8(5) "*without regard to the cost*" contrasts starkly with s. 11(4)(c)(iii) "*having regard to the resources available to it …*".

41. The 2020 SOP reduces the ascertainment of disability to a presumptive one. Clause 7.2.1(a) *"For the purposes of Assessment of Need, children …who are deemed to meet the level of complexity required for a Children's Disability Team are considered to meet the definition of disability".* This precludes the experts carrying out the s.8 AON assessment from being entitled to instigate any diagnostic assessment of a child to more fully establish "*the nature and extent"* of any apparent disability. The nature, severity, aetiology or likely duration of any underlying disability is no longer assessed with any particularity. This approach results in an Assessment Report, such as that provided on the 13th January 2021 in respect of the child the subject matter of these proceedings, a key recommendation of which is for "*further diagnostic assessment".*

42. The terms of the 2020 SOP perforce significantly alter and circumscribe the autonomy and independence of the individuals charged with carrying out the preliminary assessment. The question is whether the 2020 SOP impermissibly deviates from the requirements of s.8

or improperly interferes with their independence in the performance of their functions guaranteed by s. 8(4) of the 2005 Act:

> "*An assessment officer shall be independent in the performance of his or her functions*."

43. Given the limited duration and inevitable superficiality of a once-off interface with a child and their parents by the preliminary team, an assessment under the 2020 SOP and the ensuing Assessment Report is inevitably more "*light touch*", being predicated on an assumption that the child has some disability. It appears to have been intended to permanently replace the comprehensive expert professional assessment process hitherto undertaken in the preparation of assessments carried out pursuant to ss. 8 and 9 of the 2005 Act for the purposes of preparing an independent AON. Under the Act a competent assessment of disability is integral to the assessment of need process, being the initial step in the process.

44. The practical consequence of the 2020 SOP is that a comprehensive assessment which an Assessment Officer considers necessary to properly ascertain "*the nature and extent"* of an underlying disability - such as in relation to the presence, nature and extent of ASD – is now effectively redesignated as a health need and thereby intended to be governed by s. 11 of the Act. Comprehensive assessments are in effect excluded from the AON process. An inevitable consequence is that there is a substantial delay in obtaining necessary diagnostic assessment of children. The question is whether the 2020 SOP impermissibly trenches on the independence of, or circumscribes, the relevant Assessment Officers in the discharge of their statutory duties and functions or otherwise serves to impermissibly obstruct or impede fulfilment of those statutory duties with particular regard to s. 8 in determining the nature and extent of the disability presenting in an individual child.

The assessment of the child in this case

45. In the first instance the applicant raised complaints alleging that the assessment of the child had not been carried out in accordance with the requirements of s. 14(1)(b) of the 2005 Act. The said section entitles an applicant who seeks an assessment of need to raise a complaint to the Complaints Officer under the Act (sections 14 and 15) where they are of the view that an assessment has not been commenced or completed within a time frame specified under the Act. The parents' complaint was upheld and recommendations were made by the National Disability Complaints Officer. The impugned assessment was carried out by means of a PTA as introduced by the 2020 SOP. The team engaged in the PTA were Dr. A., a Clinical Psychologist, Ms. R., a Speech and Language Therapist, Ms. K., an Occupational Therapist and Mr. O., Physiotherapist. The Report, based on the PTA, issued on the 13th January 2021 following engagement by the PTA team with the family and the child lasting approximately 1 hour and 30 minutes. The Assessment Officer, Ms. Wilson, the author of the Report states; "*I have determined that the applicant does have a disability as defined by the Disability Act, 2005"*. The report noted that assessment the child had presented "*with challenges in the area of social communication, sensory processing, and emotional regulation*". The child also presented with "*some fine and gross motor difficulties*". The Assessment Report stated that the assessment showed that the child's challenges appeared to be impacting significantly on the ability to engage in activities within and outside the home, such as interacting with peers at school, paying attention in class, engaging in academic tasks, engaging in physical activities and regulating emotions.

46. The report, based on the PTA, identified the child as presenting with the following needs – having difficulty with fine and gross motor skills which impact on everyday tasks and that the child's "*presentations is suggestive of hypermobility*." The child had some difficulty with social communication skills which impacted on the ability to make their needs

known and interact with others. The child was also presenting with language skills below the level expected for their age and appeared to have sensory processing difficulties that impacted on regulation. The child was reported to be "*hyposensitive to pain*". It was also reported that according to the parents, the child "*appears to present with some emotional regulation and behavioural difficulties at home*".

47. The health needs of the child were identified in the Report as follows: -

> "*Speech and language therapy, psychology, physiotherapy and occupational therapy provided by an interdisciplinary team to support the needs outlined above*."

It was also observed that based team observation and parental reports that the child "*requires further diagnostic assessment*". The section of the Report entitled "*Education needs have been identified as follows*" is left blank. Neither were there any needs identified requiring referral to any "*appropriate statutory body*". With regard to recommended interventions and services, the time scale for provision of same in each case was expressed to be "*as soon as possible*".

Affidavits on behalf of the HSE

48. Ms. Wilson, the author of the Assessment Report, in her affidavit of the 29th April 2021 deposed that it is the position of the HSE that the impugned Assessment Report is "complete" for the purposes of s. 8 of the 2005 Act. She points out that she had made "*a determination that [the child]… has a disability … as defined in sections 2 and 7 of the Disability Act…"* The definition of disability in section 2 of the 2005 Act is cited as is section 7(2) of the said Act. I note in passing that nowhere in the Assessment Report is it expressly stated that the child's disability was "*permanent*" or likely to be so. In the latter part of para. 4 of her said affidavit Ms. Wilson does significantly expand on the Assessment Report of the 13th January 2021 in material respects by explicitly confirming not alone that the disability is indeed permanent, as required by s. 7(2)(a) of the 2005 Act, but also that the

child's disability gives rise to the need for services to be "*provided continually*" as required by s. 7(2)(b) of the Act. At para. 8 of her affidavit Ms. Wilson deposes that in preparing the Assessment of Need Report "… *I followed the processes which are set out in a Standard Operating Procedure which was introduced with effect from 15 January 2020 with a view to standardising national practice in the carrying out of assessments of need*." She avers that she had also identified by way of a health need the child's "*requirement for further diagnostic assessment*" (para. 10) and observes that for the avoidance of doubt, the outcome of any such assessment would not alter her statutory determination that the child has a disability "*within the meaning of the Act, and further, as to the nature and extent*" of that disability. She avers that she included the child's requirement for "*further diagnostic assessment*" as a health need "… *in terms of determining whether or not [the child's] presenting behaviours might - in addition to constituting a disability within the meaning of the Act - also meet the standard for any particular diagnosis*." She asserts (para. 12) that "*whether a child's presenting behaviours meet the criteria for a particular diagnosis is a separate matter from the question - which I am required to answer under statute - whether he or she has a disability within the meaning of the Disability Act 2005"*.

49. Reference is made in the said affidavit to communications received from the solicitors for the child's parents which asserted that the absence of an assessment as to whether the child's presenting behaviours met the clinical criteria for ASD rendered the Assessment Report incomplete. That correspondence in particular had emphasised that an ASD assessment was not a service but was part of a child's assessment of need process and that the purpose of the Act was to determine whether or not a child has a disability and the extent of same. "*An ASD assessment is not a service and should therefore be included within the assessment of need framework*". The Assessment Officer disputed the parents' contentions, noting that following a consideration of the professional reporting carried out in the child's

assessment of need, there was no record of a recommendation that the child should be referred for ASD assessment.

> *"... in my professional opinion, as the officer charged with preparing assessment reports, it was not necessary to obtain (or to discount) a diagnosis of ASD in order to carry out the statutory function of an assessment of need, namely to determine whether an applicant has a disability within the meaning of the Disability Act, and further, the nature and extent of that disability.*" (para. 17)

She deposed that the Assessment Report confirmed the existence of "*a disability*" and "*the nature and extent of same".* The issue as to whether the child's presenting behaviours also met the criteria for one or other particular diagnosis was said to be "*... a separate issue from the question whether the statutory matters that must be recorded in an assessment report are in fact so recorded*."

50. On the 30th April 2021 Malcolm MacLachlan of the HSE furnished an affidavit outlining that he was a professor and clinical lead for the National Clinical Programme for People with Disability in Ireland. He deposes that the current edition of Diagnostic and Statistical Manual of Mental Disorders (DSM-5) contains a description of Autism Spectrum Disorder at pages 50-99. Outlining a description of the diagnostic criteria he thereafter at para. 7 deposes: -

> *"A variety of different formal diagnostic tools and/or developmental screening tools may be used to assess the presence of behaviours in a child which may assist in arriving at a diagnosis, but that diagnosis will only attach where the necessary criteria are met."*

At para. 8 he deposes that: -

> "*…the question whether at (sic) child's behaviours meet the diagnostic criteria for autism spectrum disorder is an entirely different question whether he or she meets*

the statutory criteria for a determination of disability within the meaning of the Disability Act."

9. Assessments are carried out by members of an interdisciplinary team combining information from a range of sources, including; the person's referral source, clinical history, observations of their behaviour, the use of standardised psychometric instruments and personal clinical interviews. These may currently be conducted in a variety of settings and across a period of time as deemed appropriate by clinical judgement.

10. I say that I do not swear this affidavit with the aim of advocating one way or the other in respect of this child's case; rather to apprise the Court of what is involved in diagnosing autism spectrum disorder in a child, in order that the Court can compare the clinical evaluation to the statutory assessment of need conducted under the Disability Act."

51. In an affidavit sworn by Lebeau Jonker, Solicitor for the applicant, on the 28th October 2021 a letter is exhibited from Professor MacLachlan dated the 3rd March 2021 to the Psychological Society of Ireland (PSI), the Association of Occupational Therapists in Ireland (AOTI) and the Irish Association of Speech and Language Therapists (IASLT). It engages with various assertions from the said bodies which, for reasons outlined below, I do not propose to attach weight to in the context of this application. It is noteworthy however that on page 4 of the said letter Professor MacLachlan observes: -

"*What is considered best practice has to be contextualised in terms of the nature of health and social care systems, the availability of trained professionals, cultural expectations and practices; and, of course, the resources available. What counts as best practice in one context is not necessarily going to constitute best practice in*

another setting .. What constitutes best practice in the assessment of disability is contested (MacLachlan, 2019)."

It is not clear whether in this excerpt Professor MacLachlan is asserting that the assessment of disability itself is to be carried out otherwise than "*without regard to the cost of, or the capacity to provide, any service identified in the assessment*" within the meaning of s. 8(5) of the 2005 Act. He further observes: -

"… There is no internationally accepted protocol regarding what professions should be involved, what instruments should be used, or how long an assessment should take. Different jurisdictions use different protocols, which are not commensurate (Penner et al, 2017). This is not necessarily a problem as long as a systematic approach is used. Currently in Ireland most, if not all, of the psychometric instruments used in disability assessments lack Irish norms - we use norms from elsewhere (often UK or US) and extrapolate from these to infer the likelihood of certain behaviours being indicative of particular types of experiences. The use of a tiered approach to assessment allows people with problems that can be more readily identified in support of action indicated, to be provided with appropriate interventions; rather than undergoing the same lengthy assessment as another person who may have experiences that are much more difficult to specify and identify interventions for. The complexity of assessment does not necessarily relate to the complexity of intervention; and all interventions de facto present increased knowledge that can refine the practitioner's, family's and often the service user's understanding of their experience, and how best to assist them."

Affidavits on behalf of the Applicant Parent

52. In a replying affidavit sworn on the 7th July, 2021 the applicant parent strenuously disagreed with the key assertions and contentions of the HSE. Briefly put, it was contended

inter alia, that there had been communications from Ms. Wilson via email with the family recommending that they make contact with a charity which supports families with children experiencing autism. It was asserted that the child "… *cannot get services or interventions for children with Autism Spectrum Disorder – which are already severely overburdened –*" without an appropriate diagnosis (para. 11). It was the parents' view that the child suffered from "*a form of Autism Spectrum Disorder*" (para. 14). The central complaint was that the condition remained undiagnosed which meant the child could not get access to the services required. "*The HSE are more than happy to refer me to autism charities but won't actually do what they are required by law to do* …", namely to advise whether the child had Autism Spectrum Disorder or not. (para. 14) The crux of the issue from the parents' perspective is identified thus: "*I am advised that the incomplete assessment which .... received was the result of the HSE's new Standard Operating Procedure for assessments of need under the Disability Act 2005*." (para. 16) It is averred that had the child been assessed under the previous system, they would have been told whether the child had ASD or not.

53. The parents obtained the services of an independent Child and Educational Psychologist, Ms. Regan. It would appear that she never met the child. Her report was prepared at the request of the solicitor for the applicant based on a review of the Assessment Report and Service Statement as well as the Preliminary Team Assessment and letters from the HSE Liaison Officer and Clinical Psychologist. The report appears to be substantially based on a desktop review of material provided by the solicitor in May of 2021. Her primary criticism of the HSE's Assessment Report was that it did not "*provide any detail for the Department of Education to sanction support [in school]"* and that as such it rendered the child's *"service statement as ineffective for evidence of provision and intervention for the child's significant needs*." Commentary was provided by Ms. Regan on the new assessment of need (AON) model based on the documentation before her. Her high level critique made

observations on the absence of any Special Education needs provisions and that as a result there was "*no SNA access as no care needs from an educational point of view are provided*". Ms. Regan was critical of the absence of dates for service delivery. She states that *"[b]ased on the information given in the report it is my professional opinion that an ASD assessment is warranted in this case based on the presenting behaviours and developmental information*". It was asserted that "*this child's ASD trait behaviours are impacting on … activity levels, attention and behavioural responses*." The exhibited report stated that the child required immediately an ASD multidisciplinary team to effect an assessment and provide a detailed report on the child's needs.

54. An affidavit sworn by Marion Campbell, Solicitor on behalf of the applicant, on the 15th September 2021, exhibited, *inter alia*, correspondence and copies of reports including from the Psychological Society of Ireland (PSI) dated February 2021, the Association of Occupational Therapists in Ireland (AOTI) pertaining to "*Occupational Therapists' experience of the HSE Preliminary Team Assessment (PTA) approach to assessments of need*" dated February 2020 and from Irish Association of Speech and Language Therapists (IASLT) concerning a survey of such therapists' experience of the AON and PTA processes under the 2005 Act, dated the 15th February 2021. I observe that no affidavit was sworn by any party by or on behalf of any of these organisations or bodies. No satisfactory explanation was offered to the court for the absence of such affidavits. In the circumstances I propose not to attach weight to the contents or observations in same since they were not properly adduced in evidence.

The applicant's arguments

55. In written submissions the applicant contends that the HSE has not "completed" the child's AON as required by the Disability Complaints Officer's recommendations. In that regard reliance is placed on section 15(8)(b) of the 2005 Act and the report which in this

case recommended that the assessment be completed by the 9th December, 2020. It is emphasised that in the absence of a diagnostic assessment, the AON in respect of the child is not complete. There is a dispute as to whether the child's father is entitled to an order under s. 22(1)(a)(iii) of the 2005 Act directing the HSE to implement the 28th September 2020 recommendation of the Disability Complaints Officer under s. 15(8)(b) that the AON should be completed by the 19th December, 2020. There is a clear dispute between the HSE and the applicant as to the correct legal interpretation of the statutory provisions including ss. 8(2)-(6), inclusive and 8(7)(a) and 8(7)(b)(i). The latter encompass: -

> "(a) *Whether the applicant has a disability*" and if so
>
> (b) (i) "*a statement of the nature and extent of the disability*."

The applicant placed reliance on the judgment of Donnelly J. in this Court (Ní Raifeartaigh and Binchy JJ. concurring) in *C.M. (a Minor) v HSE* [2021] IECA 283, [2022] 1 ILRM 40 where the dispute was centred on the interpretation of s. 8(3) of the Act and whether it was applicable to children as well as adults. Donnelly J. considered the issue in the context of the literal approach to statutory interpretation observing at para. 54: -

> "*The primary objective of the literal approach is to view, not only the section(s) in dispute, but the Act as a whole. The construction adopted by the Court should not be adopted if it would produce an absurd result*."

She observed, citing McKechnie J. in *AWK v The Minister for Justice and Equality* [2020] IESC 10, para. 35 that "*context can be critical*". That judgment will be returned to in greater detail hereafter.

56. Reliance was placed on dictionary definitions of the words "*completed*" and "*complete*". The applicant places reliance on the judgment of Donnelly J. in this court in *J.O'SS v HSE* [2021] IECA 285 where (Ní Raifeartaigh and Binchy JJ. agreeing) she observed: -

> "*The court must have regard in interpreting the legislation to how it was intended that the legislation would operate at its optimal level. On that basis, the respondent was clearly intended to be able to carry out most if not all of these assessments within a three month (extendable to six months) time frame."* (The latter is a reference to SI 263/2007).

The applicant relied on the decision of Faherty J. in *J.F. v HSE* [2018] IEHC 294 where an assessment of need had not been completed within the statutory time frame. Faherty J. had approved the decision of Peart J. in *O'C v The Minister for Education* [2007] IEHC 170. Reliance is placed, *inter alia*, on a remark of Peart J. which was in turn cited with approval by Faherty J. in *J.F.*: -

> "*…The diagnosis is the only key which has the potential to unlock the package of ameliorating measures to which the plaintiff would be entitled after diagnosis*."

The applicant also placed reliance on the further observations of Faherty J. that: -

> "*It is not disputed that the statutory content of the 2005 Act - the diagnosis of disability in childhood - imports a significant degree of urgency in the assessment of children for disability. This is evident from the use of the term "as soon as possible" in Article 9 of the 2007 Regulations, the clear intention of the Oireachtas being that the assessment would commence as soon as possible, with a three month period specified within s. 9(5) of the 2005 Act and Article 9 of the 2007 Regulations constituting the maximum time and the very outer limit for commencement of the assessment of needs*."

57. With regard to the statutory requirements for an AON the submissions on behalf of the applicant emphasise s. 8(7)(a). Emphasis is placed on the definition of disability in light both of ss. 2 and 7(2) of the Act, it being asserted that "*a definition this complex is not capable of being properly applied in the absence of evidence obtained from a rigorous*

investigation into the applicant's signs, symptoms and background and the performance of any relevant tests." (para. 42) Emphasis is placed on the language in s. 8(7)(b)(i) which expressly envisages that an Assessment Report would set out findings of the Assessment Officer, together with determinations in relation to, *inter alia*, "*… the nature and extent of the disability*", it was argued that "*An assessment which does not provide enough information to enable such a statement to be included cannot be said to be complete*." Extensive reliance is placed on dictionary definitions of relevant words such as "*diagnosis*". It is asserted that the decision of this court in *J. O'SS v HSE* "*demonstrates the clear understanding that an assessment of need conducted in respect of a child who might have ASD would incorporate a diagnostic component*." (para. 55)

58. With regard to s. 8(7)(b)(iii) which is directed towards the statement of the services considered appropriate in the case of a determination that an applicant has a disability, it is asserted that the framework of the 2005 Act makes a clear distinction between assessments and services which are separately defined in s. 7(1). "*Put very simply, assessments identify whether a person has a disability, what the disability is, and what needs it occasions, while services are the measures to be taken to meet those needs*." (Para. 57) It is asserted that "*The HSE's interpretation of section 8 dissolves the statutory distinction between assessment and service, treating important aspects of an assessment - as fundamental as the nature of the disability - as services*." It is contended that the HSE's interpretation of "*completed*" in s. 15(8)(b) is absurd. The case stated is not directed towards s. 8 (7)(b)(iii), however.

59. An AON is asserted to be incomplete if the question of diagnosis is "*ignored*". A detailed parsing and analysis of the Assessment Report of the Assessment Officer Aisling Wilson dated the 13th January 2021 is embarked upon, it being asserted that the Oireachtas intended by virtue of the statutory provisions that an AON would incorporate a diagnostic assessment. "*It follows then that an assessment of need which has no diagnostic element*

cannot be said to have been completed, without undue delay or otherwise, in the sense that the word is used in section 15(8)(b) of the Act." (Para. 79)

60. It is contended that the 2005 statute being remedial in nature, a purposive approach to its construction is warranted, reliance being placed on the judgment of Walsh J. in *Bank of Ireland v Purcell* [1989] IR 327 and the decision of the Supreme Court (Clarke C.J.) in *J.G.H. v Residential Institutions Review Committee and Residential Institutions Redress Board* [2018] 3 IR 68 with regard to the proper approach to the interpretation of a remedial statute and the decision of this court in *G. v HSE* [2021] IECA 101. The minority judgment of O'Donnell J. (as he then was) in *J.G.H.* where he cited with approval Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health* [2003] 2 W.L.R 692, was relied upon: -

> "*The Court's task within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provision should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."*

The introduction under the 2020 SOP of the PTA is asserted to be "*an administrative innovation which serves the interests of the HSE*" (para. 91).

> "*The suggestion that the nature and extent of a disability does not require diagnostic assessment but that it can instead be estimated over the course of an hour and a half by a preliminary assessment team is not designed to vindicate the rights of disabled people."*

It was argued that the question posed should be answered in the negative.

Submissions of the HSE

61. The HSE takes issue with the applicant's interpretation of the 2005 Act and contends that the definition of "*disability*" in the statute is not medicalised but rather to be construed

by reference to the restrictions on participation in life experienced by an individual with disabilities. Concerns were raised that the applicant had raised or incorporated material that went beyond the facts set forth in the case stated by the referring court. Central to the HSE's arguments is that the issue of a diagnosis is separate from the question of whether an applicant has a disability as defined by the Act and the nature and extent of any such disability. The HSE emphasises that this Court should not engage in any detailed analysis of the underlying facts as same are a matter exclusively for the referring court. The latter court will engage with the facts on foot of the answer as may be provided by this Court to the question of law submitted.

62. It is contended that the question of law formulated by the judge addresses s. 8(7) of the Act and seeks guidance as to whether *diagnosis* is a necessary element in the preparation of an AON either for determining whether or not the applicant has a disability or secondly "*the nature and extent*" of such a disability. The HSE argues that the Circuit Court has not sought guidance as to whether diagnosis is a necessary component of the other elements of an Assessment Report to be furnished under the Act. The central issue is whether the 2005 Act in the provision of assessment reports requires a determination to be made as to whether the applicant meets the diagnosis for any particular condition. It is emphasised that the word "*diagnosis*" is not referred to in the Act and the Oireachtas has made "*a deliberate choice that diagnosis is not required*". This is said to be reflective of a broader trend against the "*medicalising*" of disability. It is contended that the definition of a "disability" in the Act represents a deliberate legislative choice to frame the concept of a disability as a "*social issue*" in terms of the effect which the impairment has on an individual's capacity to participate in the social, vocational or cultural life of the State. Same was said to contrast with the medicalised approach to disability to be found in other legislation such as the Employment Equality Act, 1998 or the Equal Status Act, 2010. It is contended that the social

conception of disability aligns with the approach in the CRPD. It was asserted that Art. 1 of the CRPD embraces the social model, although the HSE made clear it is not relying on the terms of the CRPD as a source of law *per se*. The non-medicalised approach to defining and identifying disability is said to be illustrated by the fact that pursuant to S.I. 263 of 2007 Regulation 13, Assessment Officers discharging functions under s. 8 of the Act are not required to have any medical or clinical qualification. The HSE is critical of the applicant, contending that the focus on diagnosis is entirely inconsistent with both the language and the spirit of the 2005 Act.

63. In its arguments directed towards s. 8(7)(a) of the Act the HSE contended that requiring a diagnosis as a prerequisite for the purposes of making a statutory determination as to whether an individual has a disability, is not only unnecessary but would undermine the language and ethos of the 2005 Act itself. There is agreement with the applicant that the principles outlined regarding the literal approach to statutory interpretation in *C.M. v HSE* [2021] IECA 283 should be adopted but that a purposive approach may be employed where the conditions in s. 5 of the Interpretation Act, 2005 are engaged. The HSE contends that the definition of "*disability*" to be found in sections 2(1) and 7(2) of the Act are clearly formulated and do not create a nexus with any particular condition or diagnosis. The HSE differs with the approach of the applicant and in particular contests the appropriateness of resorting to dictionary definitions in respect of a word which is thereby shorn of its statutory context.

64. The HSE takes issue with the argument that the period of three months provided for the completion of an independent AON pursuant to s. 8 suggests that the Oireachtas had intended for diagnostic testing to be carried out, it being contended that the mere provision of a time frame in legislation cannot supersede the actual words of the statute. Further, the relevant 2020 SOP was said to demonstrate the extent of the work to be done in the

applicable timeframe and that requiring a diagnosis of a child's condition in addition would render it challenging for the HSE to meet the statutory and regulatory timelines and would be contrary to the urgency underpinning the assessment process.

65. The HSE acknowledges that there are benefits attached to an early diagnosis, particularly in children, but contends that that this does not provide a mechanism in the absence of one specified by statute for providing a diagnosis. It was reiterated at length that no aspect of the ordinary and natural definition of "*disability*" to be found in the Act indicates that a diagnosis must be attached before a determination can be made regarding whether an applicant has a disability or an AON being prepared.

66. It was acknowledged on behalf of the HSE that in prior decisions of the court, it had either been expressly conceded by the HSE or assumed by the parties and/or the court that a diagnosis was an integral part of the assessment of need process and such can be inferred from the decisions such as *J.F. v HSE* [2018] IEHC 294, *C.M. (a Minor) v HSE* [2020] IEHC 406 and *J.O'SS v HSE* [2021] IECA 285. However, it is pointed out that those decisions did not engage with or address the issue of whether the AON assessment process was required to incorporate a diagnosis and accordingly any remarks pertaining to a diagnosis in those cases are to be treated as *obiter*.

67. In regard to s. 8(7)(b)(i) "*a statement of the nature and extent of the disability"*, the HSE argued that one cannot consider the phrase "*nature and extent*" in that subsection in isolation and that no requirement of diagnosis is imported by sections 2(1) and/or 7(2) the statutory definitions which encompass the statutory definition of disability. It was argued there was no parliamentary convention or authority for the proposition that the words "*nature and extent*" could be understood to substitute for "*diagnosis*".

68. It was argued that the Circuit Judge had confined the question of law stated which indicated that he was not seeking guidance beyond the issue of whether diagnosis is a necessary component for determining either: -

(a) the existence of a disability, or

(b) the nature and extent of that disability, within s.8(7)(b)(i).

The HSE strongly disputed the applicant's assertion that diagnostic testing constitutes an assessment rather than a service under the 2005 Act, it being contended that the Act defines a health service in broad terms. It further contended that the court should not go beyond the questions posed in the case stated or address whether diagnosis testing is required.

69. The HSE does not dispute that the 2005 Act is a remedial statute as that concept is understood in the jurisprudence. It contends however that this does not entitle the applicant to depart from the language of the Act. Reliance is placed in particular on the judgment of O'Donnell J. (as he then was) in *J.G.H. v Residential Institutions Review Committee and Anor*. [2017] IESC 69, [2018] IR 68 at 117. Reliance is placed on the judgment in this court of Ní Raifeartaigh J. in *G. v HSE* [2021] IECA 101 where she noted the interpretative limits of the purposive approach and made reference to the observations of O'Donnell J. in *J.G.H.* It was contended that the language of the 2005 Act is "*strongly supportive*" of the HSE's asserted interpretation of s. 8(7)(b)(i) and it provides a constraint on adopting the interpretation advocated for by the applicant. Merely because a child would benefit from diagnostic testing as early as possible does not of itself raise an entitlement to a diagnosis, the HSE argued. It was said that this was clear from the language and spirit of the Act and all the more so since disability is framed in the Act in terms of a restriction in participation rather than a consideration of the underlying cause of the restriction. It was argued that nothing in the long title justifies the incorporation of a requirement of diagnosis in the assessment process. The HSE reiterated that the applicant's case was premised on a

medicalised approach to disability and did not reflect the language of the statute which provided no requirement to incorporate into the assessment process a diagnosis. It was submitted that the question of law should be answered in the affirmative.

Submissions of the IHREC

70. IHREC argued that it was crucial that the 2005 Act provisions be interpreted in a manner consistent with fundamental rights and in particular the State's obligations under the CRPD. IHREC took issue with the underlying premise of the HSE insofar as it contended that where the identification of an impairment requires a diagnostic assessment that process does not *per se* constitute a medical model of disability but rather is consistent with the social model of disability as provided for in the CPRD. It was contended that the HSE's interpretation of a "*disability*" pursuant to the Act risked depriving the child in question of fundamental rights contrary to the provisions of the CRPD and Art. 42A of the Constitution. With regard to the appropriate approach to the interpretation of s. 8(7) in the first instance, a consideration was made of the long title to the Act. It was said that the AON process under s. 8 engages a range of fundamental rights including the constitutional right to bodily integrity. It was contended that domestic law should, in so far as possible, be construed in a manner consistent with the State's obligations under international law. IHREC acknowledged that the State had ratified the CRPD in March 2018, subsequent to the Act coming into force. It was asserted that, nevertheless, the courts should have regard to the State's obligations pursuant to international law, particularly in circumstances where the 2005 Act directly engages the State's obligations under the said Convention. It was contended on the particular facts pertaining to the child at the centre of this application, that an AON pursuant to s. 8(7) requires an assessment of all necessary matters, including a diagnosis of the child's disability where one has not already been provided. A diagnosis is

necessary, it was contended, so that the child's parents can understand the nature of the impairments arising with a view to assisting them in meeting the child's needs.

71. IHREC contends that the s. 2 definition of *disability* perforce does encompass a medical element as well as a social aspect since it makes reference to a restriction on participation in society arising by reason of an "*enduring physical, sensory, mental health or intellectual impairment*". This medical element was said to be reinforced when interpreted alongside s. 7(2) of the Act which places emphasis on the *permanent* nature of the restriction and the need for the provision of services *continually*. IHREC contend that the inclusion of a medical element does not offend the purpose of the 2005 Act or the State's obligations pursuant to CRPD.

72. It was asserted that failing to identify or diagnose a person's impairments is likely to hinder that person's participation in society on an equal basis with others contrary to Art. 1(2) of the CRPD.

73. With regard to the 2020 SOP, the subject matter of the case stated, IHREC argued that both the SOP and the HSE's submissions appear to side-line the medical aspect of the definition of disability and appear to go so far as to argue that the reference to a person's underlying condition requires departure from the clear language of the 2005 Act since disability is defined by reference to restrictions on a person's capacity to participate. IHREC emphasised the fact that the restriction is framed as one which is "*by reason of an enduring … impairment*" - a core element of the definition of disability. IHREC queried how an AON can be effectively carried out in the absence of appropriate identification or diagnosis of the applicant's impairment giving rise to the person's disability.

74. Reviewing the authorities, the IHREC acknowledges that the issue has not been firmly decided but contend that authorities on the 2005 Act suggest that diagnosis is a relevant part of an assessment of need process. A key concern of IHREC is that the 2020 SOP would

appear to exclude diagnosis as a part of the assessment process as a matter of course, even in situations where same might be considered necessary or appropriate.

75. The assessment undertaken in respect of the subject child is considered in detail and is contended to be illustrative of the deficits inherent in the HSE's approach under the 2020 SOP. Although the child had been determined to have a disability, only vague descriptions of how they presented at assessment were provided. The Report does not include even an initial diagnostic assessment despite recognising that further assessment is required and fails to make any reference to the child's educational needs. The service statement provided fails to make reference to any further diagnostic assessment and it is anticipated there will be a substantial delay in accessing interdisciplinary team services. This appears, it is said, to lend weight to the concerns of the child's parents that the child is prejudiced and may not be able to access vital services due to the lack of a diagnostic assessment.

76. IHREC submits that the HSE's interpretation and application of the 2005 Act cannot be reconciled with the terms of sections 2, 7, 8 and 9 of the 2005 Act when same are interpreted in light of the State's obligation under the CRPD and the child's rights pursuant to Art. 42A of Bunreacht na hÉireann.

77. With regard to the CRPD, particular emphasis is placed on Articles 3, 4, 7 and 25 of same. Article 25 was said to be of special importance with reference to early identification and intervention in regard to disability. It was contended by IHREC that the State's obligations under Art. 25 are not consistent with an AON which excludes the identification and diagnosis of a person's disability in appropriate cases. It was contended that the definition of *disability* under the 2005 Act cannot be understood without regard to the medical element since the AON process should provide a suitable mechanism for early diagnosis, identification and intervention in light of Art. 25 CRPD.

78. Such an approach and interpretation were said to be consistent with other rights under CRPD including Articles 24, 26 and 30. It was contended that Art. 24(2) requires the State to make reasonable accommodations to support individual's needs and that individuals are assisted in integration in academic and social contexts. Further that the Convention placed importance on the persons with disability being consulted and engaged with.

79. IHREC argued that if no diagnosis is included in the assessment of health needs, early identification and intervention and the design of services to minimise and prevent further disabilities is likely to be significantly prejudiced. IHREC argued that properly understood and applied, the AON process under the Act can and should provide a suitable mechanism for early diagnosis, identification and intervention, as appropriate, and that such an approach and interpretation is in line with the State's obligations under Art. 25(b) CRPD. It was argued by IHREC that it would undermine rather than uphold the rights of persons with disabilities under Bunreacht na hÉireann and the CRPD if the 2005 Act were to be interpreted and applied as excluding diagnosis of a child's impairment giving rise to disability as a matter of course.

Analysis

80. The key issue arising for determination is whether, in light of the nature and ambit of the independent AON ordained by the legislature by the relevant subsections of s. 8 of the Act, same impermissibly interfered with or modified by the operative provision of the 2020 SOP? At issue is the extent to which, if at all, the 2020 SOP in its intended operation impermissibly modifies the manner in which the independent AON is carried out, so as to either preclude or delimit any diagnostic assessment of a child's disability by the designated Assessment Officers. Where the Assessment Officer determines that an individual has a disability, is the AON to be considered as complete for the purposes of the 2005 Act where it does not incorporate any diagnostic assessment of the child's disability? The question itself

as posed by the learned Circuit judge is clear that the issue of diagnosis can arise either at the point of "*determining the existence of a disability*", which may engage aspects of s. 8(1), (2), (4) – (7)(a) and (b)(i) inclusive, and also *"in setting out the nature and extent of the disability in question"* – an exercise, which in the overall context of the question, encompasses a limited consideration of s. 8(7)(b)(ii) - (iv).That the Act makes no reference to a "*diagnostic assessment*" cannot of itself raise an inference that best professional practice for the competent ascertainment as to the presence of a relevant disability could exclude a diagnosis process otherwise considered warranted by the AO carrying out an AON.

81. The parties have agreed that prior to the introduction of the 2020 SOP, diagnostic assessment was generally an integral feature of the assessment process under s. 8 in any case where the Assessment Officer considered same necessary or appropriate. In what circumstances does an AON under s. 8 now require a diagnostic assessment in order to comply with the provisions of s. 8 of the Act and the Act itself? The operation of the 2020 SOP circumscribes the entitlement of the Assessment Officer to sanction a diagnostic report in the ascertainment of whether a disability exists or not. As outlined above, in given circumstances a disability is deemed to be established. However, s. 8(6) of the Act is quite specific that the Assessment Officer in the discharge of their functions *"…carries out or arranges for the carrying out of an assessment under this part*". The general approach introduced of a superficial deeming that a disability exists based on a desktop assessment as envisaged by 7.2.1. a and b of the 2020 SOP fails to meet the statutory requirements of s.8 in, *inter alia*, the following respects;

a. Such is not an "*assessment*" as to the existence of a disability as envisaged by s. 9(1) in the context of the definitions of *disability* in s. 2(1) and s. 7(2) of the Act.
b. A deeming approach to identifying disability risks assuming the existence of a disability where none exists which meets the standard in s. 7(2).

c. The deeming provision in the 2020 SOP impermissibly interferes with the statutory independence of the Assessment Officer in the performance of his or her functions, contrary to s. 8(4).

d. The deeming approach to identifying disability under the 2020 SOP impermissibly delimits the exercise by the Assessment Officer in appropriate cases to administer or procure diagnostic assessments or tests considered necessary or appropriate to determine the true *nature and extent* of an underlying disability, contrary to s. 8(7)(b)(i).

e. The deeming approach to identifying disability under the 2020 SOP impermissibly delimits the exercise by the Assessment Officer in appropriate cases of the right to administer or procure diagnostic assessments considered necessary in the preparation of an AON Report "*without regard to cost*" contrary to s. 8(5).

f. The operation of the 2020 SOP risks impeding the Assessment Officer in carrying out an AON and preparing a Report as prescribed by s. 8(6) and in particular obstructs and impedes the proper identification of the true " *nature and extent"* of the generic disability asserted.

g. Such an AON referred to at f. has two distinct parts – assessment as to the existence of a disability and assessment of need arising from the said disability and in light of the *nature and extent* of same. The operation of the 2020 SOP in practice restricts Assessment Officers in procuring appropriate diagnostic assessments for the purposes of enabling the preparation of Report which comply with ss. 8(6) and (7) of the Act encompassing the "*findings*" and "*determinations*". As such, the operation of the 2020 SOP impermissibly trenches on the independence of an Assessment Officer in the operation of s. 8 to procure a diagnosis where such is considered relevant or necessary to determine whether individual has a disability or to establish

the nature or extent of any such disability or of the services to be considered appropriate to meet the needs of an individual with a disability as the case may be. The competent identification of any underlying disability is a fundamental prerequisite to the determination in turn of consequent needs and appropriate services. The operation of the relevant SOP impermissibly undermines the entitlement of an individual to an AON compliant with s.8(7)(a) and (b)(i), (ii).

There is no entitlement to a diagnosis as of right

82. In the course of the hearing, the applicant appeared to accept that there is no general entitlement in all cases to insist that a diagnostic assessment be carried out and neither is it a mandatory component in every case where s. 8 is engaged. The HSE suggested that there is a spectrum of circumstances which can arise. In certain instances, parents may have commissioned their own report which may contain a diagnosis in respect of the child and that same can be provided to the independent assessment officer. The applicant appeared to suggest that the Assessment Officer would be bound by such a report. However, that is manifestly not correct. Such an approach would be inconsistent with s. 8(4) of the Act which provides that "*an Assessment Officer shall be independent in the performance of his or her functions*". The Assessment Officer in the discharge of their assessment functions, both as to ascertainment of the existence of a disability and determination of the services considered appropriate to meet the needs of the individual concerned, enjoys statutory independence and the assessment is to be "resource blind". The functions and duties of the Assessment Officer under s. 8 are such that taken in the context of the Act as a whole, it is primarily a matter for the Assessment Officer as to whether a specific diagnosis is required to be sought in the discharge of their statutory functions under s. 8 - whether in the context of ascertaining the existence, nature, extent or permanency of a disability or for identifying the appropriate services required to meet specific needs in the context of preparation of an AON.

83. In the discharge of his or her functions under s. 8 in respect of the process leading to the preparation of an independent AON, the Assessment Officer is entitled to consider and adopt or reject in whole or in part a privately commissioned report as they consider appropriate in light of their own assessment of the applicant in question.

84. Sight must not be lost of the fact that, viewing the overall scheme of the Act, the independent AON provision in s. 8 is directed towards a specific objective and accordingly the steps in the process are tailored to that end. As is clear from s. 8(7) it sets out "*the findings*" of the Assessment Officer. It also sets out the "*determinations*" of the said officer in relation to: -

(a) Whether the applicant has a disability.

(b) Where a disability is determined to exist the Report must state:

(i) the nature and extent of such disability,

(ii) the health and education needs (if any) occasioned to the individual by reason of that disability,

(iii) a statement of the services considered appropriate to meet the needs of the individual and the time frame "*ideally required by the person*" for provision of those services and "*the order of such provision*".

85. Decisions such as Peart J. in *O'C* and Faherty J. in *J.F.* are of limited value insofar as they proceeded on an assumption that a diagnosis of a specific condition was a universal prerequisite to the preparation of an AON under s. 8(7). However, such an approach cannot be correct for, as the HSE pointed out, nowhere in the Act is a formal diagnostic process mandated as a pre-requisite to assessing whether a disability exists. The imposition of such an element would be excessively prescriptive in circumstances where, as all the parties before the court acknowledged, there is a myriad of different conditions which can meet the definition of a "*disability*" within the meaning of s. 2(1) and s. 7(2) of the Act. Not all such

conditions require a formal diagnosis for the purposes of carrying out a valid assessment under s. 8 and the creation of an AON that is compliant with s. 8(7) in all material respects.

A diagnosis is not required in all cases

86. The argument advanced on behalf of the applicant that where no diagnostic assessment had been carried out, the HSE cannot say whether or not a child has an enduring impairment which falls within s. 7(2) and that such a determination invariably requires a diagnostic assessment - particularly in cases of cognitive impairment - is not correct as a universal proposition applicable in all circumstances. Each case must turn on its own individual facts. As is clear from the statutory scheme, it is primarily for the Assessment Officers in the independent performance of their s. 8 functions to decide in each individual case whether, in light of the facts and circumstances presenting, or to what extent any diagnosis or other intervention is required in accordance with prevailing professional norms to enable the carrying out of a competent assessment either as to the true nature and/or extent of any underlying disability or to identify the appropriate services required to meet the requirements of s. 8 and ensure that the individual be provided with a compliant assessment process and a s. 8 compliant AON report.

87. Section 8 requires the carrying out of an assessment process leading, in cases where relevant disability is identified, to a Report embodying a statement of the nature and extent of the disability sufficient to enable the proper and competent determination – "*without regard to the cost"* - of the identified health and/or education needs of the individual in question. Insofar as the 2020 SOP trenches on the professional practices of the Assessment Officers, undermines the independence of Assessment Officers in the performance of their statutory functions, compels a desk-top assessment resulting in a deeming that disability has been established in a high number of instances, forecloses the general right of Assessment Officers to competently establish with particularity either the extent of an underlying

disability or the extent of consequent relevant need, impermissibly interferes with the independence and proper performance of their functions by the Assessment Officers under s. 8 of the 2005 Act.

88. Third parties – whether the HSE, parents or guardians - are not entitled to insist upon the inclusion or exclusion of any particular methodology or diagnostic step in the performance of the s. 8 assessment process by the authorised Assessment Officers.

The Assessment Report

89. The Assessment Report concerning the child in the instant case is illustrative of the significant changes introduced under the 2020 SOP to be based on a generally time-bound, desk-top assessment by the designated Assessment Officers for the purpose of creating what is now designated to be a "*Preliminary Team Assessment*". It is evident that the team of assigned to carry out the assessment were highly competent and included a Speech and Language Therapist, Occupational Therapist and a Physiotherapist. There is absent any determination of either the nature or extent of the underlying disability deemed to exist. The clinicians refrain from expressing any professional view based on their observations. That is to be expected since the Assessment Report prepared at Section 3 is expressed as a "*Preliminary Team Assessment*" – a process not provided for under the 2005 Act.

90. In Part 6 of the Assessment Report under the heading "*Health needs have been identified as follows*", it provides that that the named child "*requires further diagnostic assessment".* Such an assessment is self-evidently directed towards the First Stage of the assessment – identifying the nature and extent of the underlying disability, within s. 8(7)(b)(i) which in turn will inform the Second Stage of the assessment directed compliance with s. 8(7)(b)(ii) - (iii) in particular. As such therefore the Assessment Report which issued on 13 January, 2021 did not comply with s. 8 of the 2005 Act. It is of concern, in light of the recommendation of a "*further diagnostic assessment*", that the service statement

subsequently furnished in February 2021 made no reference to any "*further diagnostic assessment*".

91. In light of the Assessment Report prepared in this case, a "*diagnostic assessment*" was, in the professional view of the Assessment Officers involved, self-evidently considered to be necessary and intrinsic to the assessment of "*the nature and extent*" of the disability itself. The preclusion of such a step at the s. 8 assessment stage by the terms and operation of the 2020 SOP and its purported replacement by a PTA not provided for under s. 8 resulted in a Preliminary Team Assessment and Report that failed to comply with the provisions of s. 8. Weight must be attached to the characterisation of the exercise being carried out, purportedly pursuant to s. 8 in the SOP as a "Preliminary Team Assessment". In that context it implies that a further assessment is or may be in contemplation.

92. The question posed by the learned Circuit Court Judge presupposes that there "*...has been a determination by an assessment officer that an applicant has a disability"* in the instant case. Such a "*determination"* presupposes a finding concerning the existence of a relevant disability reached following an assessment made in accordance with the procedures specified in s. 8 of the Act. In the instant case there was no s. 8-compliant determination of a disability for all the reasons stated above but rather a deeming that such a disability existed. The ensuing Assessment Report failed to identify the "*nature and extent of the disability*" and that failure invalidated the Report.

93. Inevitably, that in turn impeded the preparation of an adequate statement of the services considered to be appropriate by the individual to meet their needs and to satisfy the requirements of a valid service statement within the meaning of the Act. However, strictly speaking, the service statement and the requirements of same are not explicitly raised by the judge and do not fall to be addressed.

94. The dislocation of a diagnostic aspect to the disability assessment stage in this particular case, notwithstanding that it was self-evidently considered necessary by the Assessment Officers as the Assessment Report makes clear, undermined the s. 8 process to a degree that invalidated it. Thereby the SOP purports to impermissibly vary the statutory scheme.

Statutory Interpretation

95. It is evident from the scheme of the Act that it was the intention of the Oireachtas to separate the process of assessments from the provision of services. Whilst service statements also fall within Part 2 of the Act, they are sequentially separate from and subsequent to the process of assessment as the Act makes clear, in particular s. 11. The s. 8 assessment process itself falls into two stages – determining that a qualifying disability exists and assessing the appropriate consequent health and/or education needs thereby occasioned, as outlined above.

96. In the case of *C.T.M. v HSE & Ors.* [2022] IEHC 131 Phelan J. considered the issue as to whether a PTA carried out pursuant to the 2020 SOP was compliant with the statutory requirements of the 2005 Act. She was satisfied on the evidence that the HSE had impermissibly sought to alter the requirements of a Part 2 assessment by confining it to a 60 to 90 minute assessment without a diagnostic assessment element. She observed at para. 156: -

> "*… what is required under Part 2 is an assessment of the nature and extent of the disability without any conditioning of the assessment as 'preliminary' but rather a full and comprehensive assessment which identifies needs, identifies services appropriate to those needs and the time-frame in which ideally they would be provided. None of this can be effectively achieved without also assessing the cause of the child's disability in an accurate and competent manner."*

97. She observed that she did not "*construe Part 2 of the 2005 Act as requiring a definitive diagnosis on every case.*" She observed: -

> *"It stands to reason that as a child grows and a condition evolves, there may be a clinical need for further assessment. What the Act requires is that to the extent practicable at that time the nature and extent of a disability should be fully assessed during the Part 2 process."*

98. She concluded in relation to the HSE's contention that the PTA under the 2020 SOP had been carried out in compliance with s. 8: -

> "181. … *The respondent has impermissibly sought though the introduction of the SOP to alter what is required under a Part 2 assessment by directing the conduct of assessments on the basis that all that is required under Part 2 is a preliminary team assessment of up to 90 minutes from which a 'broad' statement of the nature and extent of the needs may be discerned without requirement for diagnostic assessments. Consequent upon the terms of the SOP and by performing an assessment in compliance with the terms of the SOP, the Assessment Officers in both cases erred in law …"*

99. It is noteworthy that the Assessment Report in the instant case makes no reference to education needs having been identified in accordance with s. 8(7)(b)(ii). As with the case of *C.T.M. (a Minor) v The Assessment Officer and Ors.* [2022] IEHC 131 it is likely that that omission can be understood, given that the Assessment Report is dated the 13th January 2021 and predates the judgment delivered in this court in *C.M. v HSE* [2021] IECA 283 which considered the contention advanced on behalf of the HSE that s. 8(3) of the 2005 Act insofar as it provided for the assessment of educational needs was confined to adults. Donnelly J. unequivocally rejected that contention.

100. The judgment of Donnelly J. in *C.M. v HSE* [2021] IECA 283, [2022] 1 ILRM 40 is of relevance in a number of respects, not least her observations concerning s. 8(5) of the Act;

> "*23. Under s. 8(5), the assessment must be carried out without regard to the cost of or the capacity to provide, any service identified in the assessment as being appropriate to meet the needs of the applicant concerned... Budgetary constraints etc. are addressed later in the Disability Act under the heading of 'service statement'.*"

The Act draws a clear distinction between the ample and "resource-blind" approach to be adopted under s. 8 to the identification of services in the AON process which contrasts starkly with the parameters of the service statement, which, in the language of Donnelly J., "*remains grounded in the reality of what may be available having regard to the resources of the respondent.*" (para. 23)

101. In the context of the construction of s. 8(3) of the 2005 Act, Donnelly J. in *C.M. v HSE* was satisfied that on a literal interpretation the subsection: -

> "*applies to all applicants, adult or children. The wording in s. 8(9) is clearly different to that of s. 8(3) and on its plain and ordinary meaning discusses what is to occur after the assessment of a child has identified an educational need.*"

Literal approach

102. The issue of statutory interpretation was considered by the Supreme Court in *Nano Nagle School v Daly & Anor* [2019] IESC 63 where MacMenamin J. at para. 85 observed, demonstrated the effective application of the relevant interpretative principles, in the context of employment equality legislation;

> *"In my view, the term 'distribution of tasks' must be read in a manner which is consistent with the entirety of s.16, and the purpose of the Act. If it is arguably ambiguous, it should be given an interpretation that reflects the plain intention of the*

Oireachtas, which can be determined from the Act as a whole. (Section 5, Interpretation Act, 2005). Seen from the perspective of legislation, it could not have been the intention of the legislature to create a situation where, by deploying the term 'tasks' to divide up the term 'duties', an employer could effectively render an employee's duty incapable of performance. That would defeat the purpose of the Act, which is to achieve equality. It is arguable also that this would allow an employer to unlawfully 'classify' a post in a discriminatory way."

103. Donnelly J. observed in *C.M. v HSE* [2021] IECA 283, considering the terms of the 2005 Act at issue in this case stated, at paras. 53/54;

"53. The literal approach to statutory interpretation has been described in numerous judgments (See for example: Howard v. Commissioners of Public Works, [1994] 1 IR 101 cited with approval in the Supreme Court in DPP v. Moorehouse [2006] 1 I.R. 421 and more recently in AWK v. The Minister for Justice and Equality [2020] IESC 10). The purpose of the literal approach is to determine, upon plain reading of the statute, the objective intention of the Oireachtas. McKechnie J. in AWK v. The Minister for Justice and Equality sets out the literal approach and it is worthwhile quoting him at length here: -

> *'[34] […] The text published is the basic material involved because it is the most pre-eminent indicator of intention. As stated by the Law Reform Commission, in a publication later referred to (para. 45 infra), this approach remains the primary method of construction. Regard to alternative means, by reference to the various and multiple subsidiary rules, which collectively are called aids to interpretation, are resorted to only where this primary approach lacks the capacity to resolve the issue or is otherwise found wanting. This method of construction is variously described as the literal*

method or, as giving the words their original meaning or their ordinary and natural meaning. There is no difference in effect between any of these descriptions. They all entail the same substantive drivers in the exercise undertaken.

[35] As part of this approach however, it has always been accepted that context can be critical. It is therefore perfectly permissible to view the measure in issue by reference to its surrounding words or other relevant provisions and, if necessary, even by reference to the Act as a whole. Furthermore, it is presumed that the legislature did not intend any provision enacted by it to produce an 'absurd' result. That rule, admittedly in a different context, was put as follows in Murphy v. G.M.; Gilligan v. Criminal Asset Bureau [2001] 4 I.R. 113. 'A construction leading to so patently absurd and unintended a result should not be adopted unless the language used leaves no alternative: see Nestor v. Murphy [1979] I.R. 326' (Keane C.J. at 127 of the report). Accordingly, whilst not in any way trespassing upon a purposive approach, certainly not that as provided for by s. 5 of the 2005 Act, I believe that it is permissible to have regard to the underlying rationale for the provision(s) in question. On this basis, I propose to examine meaning.'

54. The primary objective of the literal approach is to view, not only the section(s) in dispute, but the Act as a whole. The construction adopted by the Court should not be adopted if it would produce an absurd result. In order to avoid such an absurd construction, the Court can have regard to the underlying rationale for the section(s) in question. It is by engaging in this analysis that the Court can extract the objective intention of the legislature. It is only if the literal meaning of an Act would lead to an absurd result that a purposive or teleological approach is required. Section 5 of

the Interpretation Act, 2005 provides for that as follows:- '(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) - (a) that is obscure or ambiguous, or (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of – (i) in the case of an Act to which paragraph (a) of the definition of 'Act' in section 2(1) relates, the Oireachtas, or (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned, the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.'"

104. Having reviewed the 2020 SOP and the PTA process, Phelan J. in *C.T.M.* concluded at para. 182: -

"*The resulting reports are ultra vires by reason of the patent failure to properly construe the breadth of the assessment obligation arising under Part 2, thereby resulting in an assessment which is not in accordance with the requirements of Part 2 and which frustrates the statutory intention that services need would be identified and a level of unmet need reported*."

She further observed -

"... it is only through the proper identification of need that steps can be taken to secure the services to meet that need and so it is not permissible to avoid the proper discharge of the assessment duty because it may lead to heightened awareness of and frustration with deficits in the actual provision of services." (emphasis added)

She observed that the consequences of failure to properly define the parameters of the assessment *"... is not alone that it undermines the ability of the respondent to itself plan for service provision."*

In consequence, the HSE approved a SOP on 17th July 2023 which replaces the SOP the subject of this consultative case stated.

105. There is no disagreement between the parties as to the remedial nature of the 2005 statute. That such is the case was reiterated by Dunne J. in *J.N. v. Harraghy & Anor*. [2023] IESC 9. As such the operative provisions of the 2005 Act should be interpreted as widely as words reasonably permit.

106. Dunne J. in the earlier decision of *McDonagh v Chief Appeals Officer* [2021] IESC 33 observed at para. 77 that the legislative intention of a socially remedial statute ought to be construed in a manner both "*generous and flexible*". She cited *Dodd on Statutory Interpretation in Ireland* (Tottel, 2008), where the author observed:

> "*Remedial social statutes and legislation of a paternal character favour a purposive interpretation and are said to be construed as widely and liberally as can fairly be done within the constitutional limits of the courts' interpretative role. This formula has been repeated in a number of cases. It has been codified to some extent in some jurisdictions. Remedial social statutes are enactments which seek to put right a social wrong and provide some means to achieve a particular social result. The interpretative approach to remedial enactments can be related to the mischief rules and purposive approach, in that interpretations that promote the remedy that the legislature has appointed are preferred..."*

107. It is noteworthy that Clarke C.J. in *J.G.H. v Residential Institutions Review Committee* [2018] 3 I.R. 68, a decision followed by the Supreme Court (Dunne J.) in *J.N. v Harraghy*, observed regarding the construction of remedial statutes:

> "*The underlying principle behind the proper approach to the interpretation of remedial legislation is that it must be assumed that the Oireachtas, having decided that it is appropriate to apply public funds to compensate a particular category of*

persons, did not intend that potentially qualifying applicants would be excluded on narrow or technical grounds, for that would be wholly inconsistent with the purpose of the legislation. On the other hand the Oireachtas is entitled, when deciding to apply public funds in a particular way, to define, within constitutional bounds, the limits of any scheme which it is decided should be put in place. Where that scheme is remedial, Courts should not be narrow or technical in interpreting those bounds but they should not be ignored either." (at 4.5)

In his separate dissenting judgment in *J.G.H.*, O'Donnell J. (as he then was) observed at para. 63;

"*It is also said that the Court should adopt a broad purposive interpretation of a remedial statute, relying on Bank of Ireland v. Purcell [1989] I.R. 327 and Gooden v. St Otterans Hospital [2005]3 I.R. 617. This is of course a purposive approach. Even if this is so, the statute must still be interpreted. The process of statutory construction cannot be treated as an exercise where the words of the statute are fed into the magician's black box and words of incantation such as purposive, generous or literal or strict are spoken almost at random, before the desired result is extracted from the other side. As Hardiman J observed in Gooden, the limits of construction are reached when a court is asked to rewrite a statute or supplement it. This echoes the approach of Lord Wilberforce in Royal College of Nursing v. Secretary of State for Health [1981] AC 800: "There is one course which the courts cannot take, under the law of this country; they cannot fill gaps…"*

Both judgments in *J.G.H.* were cited by Ní Raifeartaigh J. in this Court in *G. v H.S.E.* [2021] IECA 101, which decision was upheld by Baker J. on appeal to the Supreme Court.

Application of the relevant principles

108. In light of the above authorities, the proper approach to the construction of s. 8(7) of the 2005 Act "*assessment"* and "*an assessment report*" must be construed in a manner consistent with the entirety of s. 8 itself, having due regard to its function within Part 2, the purpose and intendment of the Act and the Long Title. Insofar as it may be asserted to be ambiguous the provision ought to be given an interpretation that reflects the plain intention of the Oireachtas which is to be interpreted from the Act as a whole in light of s. 5 of the Interpretation Act, 2005, cited above. Considering the effect of the latter provision on an interpretative exercise Murray J in *Heather Hill Management Company Ltd & anor. v. An Bord Pleanála & Ors.* [2022] IESC 43, [2022] 2 ILRM 313 at para 109;

> *"What…modern authorities now make clear is that with or without the intervention of [s.5 of the Interpretation Act, 2005]… in no case can the process of ascertaining the 'legislative intent' or the 'will of the Oireachtas' be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted.*"

109. The characterisation of an approach to interpretation as being informed by either a "*medical*" or "*social*" model of disability - and the preferability of the latter over the former as contended for by the HSE - is substantially beside the point and not necessarily of any assistance in the interpretative exercise required. Such a binary approach is not supported by the Act nor does the relevant SOP convincingly display adherence to a social model of disability where its operation effectively forecloses ascertainment of the true nature of an underlying disability in many instances, as outlined herein. The HSE's contention that compliance with the requirements specified in s. 8 in the carrying out and execution of an AON in the manner contended for by the applicant and IHREC would result in an unduly

medicalised approach is not convincing. In particular the arguments advanced by the HSE do not identify a permissible statutory pathway for the HSE to deviate from the procedures mandated under s. 8 in regard to the assessment process and the preparation of a consequential Assessment Report, nor do they entitle the HSE to supplant the operation of the s. 8 assessment in accordance with the provisions of s. 8(7)(a) and (b) or replace the statutory process by an alternative or less comprehensive assessment process devised by the HSE under the 2020 SOP. The PTA assessment under the 2020 SOP deviates materially and impermissibly from the procedures ordained pursuant s. 8 of the statute.

110. I am satisfied that this court is entitled to have regard to the fact that the CRPD was ratified by the State in 2018. It is an ancillary factor to be taken into account in approaching the construction of s. 8. Whilst there are certain similarities between the language contained in the CRPD and the statute, I do not find it necessary to resort to the CRPD in this instance to be satisfied as to the true ambit and extent of the assessment of disability required by s. 8 of the 2005 Act.

111. In each case the Assessment Officers charged with the carrying out of the assessment and preparation of a report must in the first instance whenever it is determined that the individual has a disability, determine its "*nature and extent*". Given the comprehensive nature of the rights conferred by the legislature under s. 8 of the Act on persons with a disability to have carried out an independent assessment, which as to the ambit of the services identified by the AON, is to include "*any service identified in the assessment as being appropriate to meet their needs*" (s. 8(5)), it necessarily follows that the ascertainment of disability should be sufficiently comprehensive in the ascertainment of its "*nature and extent*" to ensure that the AON and Assessment Report supplies the standard of particularity, granularity and detail contemplated by s. 8(5) as to the full range of which the Assessment Officers considers appropriate to meet the consequential needs flowing from the identified

disability. The approach of deeming a disability to be established without more as envisaged by the 2020 SOP impermissibly forecloses the proper operation of s. 8 by precluding a valid AON being prepared. Absent a proper determination of the *nature and extent* of a disability in the first instance, an AON prepared on the assumption of disability or based on an otherwise cursory assessment breaches s. 8.

112. I am satisfied that the approach being adopted by the HSE by the 2020 SOP, perhaps well-intentioned, perhaps informed by the exigencies of economic considerations, presents very substantial and ultimately impermissible obstacles on the path of the individual attempting to exercise their right to obtain a valid independent assessment of need under s. 8. This is particularly acute in circumstances where the individual in question is a child. Regard can be had to the fact that the State ratified the UN Convention on the Rights of the Child (UNCRC) prior to the coming into force of the 2005 Act.

113. The suggestion that the sea change brought about by the introduction under the SOP of the light touch PTA approach with effect from January 2020 was to ensure harmonious application of the statutory provisions across the State is unconvincing. What evidently was operating as a comprehensive process in regard to its approach to the performance of the obligations under s. 8 – leaving aside time constraints – has been very significantly diluted in a manner that in most cases precludes the possibility of a comprehensive or case specific appropriate diagnosis as an integral part of any PTA. This was an impermissible deviation from the essential indicia of a s. 8 compliant assessment in the first instance. Where the assessment itself is substantially or materially deficient, in turn the Assessment Report must, inevitably, be inadequate since the author of such a report is not in a position to authoritatively outline in any comprehensive fashion either the nature or the extent of the disability identified or believed to exist. In turn, that undermines the Assessment Officer in providing a Report compliant with ss. 8(5) and 8(7)(b) concerning the individual in question.

114. The Assessment effected under the 2020 SOP can contain no more than an estimate or uninformed approximation of what services might be considered appropriate. The wholesale dilution of the assessment itself undermines the ensuing AON which consequentially results in a material deviation from what the Oireachtas has mandated pursuant to s. 8(7) of the 2005 Act.

115. The SOP, by requiring an AON to be concluded without the benefit of any appropriate diagnostic assessment, in circumstances where the preliminary assessment itself identifies a "*further diagnostic assessment*" as needed "based *inter alia* on observation …", without any explanation as to why a diagnostic assessment was not carried out in the first place as an integral part of the first stage of the s. 8 assessment, calls for a coherent explanation and none was forthcoming. Furthermore, the definition of "*disability*" in s. 2 envisages an enduring impairment. The identification of an "*enduring impairment*" is a substantial determination in the case of any individual, be they adult or child, and ought not to be lightly made or assumed without cogent evidence.

116. The operation of the 2020 SOP risks an inadequate, potentially erroneous or substandard Assessment Report. It also risks potential injury to individuals, particularly children, where delay in identifying the underlying nature and extent of a disability, a prerequisite to the completion of a statutory compliant independent assessment of need, risks children in particular being deprived of at least the benefit of being entitled to apply for needs-appropriate services in accordance with their entitlements to do so.

117. It is of necessity to be inferred in light of the Assessment Report in the instant case, that the absence of a diagnostic assessment of the child which was immediately recommended under the terms of the Assessment Report itself rendered the assessment on which the report was based inherently inadequate and deficient and otherwise than in compliance with s. 8 of the Act.

118. Further, the impermissible disaggregation of the "*further diagnostic assessment*" patently needed to identify the "*nature and extent*" of the underlying disability from the assessment process, when by necessary inference, same was necessary, resulted in a clear breach of the child's rights and precluded compliance with s. 8(7)(b)(i). That omission in turn rendered impossible the preparation of a valid Assessment Report incorporating an adequate statement of the health and education needs of the child based on the true nature and extent of the disability. The said omission also precluded the proper identification of the services appropriate for the child to meet their needs, in accordance with s. 8(7)(b)(ii) and (iii). The absence of a proper diagnosis in this instance caused the AON process to deviate impermissibly from the provisions of s. 8(7) of the Act.

119. The net effect of the assessment methodology imposed on Assessment Officers under the 2020 SOP is that the initial step in the process of assessing disability is compressed to a deeming or desk-top exercise. Further, by effectively relocating any proposed diagnostic process not as an element within the identification of either disability or services appropriate to meet identified needs but rather to form part of a service statement, the clear objectives and intent of s. 8(2), (4), (5), (6) and (7) are defeated. This impermissibly circumscribes and undermines the proper operation of s. 8 of the Act.

120. The contention of the applicant that a diagnosis is required in every case is not correct. Such an approach is unduly prescriptive and risks trenching upon the statutorily guaranteed independence of the Assessment Officer as specified in s. 8(4) of the Act in the performance of his or her functions. The SOP impermissibly trenches on the independence of the Assessment Officer in the discharge of his or her functions under s. 8 insofar as it impedes Assessment Officers from discharging their functions by causing to be carried out a diagnostic step or assessment in any case where the Assessment Officer is of the view that same is warranted, desirable or necessary for the purposes of the preparation of an

Assessment Report that is in all material respects compliant with ss. 8(7)(a) and (b)(i) and(ii) of the Act.

121. An Assessment Officer must be accorded a margin of appreciation in the discharge of his or her functions under s. 8 where the professional judgement comes into play. However, the assessment contemplated is generally evidence-based and it is necessary and appropriate that the Assessment Officer has all appropriate evidence to enable them to make a valid independent assessment and complete an assessment Report. The Report must in each case competently identify "*the nature and extent*" of any disability found to exist. If the ascertainment of either the *nature and extent* of the disability are not within the assessor's field of competence, whatever diagnostic tools or processes are considered appropriate must be deployed for the purposes of discharging the statutory function in order to support the finding of an impairment of a kind that falls within the definition of disability in s. 2(1) as modified by s. 7(2).

122. There is force in the arguments advanced by IHREC that in light of the requirement within the definition of disability that there be an "*enduring impairment*", it will indeed be the exception where a diagnostic assessment is not required to satisfy the obligations mandated by ss. 8(5), (6) and (7) of the Act. Counsel for IHREC's submission that to construe the Act it is not necessary in the instant case to depart outside the language already there, which is succinct and clear in terms of the scope and ambit of the categories of persons to whom the Act can apply, is correct. Heretofore and up to the introduction of the 2020 SOP, assessments under s. 8 quite properly included a diagnostic assessment when same was considered warranted on a case by case basis. The 2020 SOP took away the benefit of this approach.

123. That an integral recommendation of the Assessment Report prepared in this case identified the need for a diagnostic assessment for the purpose of identifying the health needs

of the child fundamentally undermines the stance being adopted by the HSE for the reasons stated above. It strongly suggests that the assessment which the PTA team was constrained to carry out was manifestly incomplete and the team were trammelled in the discharge of their statutory functions to an impermissible degree, such that the resultant Report failed to comply with s. 8 and lacked a statement as to the nature or extent of the child's disability, which in turn precluded the preparation of a valid assessment of the appropriate services needed by the child. To conclude otherwise would be contrary to the provisions of s. 8.

Conclusions

124. For all the reasons outlined above, the SOP of January 2020 impermissibly represents a significant overreach on the part of the HSE and impermissibly trenches upon and interferes with the discharge by Assessment Officers of their functions and duties having due regard to sections 7 and 8 in particular of the Act. The approach adopted inevitably will achieve delay.

125. The 2020 SOP to a very significant extent undermines the rights of persons with a disability within the meaning of ss. 2(1) and 7(2) from having a competent assessment carried out compliant with s. 8 and the benefit of an Assessment Report based on the necessary findings that meet the standards set for such a report by provisions of ss. 8(6) and (7) in particular.

126. Absent the availability of such a diagnosis, it inevitably follows in any complex case there must be a significant element of surmise on the part of the Assessment Officer who is involved in a preliminary team assessment in reaching a conclusion as to the nature and extent of disability being experienced by the individual. Such an approach is contrary to what the Oireachtas clearly intended, as is demonstrable from ss. 7(2) and 8(7). It is clear from the definition of "*substantial restriction*" in s. 7(2) that this is not coterminous with

"disability". "*Substantial restriction"* in s. 2 is defined for the purposes of Part 2 of the Act and s. 7(2) as a restriction which is: -

> *(a) permanent or likely to be permanent, results in significant difficulty in communication, learning and mobility or in significantly disordered cognitive processes, and*
>
> *(b) gives rise to the need for services to be provided continually...*

Given the particularity with which "*substantial restriction*" is defined, it is all the more important that Assessment Officers exercising their independent statutory functions under s. 8 have at their disposal all necessary facilities, including diagnostic facilities, for the purposes of properly assessment whether a disability of a kind that falls within the ambit of s. 7(2) is identified.

127. It is very clear that the Oireachtas never intended that a diagnostic assessment which is considered appropriate by an Assessment Officer in the discharge of assessment functions under s. 8 would be resource contingent. It is noteworthy that in *R.C. v HSE* [2022] IEHC 652 Meenan J. held that an AON fell short of the requirements provided in the 2005 Act and that the respondents were at all times aware that a private diagnosis was insufficient for services appropriate to the child's needs to be made available since what was required was a diagnosis from the HSE.

128. Standard Operating Procedures are desirable and, properly framed, operate to provide clarity and certainty for all those engaged in a professional or complex process and of benefit to the users of such a service. However, the 2020 SOP imposed unwarranted and impermissible barriers in the performance by Assessment Officers of their functions and duties pursuant to the Act. For all the reasons stated above, it places individuals believed to have a relevant disability within the meaning of ss. 2(1) and 7(2) at an unacceptable disadvantage whereby the process mandated by the Oireachtas for ascertaining whether a

relevant disability has been established including regarding ascertainment of any "*substantial restriction*" within the meaning of s. 7(2) of the Act is unlawfully impeded.

129. Accordingly, in general, where an Assessment Officer determines that an applicant has a disability, the assessment of need should not be regarded as complete for the purposes of the Disability Act, 2005 unless, where in the opinion of the Assessment Officer a diagnostic assessment is warranted, appropriate or necessary in light of the evidence presenting, to ensure that the Report properly identifies both the nature and extent of underlying disability or disabilities and the assessment report incorporates such diagnostic assessment of the individual or child's disability and clarifies both its nature and extent.

130. The question posed by the learned Circuit Judge as outlined above is framed in general terms and is not confined by or referable to the specific facts and circumstances obtaining in the instant case which is the subject of the substantive application to the Circuit Court. In those circumstances, for the reasons stated above, it calls for a qualified answer.

The Answer

131. The answer to the question posed is as follows;

> *"An assessment of need carried out pursuant to section 8 of the 2015 cannot be regarded as complete in the absence of a diagnostic assessment of the child's disability unless in the reasonable opinion of the assessment officer such a diagnostic assessment is not required for the purposes of identifying the nature and extent of the disability and/or for the purpose of identifying the health and education needs (if any) occasioned to the person by the disability and the services considered appropriate to meet those needs and/or the period of time ideally required for the provision of those services and the order of such provision."*

Costs

132. The preliminary view of the court is that the applicant, having substantially succeeded in their arguments, in light of s.169 of the Legal Services Regulation Act, 2015, is entitled to an Order for Costs against the HSE. With regard to the costs of IHREC, given their position as *amicus*, and the undertaking given in the Affidavit of Ms. Gibney, sworn 12 November 2021, to bear its own costs in respect of this appeal, as confirmed on its behalf by counsel on 26 November 2021, there will be no order as to costs. If any party contends for further or varied orders in respect of costs written submissions no longer that 2,000 to be submitted to the other parties and the Court of Appeal Office within 21 days of delivery of the within judgment. Any submissions in reply, no longer than 2,000 words, to be delivered within a further 21 days.

133. Collins and Pilkington JJ. have authorised me to confirm their concurrence with this judgment.