THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2021/405 JR]

BETWEEN:

C.T.M. (A MINOR)
SUING BY HIS MOTHER AND NEXT FRIEND

APPLICANT

AND

THE ASSESSMENT OFFICER

THE HEALTH SERVICE EXECUTIVE

RESPONDENTS

AND

[Record No. 2021/710 JR]

J.A. (A MINOR)

SUING BY HIS MOTHER AND NEXT FRIEND

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan delivered on 11th March, 2022

INTRODUCTION

1. These cases follow in a line of cases in which the courts have been required to interpret the provisions of the Disability Act 2005 [hereinafter "the 2005 Act"] insofar as they concern the assessment of the health and educational needs of children with disabilities under Part 2 of that Act.

2. It is uncontroverted in these proceedings that children who qualify for an Assessment of Need [hereinafter "AON"] under Part 2 of the 2005 Act have a right, within a prescribed statutory time-frame, to:

a. an assessment of their health and educational needs arising from their disability (under s. 8);
b. an Assessment Report (under s. 8(7));
c. a statement of the services they will receive (under s. 11);
d. make a complaint in relation to prescribed matters (under s. 14).

3. It is also uncontroverted that there has been widescale non-compliance with statutory time-limits across many regions of the country.

4. What is directly in issue in these proceedings is how extensive the AON under Part 2 of the 2005 Act must be and more specifically, whether it entails a diagnostic requirement. The response to this question impacts on the ability of the respondent to comply with statutorily prescribed time-limits for the AON. An initial or preliminary assessment is obviously less resource intensive and therefore easier to deliver quickly but is also less complete. A fuller assessment, such as might be required in the diagnosis of a disability like autism, may require the involvement of specialist and different disciplines and be more resource intensive.

5. To understand the genesis of the issue confronted in these proceedings, some background is required. While the evidence suggests that the practice under the 2005 Act in relation to the conduct of AON has not been uniform in all areas of the country, it supports a conclusion that until a change in approach directed by the respondent in 2020, it was normal practice to complete a full assessment involving a wide range of disciplines for the purpose of an AON report. Where full and comprehensive assessments were completed, however, they could be resource intensive depending on the circumstances of each individual case. In a significant number of cases the statutory time period fixed for completing the AON was not respected and this in turn led to delays in completing AON and associated litigation.

6. In order to ensure consistency in AON and adherence to statutory time-frames and presumably thereby also reduce the risk of exposure to litigation, the respondent developed a Standard Operating Procedure (SOP) which was implemented from January, 2020. The SOP

provides for a preliminary or triage type assessment instead of the full assessments which had previously been carried out. Under the SOP, the assessment is referred to as a "*Preliminary Team Assessment*". This truncated form of assessment is considered by the respondent to meet the requirements for an AON under Part 2 of the 2005 Act.

7. Crucially, the newly adopted SOP expressly provides that diagnosis is not required under the Part 2 assessment process and provides as a guideline that the preliminary team assessment should take 60 to 90 minutes. The new SOP applied to the two assessments in the cases before me, both of which were concluded in the indicated time-frame of 90 minutes and both of which concluded without diagnosis of the child's condition.

8. Not surprisingly, the terms of the new SOP, which has been applied to all assessments of need since the 15th January 2020, are controversial because the new approach signalled in them to AON nationally results in the delivery of a preliminary or triage type assessment without diagnosis instead of the full comprehensive assessment which frequently included diagnosis hitherto.

9. At the heart of the issues I am required to determine in these proceedings is whether a preliminary or triage type assessment of the type envisaged under the respondent's newly adopted SOP meets the statutory requirements for a Part 2 assessment or is based on an erroneous interpretation of the requirements of Part 2.

THE APPLICATIONS FOR ASSESSMENT OF NEED

10. The applicants in these proceedings are both young boys of pre-school age.

11. It is appropriate at the outset to summarise the AON that took place in each of their two cases.

Child "CTM"

12. At the date of hearing, CTM was 2 years and 11 months old. He has significant physical and cognitive difficulties.

13. In an affidavit sworn by his mother to ground the proceedings, she says she was advised by a GP and several privately retained therapists that her son was displaying the warning signs for autism. These were identified on affidavit as difficulties in social interaction, communication and a lack of flexible thinking. The applicant's mother was advised by the applicant's GP to apply for a comprehensive AON under the 2005 Act. There is a positive autism history in the applicant's extended family but it has also been suggested that he may have cerebral palsy and he has displayed many of the warning signs.

14. On the 16th November 2020, the applicant's mother applied for an AON under the 2005 Act. The assessment conducted was identified as "*preliminary*". The assessment was conducted in accordance with the newly adopted SOP.

15. It was comprised of a clinical assessment of CTM completed by a speech and language therapist and a physiotherapist. The assessment was in the form of a 30 minute phone interview with his mother and 60 minutes of observed play. No standardised autism diagnostic testing was carried out.

16. In their "Summary Report" which was dated 19th January 2021, the two clinicians identify the purpose of their report as being to ascertain whether the application meets the criteria of the 2005 Act as to "substantial restriction" in the terms set out in s. 7(2) of the Act. This report makes no reference to the s. 2 definition of disability. The report sets out a description of CTM's presentation based on the questionnaire prepared by CTM's mother and the responses given by her over the telephone and on the play-based observation of CTM for the purpose of the preliminary assessment under the SOP. The clinicians concluded, with reference to the s. 7(2) definition of "*substantial restriction*", that CTM demonstrated substantial restrictions in the areas of communication and learning. No specific services were identified but it was recommended that he be referred to the Early Intervention Team for assessment and intervention.

17. On receipt of the report from the two clinicians, the assessment officer proceeded to prepare her assessment report. This is the purported statutory report under s. 8(7). This report was issued in February 2021.

18. In her report the assessment officer records that she has determined that the applicant has a disability as defined in the 2005 Act. She does not expand on this and gives no indication as to whether she considers that the applicant has an enduring physical, sensory, mental health or intellectual impairment (being the categories of disability identified in s. 2 of the 2005 Act).

19. Under the heading "*nature and extent of disability*" the assessment officer identifies difficulties which:

> *"…may suggest the presence of autism and warrant further diagnostic intervention and assessment".*

20. The statutory report describes in summary fashion the presenting difficulties reported by the clinicians when addressing the question of whether "*substantial restrictions*" were present in respect of communication and learning. The reason or cause of these restrictions is not stated.

21. The health need identified by the assessment officer in the statutory report is a need for "*further assessment*" to be conducted by the local area children's services (and not the assessment officer) and it is stated that they will decide which service will best meet CTM's needs. Under the heading "*Health and Education Needs Occasioned to the Person by the Disability"*, the report records as follows:

> *"XX will remain with North Tipperary Childrens Services until further assessment for autism is carried out. Following this assessment/discussions with parents, it will decide which service will best meet XX's needs."*

22. In this way the assessment officer identifies as a service required by CTM that he needs "*further assessment*" to decide the services he requires. The assessment officer defers the

identification of the services CTM needs to the local disability service following further assessment/discussions to take place outside the framework of the Part 2 assessment process.

23. While a need for "*further assessment*" is identified as a health need, the Assessment Report is entirely silent with regard to educational needs. Under the heading "*Interventions/Services*" required, the report simply records "*General Health Services, Children Disability Team*".

24. Accordingly, no specific service is identified for the applicant in the AON other than a requirement for further assessment before recommendations as to required services can be made.

25. Unsurprisingly, the s. 11 Services Statement completed by the respondent on the 19th February 2021 following on from the AON identifies no further service for CTM, reciting that he is already on the waiting list for intervention with the local area children's services which it has indicated has a waiting list of sixteen months.

Child "JA"

26. At the date of hearing, JA was 3 years and 3 months old. JA's mother deposes to the fact that she became concerned by developmental delay, specifically delay with motor skills and speech and language delays. She was also concerned by his difficulty in communicating or socialising with his peers. As these concerns were shared by his Montessori teacher in crèche, she decided to seek professional help in getting him assessed. On the 5th October 2021, the applicant's mother applied for an assessment of need under the 2005 Act. Shortly afterwards, on the 10th October 2021, the applicant's mother sought to also have the applicant privately assessed by a psychologist. The assessment conducted by the respondent was identified as "*preliminary*" and was completed in April 2021. The assessment was also conducted in accordance with the newly adopted SOP.

27. On foot of his mother's application, a clinical assessment of JA was completed by the speech and language therapist and physiotherapist and was in the form of a 30 minute phone interview and 60 minutes of observed play in line with the new SOP. No standardised autism diagnostic testing was carried out.

28. In their "*Assessment Summary*" which is stamped "*Preliminary Team Assessment*" and was dated 20th April 2021, the two clinicians simply describe what they observed during a one hour play session and what was reported during a telephone discussion with JA's mother. The report makes no reference to the s. 2 definition of disability or to the 2005 Act. The summary report concludes with the heading "*the next steps*" and the following text:

> *"Today's preliminary team assessment has provided us with very useful information about your child. Based on this information, it has been decided that your child's needs will be best met in the following service:"*

29. Although this wording suggests that a service is being identified in the summary report, it is followed by a gap or blank space and the report is signed off without any service being specified.

30. On receipt of the report from the two clinicians, the assessment officer proceeded to prepare her assessment report. This is the purported statutory report under s. 8(7) of the 2005 Act and it was issued in April, 2021.

31. While the assessment officer records that she has determined that the applicant has a disability as defined in the 2005 Act, she does not expand on this and gives no indication as to whether she considers the applicant has an enduring physical, sensory, mental health or intellectual impairment (being the categories of disability identified in s. 2 of the 2005 Act).

32. Under the heading "*nature and extent of disability*" the assessment officer refers to 7.2.1a of the SOP and states in reliance on the SOP that:

> *"...for the purposes of the assessment of needs children and young people who are deemed to meet the level of complexity required for a Children's Disability Network Team are considered to meet the definition of disability under the Disability Act. [JA's] presentation during the PTA appointment on 20 April 2022 indicates that he presents with the level of complexity required for Children's Disability Network Team."*

33. The language used here suggests that the assessment officer relied on section 7.2.1.a of the SOP to determine the presence of a disability rather than the definition of a disability under the 2005 Act.

34. The health need identified by the assessment officer in the statutory report is a need for:

> *"JA needs a referral to the Early Intervention Team/Children's Disability Team to access speech and language therapy, occupational therapy, physiotherapy and psychology he is on the waiting list for this service."*

35. In this way the assessment officer identifies the service required by JA as referral to the waiting list that he is already on, albeit for identified services. As in the case of CTM, the Assessment Report is entirely silent with regard to educational needs.

36. The s. 11 Services Statement completed on behalf of the respondent in May 2021 identifies no service for JA beyond referral to the Early Intervention Team for services. The local waiting list in this instance is given as thirty-six months.

37. By letter dated the 2nd July 2022, JA's mother was advised in clear, unequivocal and unqualified terms as follows:

> *"ASD assessments are not conducted as part of the PTA process".*

38. Neither assessment officer (both of whom swore affidavits in the proceedings) identifies as having any clinical expertise (and there is no requirement under the Act that she be a clinician). It appears that the outcome of the preliminary team assessment or "PTA" in both cases is that it is the local area children's service rather than the Part 2 assessment process which will identify services to address their needs. While in both cases it was determined that the applicant has a disability, a question arises as to whether the assessment officer has applied the correct statutory test to determine the presence of a disability within the meaning of the 2005 Act as a precursor to an entitlement to the Part 2 AON. It is recalled, as made clear from the

statutory provision which will be further addressed, that only children who have been found to have a disability as defined in the 2005 Act qualify for a statutory AON.

39. In JA's case, his mother proceeded to have him privately assessed by a clinical psychologist who assessed JA using recognised diagnostic standards and made a positive diagnosis of autism in November 2020. He was assessed as "*Level 2, Requiring Substantial Support*".

40. The applicants contend that the statutory AON Reports prepared in accordance with the new SOP is inadequate for the purposes of Part 2 of the 2005 Act in both cases as it fails to properly set out a statement of the nature and extent of the disability, a statement of the health and education needs (if any) occasioned by the disability, a statement of the services considered appropriate by the person or persons referred to in s. 8(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.

41. In his affidavit Professor McLachlan, on behalf of the respondent, refers to the established diagnostic criteria for autism spectrum disorders (DSM-5). It is not disputed that neither CTM nor JA were assessed using these criteria during the preliminary team assessment conducted under the SOP. The applicant's counsel consider the process to be substantially inadequate and described the preliminary team assessment process as no more than "*kicking the can down the road*" where the outcome is simply to refer for further assessment, while the respondent maintains that the Act is not prescriptive as to the type of assessment done. It contends that diagnostic testing is not required to complete an AON under Part 2 of the 2005 Act.

ISSUES

42. As summarised above, at the heart of both cases lies the core question of whether a statutory AON concluded in accordance with the Assessment of Needs Standard Operating Procedure approved by the respondent in October 2019 and applied since January 2020 (including by each of the assessment officers in the assessment of needs of both applicants) has

resulted in an assessment of needs in each case which meets the statutory requirements of the 2005 Act or falls short of what is required under Part 2 of that Act.

43. Counsel on behalf of the respondent has properly pointed out that the cases as pleaded are directed to the absence of a diagnosis but that there was some nuancing of this position in the case as run before me in view of an acceptance that a definitive diagnosis will not always be possible. It was suggested that the parameters of the case changed as between the case as pleaded, as opened and as run.

44. I am mindful that these are judicial review proceedings and therefore the principles in *AP v. Director of Public Prosecutions* [2011] 1 I.R. 729 apply. While it is true to say that the applicants' cases showed some evolution, I consider that there has been no impermissible departure in these cases from the essence of the case for which leave was granted. The question of what is required in a Part 2 Assessment is one of law turning on statutory interpretation. This issue was fully ventilated before me with both sides offering submissions on the correct interpretation of the relevant provisions of the 2005 Act.

45. I am satisfied that issue is properly joined between the parties on the case as pleaded and as argued as to whether there is a diagnostic requirement in discharging the statutory assessment functions under the 2005 Act having regard both to (i) the duty to determine whether a disability within the meaning of the 2005 Act is present; and (ii) the duty to assess the nature and extent of disability where one is found to be present.

46. As the issue is one of statutory interpretation, there is no question of evidence being relevant to the issue and neither party has been denied the opportunity to put forward evidence. Furthermore, the issue is one which is clearly raised on the pleadings and neither one of the parties has been taken by surprise.

47. A separate issue is canvassed only in the JA case. The further issue canvassed is as to the existence of an alternative, effective remedy under the 2005 Act and whether, therefore, judicial review is an appropriate remedy in that case.

48. While there are therefore two separate issues before me for determination, it is clear from the manner in which the cases were opened, that both the applicants and the respondent

are desirous of the core issue of statutory interpretation, clearly fundamental to the vindication of the applicant's rights and proper discharge by the respondent of its assessment duties, being decided by the court whether that be in the CTM case or in the JA case. Indeed, it was explained to me that it was for this reason that these two cases were identified to proceed ahead of a number of other cases in which similar issues arise rather than one case alone. The logic of this approach is that it enhances the prospects of the issue of statutory interpretation being finally determined and protects against a risk of mootness or other impediments where a case, which is commenced, may not be pursued to finality, as can happen in these cases.

49. The alternative remedy question is advanced in only one of the two cases because the respondent wishes the issue of statutory interpretation in relation to the AON question to be decided but also wishes to establish the proper parameters of the alternative statutory remedy available. This would appear to be with a view to guiding appropriate resort to the statutory remedy where it constitutes an effective remedy and limiting the occasions in which inappropriate recourse may be had to the remedy of judicial review before the High Court.

50. A damages claim was advanced on the pleadings in both cases but I was advised by the parties that it was not being pursued on agreement that no *Henderson v. Henderson* type issue would be raised in the event of future proceedings. The respondent also pleaded acquiescence on the part of the applicants in making applications which fell to be assessed in accordance with the SOP in the knowledge of the approach it was proposed to take but this point of opposition was, properly in my view, not maintained in argument and is therefore not addressed in this judgment. Although a claim under the European Convention on Human Rights was pleaded, it was not pursued in written or oral submissions and no case-law from the European Court of Human Rights was opened to the Court.

51. As these two cases were heard together and raise a very similar issue of statutory interpretation, the court has decided to prepare a single judgment which covers both cases but treating separately of the two cases to the extent necessary to address differences between them. After an introductory section dealing with the legislative and litigation background and operational practices, I will consider the question of statutory interpretation as it concerns the presence of a diagnostic duty within the parameters of the AON in Part 1 of this judgment and the question of an adequate, alternative remedy in Part 2.

LEGISLATIVE LANDSCAPE

52. The recognition of a need for a diverse response to address discrimination, promote equality and vindicate rights was apparent from the report of the Commission on the Status of People with Disabilities, relied upon by the respondent in argument in these cases. The said report made wide ranging recommendations as long ago as 1996. These recommendations included, amongst many, the introduction of disabilities legislation which made provision for an entitlement to a "single assessment of needs" which would result in a statement of needs.

53. When it was introduced, the 2005 Act joined a suite of other statutory measures directed to enhancing the protection of disabled persons in Irish law including the Employment Equality Act 1998, the Equal Status Act 2000 and the Education for Persons with Special Educational Needs Act 2004 [hereinafter "the EPSEN Act"].

54. Reading these separate statutory measures together, it appears that the 2005 Act was one part of a policy developed over many years in apparent recognition that vindicating the rights of disabled people requires a social response together with the adoption of a civil rights perspective. While it was argued on behalf of the respondent that the developing policy was to promote a social response, I do not consider the terms of the different measures introduced support a conclusion that the "social response" was intended to be in substitution for or somehow to prevail over an individual rights approach. Instead, it seems to me that the legislative response was to adopt remedial legislation which pursued a multifaceted approach to addressing the less favourable treatment and restrictions which persons with disabilities encounter including the creation of individual rights intended to be enforceable as such.

55. As apparent from their terms, the EPSEN Act 2004 and the 2005 Act as promulgated were intended to operate in tandem. The Acts provide for what counsel for the applicants described as the "*gold standard*" of provision for people with disability.

56. The two pieces of legislation have not had their full intended impact, however, as provisions in both pieces of legislation have yet to be commenced. Case-law under the 2005 Act, identified by both counsel for the applicants and the respondent in their submissions before me, supports the conclusion that the piecemeal implementation of these interconnected

statutory provisions has contributed to the challenge of ensuring the proper interpretation and application of those provisions which have been commenced in respect of disabled children.

LITIGATION BACKGROUND AND OPERATIONAL PRACTICE

57. It is understandable that when new duties are created in a context where there are established practices, an attempt may be made to fit the discharge of the new duties within the framework of existing work practices.

58. The cases on behalf of CTM and JA were opened to the court by reference to a series of recent decisions involving the interpretation of the 2005 Act arising in circumstances where the respondent sought to discharge the new statutory duties arising under the 2005 Act using existing operational models. It was noted that three cases were before the Courts during the currency of the assessments the subject of the within proceedings and while the SOP, which is the focus of attention in these cases, was under development.

59. The three cases were heard together in the High Court in the first instance (*CM v. HSE* [2020] IEHC 406, *DB v. HSE* [2020] IEHC 404 and *J O'SS v. HSE* [2020] IEHC 405) with the High Court (Barr J.) finding for the applicants on the failure of the respondent to report statistics to the Minister (under s. 13) but against the applicants in the other two cases which were then appealed to the Court of Appeal.

60. Much reliance was placed in argument before this Court on the decision of the Court of Appeal in *CM v. HSE* [2021] IECA 283 (on appeal from the decision of Barr J. in the High Court). The decision of the Court of Appeal addressed whether the provisions of the 2005 Act directed to the assessment of educational needs also apply to children with disabilities. In that case the respondent sought to contend that insofar as s. 8(3) of the 2005 Act provided for the assessment of educational needs, this applied to adults and not children having regard to the terms of s. 8(9) of that Act which provides a separate pathway for children to have their educational needs assessed under the EPSEN Act 2004 albeit that the s. 8(9) pathway was a *cul de sac* because ss. 3 & 4 of the EPSEN Act 2004 had not been commenced. The background to the argument advanced on behalf of the respondent was that traditionally the respondent had not assessed the educational needs of children and had not construed s. 8(3) as encompassing

a duty on the part of the respondent to assess the educational needs of children with disabilities. The court disagreed and found the respondent to be under a duty to itself conduct an assessment of educational need under s. 8(3) of the 2005 Act in the case of children.

61. In passing, as previously noted, the assessments concluded in February 2021 and April 2021 in the cases of CTM and JA did not identify any educational needs. It is possible that this is because of their ages at the time of assessment but it may also be explained by the fact that until the decision in *CTM* in October 2021, the position of the respondent was that the assessment of educational needs in the case of a child fell to be addressed under the s. 8(9) *cul de sac*, a position which is no longer accepted to be correct in law. I draw no conclusion on the failure to identify educational needs in these cases but would observe that the absence of any record of the results of any assessment of educational needs whatsoever, in circumstances where there is a statutory duty to assess those needs, must give rise to a question as to the compatibility of the assessment process in practice with what is prescribed in statute. This question is not squarely before me in the cases as pleaded.

62. In similar vein, the decision of the Court of Appeal in *J. O'S S (A Minor) v, HSE* [2021] IECA 285 raised the issue of the chronological/geographical order in which the respondent must process applications for assessment under s. 8 of the 2005 Act "*in order of the date in which they are received*". The respondent interpreted this requirement, in line with its existing practice, as permitting the carrying out of assessments of need on a regional basis within each of the nine community health organisation regions established by the respondent. This practice resulted in inconsistencies as between different regions in terms of wait times (referred to as " " in the judgments). The Court of Appeal found that the respondent had acted ultra vires of the 2005 Act in carrying out assessments of needs otherwise than in chronological order on a countrywide basis in accordance with the date upon which the respondent received the applications.

63. Accordingly, the disconnection between operational realities and "*the gold standard*" identified in the legislation complained of in these proceedings is not a novel issue. Difficulties in delivering an AON in accordance with the provisions of the 2005 Act within existing operational constraints recur through the case-law.

64. It was contended on behalf of the applicant in opening these cases that *CM*, *DB* and *JO'SS* were cases where the HSE took steps to conform the legal obligations imposed on them to their own structures and work practices but the courts found this impermissible. Reference was also made to another tranche of cases which I am told the respondent did not contest which were focussed on a failure to adhere to timelines in respect of which the respondent conceded orders of mandamus. Counsel for the applicant likens what occurred in *CM*, *DB* and *JO'SS* to the steps taken by the HSE to develop the SOP which is subject to scrutiny in these proceedings. It is suggested that it is an attempt to conform the legislation to what the respondent believes it can do.

RATIONALE FOR THE SOP AND OBJECTION TO THE CHANGED PRACTICE INTRODUCED BY THE SOP

65. The case advanced on behalf of the applicants (and not materially disputed save to point out that there were inconsistencies across the country in the approach taken with practices varying) is that prior to the introduction of the SOP, the child's needs determined the level and type of assessment provided under their AON. It is claimed on behalf of the applicants that these assessments varied because the children's needs varied, whereas the respondent points to a lack of uniformity of approach to the AON. The evidence suggests, however, that typically a child presenting as the applicants in this case did, with queried autism, would have been seen by a team of four practitioners, including a psychologist, speech and language therapist and occupational therapist.

66. The SOP replaces this arrangement with what the applicants contend is a uniform screening assessment (the PTA model) by two assessors to be completed in a maximum of 90 minutes, regardless of the child's needs. Thus, while the evidence before the court confirms that of the total number of assessments carried out in 2018, 27% indicated that the child had autism (or ASD), the applicants contend that no such diagnosis is likely to be possible in many cases under the PTA model because a full assessment of the presenting condition is deferred, as indeed it has been in the case of CTM and JA.

67. It is contended on behalf of the applicants that the obligations imposed on the HSE by the legislation are cut across and impermissibly emasculated by the SOP. Counsel for the

applicant described the SOP as a "*truly radical evisceration of what the Oireachtas required to be done in the legislation*." Through the SOP the comprehensive assessment which was no doubt administratively difficult and expensive, but also helpful to parents and the children concerned, has been replaced with a "*preliminary team assessment*". Where an assessment officer now decides that a full assessment is required to identify the existence of a condition like autism, the officer does not engage the aid of experts to conduct this assessment but instead, following the preliminary team assessment, defers the assessment to be conducted not under the Part 2 AON process, but some time later through the services to be delivered at a future date and outside the time-frame fixed under the 2005 Act or the requirements of the Act.

68. It is suggested that by adopting the strategy embodied in the SOP the strict time-lines which have been problematic and which have not been complied with, can now be adhered to. It is said on behalf of the applicants that this is because the assessment that is required under the Act and needed by the child is not actually conducted at all. All that is decided is that the child has a disability (without necessarily diagnosing what the disability is) and needs further assessment to determine appropriate service provision. The child is then placed on a waiting list which in the case of the applicants in these cases is estimated in the region of 16 months (subsequently revised downwards) and 36 months respectively. The effect of this on the child is that instead of a resource blind AON which identifies optimal (albeit perhaps not achievable on existing resources) service provision in line with the child's needs, the child is triaged for further assessment and joins the queue with others who may not have a disability (within the meaning of the 2005 Act) and without the nature and extent of their disability and need having been properly or fully identified. The failure to assess fully then in turn hampers the ability of the respondent, the State and the child's parents or guardians to pursue appropriate provision.

69. The respondent on the other hand defends the SOP as a measure which allows Irish services for people with disabilities to catch up with broader international recognition that a medical/deficit model of disability should be replaced with a rights/social model. They contend that there is no necessary relationship between the diagnosis of the condition and the needs that arise from it and that one can assess need without diagnosing a condition.

70. Although the legislation provides for the completion of an assessment of needs report within six months (save in exceptional circumstances), the evidence before me confirms that by 2019 the national average waiting time for an assessment of need report was 19.8 months.

The wait time varied from area to area. The respondent points to a lack of consistency as between areas as to the level of assessment required to complete a report before 2020 and this lack of consistency was relied upon as an explanation for some of the disparity as between areas in terms of compliance with statutory time limits.

71. The respondent contends that neither the 2005 Act nor the Regulations provide in detail for the procedure by which the assessment of need process is to be carried out and that there were "*significant and undesirable regional variation developed in the operation of that process in the period following its commencement in 2007 (in respect of children under five years of age)*". Consequently, it is maintained that the respondent was entitled to, and has since the 15th January 2020 provided for, a set of uniform national procedures by which the assessment of need process is to be carried out in the form of the SOP.

72. It is acknowledged by the respondent that prior to the adoption of the SOP, AON were more extensive and involved a range of diagnostic assessments. The evidence suggests that some assessments took as long as 90 hours of clinical time, with an average time of 29 hours clinical time. In contrast, due to the changes introduced by the respondent in relation to the nature of how assessments are completed by way of a preliminary team assessment, such assessments conducted under the new SOP are typically completed within 60-90 minutes of clinical time (this is what is recommended under the SOP and is in line with what happened in the applicants' cases). While not determinative of the question of statutory interpretation as to what Part 2 of the 2005 Act requires, it is observed that it must be an inevitable result of such a dramatic reduction in the average clinical time devoted to conducting assessments that assessments of need under the SOP are concluded in a manner which, on average, are less thorough and less comprehensive than previously.

73. The respondent states that the SOP was introduced in order to ensure that delivery of the AON across the country was carried out in a uniform manner. They refer to improvements that have been achieved in the numbers of overdue AON nationwide since the introduction of the new SOP. They further say that the SOP was informed by an expert report prepared by Prof. Malcolm McLachlan, then of the Assisting Living and Learning Institute and the Department of Psychology at Maynooth University. The report is entitled "*Towards Equitable Access to Quality Services for Children and Young People with Disabilities in Ireland"*, Maynooth University, 2019. Important insight into the development of the SOP may be

gleaned from the said report by Professor Malcolm McLachlan (now Clinical Lead for the Programme for People with Disability in Ireland working with the respondent), prior to the development of the SOP and now relied upon to explain it.

74. In his report (which he dates to February 2019 and which was exhibited on behalf of the respondent), Professor McLachlan advocates that diagnosis should be separate from an AON. He refers to instances where the court has directed the respondent to provide diagnostic assessments under the 2005 Act, stating that while:

> *"…well intentioned such a direction fails to achieve its desired ends; of providing access to an intervention."*

75. In his report he is critical of the AON process under the 2005 Act stating:

> *"Importantly, the AON does not consider the cost of providing for the needs identified, nor whether the capacity to provide such services currently exists. This puts clinicians in an invidious position of having a legal obligation to assess needs without necessarily having the means to address them. As already noted the identification of such needs without action to ameliorate them, is likely to be enormously frustrating and stressful for those seeking such an assessment and for those wishing to provide it. Making service users aware of such need achieved without providing for them is both morally and ethically problematic; as it is likely to add further angst to an already distressing situation. It should be noted that the Disability Act states that assessment carried out without regard to the cost of, or the capacity to provide and service identified in the assessment as being appropriate to meet the needs of the applicant concerned. It does not refer to the cost providing assessment and so the Act contributes to rather than helping us to address these difficulties."*

76. It is manifest from the foregoing that Professor MacLachlan was dissatisfied with the manner in which the 2005 Act provides for the AON. He considers that it creates rather than addresses problems, essentially because resources are deployed in conducting the assessments. This takes from available resources to provide services and adds to the angst suffered by service users when the services identified for them are then unavailable. He refers to the fact

that the 2005 Act requires a categorical "*yes*" or "*no*" determination of disability but argues that such a determination should be open to new evidence and revision. He advocates that detailed assessment should take place as part of the intervention cycle and be ongoing rather than conducted as part of the assessment of needs process. Tellingly, he further advocates for the amendment of the 2005 Act to focus on the right to "*a supportive intervention*" rather than an assessment of need. Later in his paper, he advocates for the development of an approach to assessment, intervention and diagnosis which is "*realistic and pragmatic*."

77. The respondent contends that the streamlined approach to assessments provided for in the SOP and which reflects much of the rationale expanded upon by Professor MacLachlan in his paper and treats of the assessment as "*preliminary*", is nonetheless in conformity with the right to an assessment. It is contended that AON completed in accordance with the SOP properly determines the existence of a disability and its nature and extent in accordance with s. 8 of the 2005 Act and is comprehensive and accurate in accordance with the HIQA Standards set under section 10.

Part I – Is there a Diagnostic requirement within the AON process?

Statutory Framework

78. In addition to the 2005 Act itself, the statutory framework within which an AON falls to be carried out includes the Disability (Assessment of Needs, Service Statements and Redress) Regulations, 2007 (S.I. No. 263/2007), and the HIQA Standards adopted pursuant to s. 10 of the 2005 Act.

The 2005 Act

79. As is clear from the long title to the 2005 Act, one of the central purposes of the Act is to enable provision to be made for "*the assessment of the health and education needs occasioned to persons with disabilities by their disabilities.*"

80. As accepted in the Statements of Opposition filed (para. 1 of the Statement of Opposition in each case), an assessment under the 2005 Act requires the respondent to

determine whether an applicant has a disability within the meaning of that Act, and if so, the health and education needs occasioned by the disability, and (in the case of children) the health services required to meet those needs. To this end, Part 2 of the 2005 Act makes provision for the Assessment of Need (s. 8), Service Statements (s. 11) and Redress (s. 14) for persons whose disability comes within the definition under the Act. The machinery of Part 2 of the 2005 Act is only available to qualifying persons.

81. The statutory definition of disability is contained in ss. 2(1) and 7(2) of the Act. In s. 2(1) "disability" is defined as meaning:

> *"…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."*

82. An "*assessment*" as defined under s. 7 of the Act, means an assessment undertaken or arranged by the respondent 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. Accordingly, an entitlement to an assessment under Part 2 of the 2005 Act vests in a person who has a qualifying disability.

83. Section 7(2) provides for the further definition of "*substantial restriction*" as used in the s. 2 definition of "*disability*" stating that for the purposes of a Part 2 assessment, it means 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.

84. The assessment of need process set out in s. 8 results in preparation of an assessment report in accordance with the terms of ss. 8(6) & (7) and a Service Statement in the terms of section 11(2). The legislature has prescribed that the AON should 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 (section 8(5)).

85. An assessment report records (insofar as relevant to these application and required by s. 8(7) of the Act) an independent assessment officer's conclusion as to whether an applicant has a disability, and if so, a statement of the nature and extent of the disability, together with a resource-blind assessment of the applicant's health and education needs thereby arising, the services required to meet those needs and the timeframe "*ideally required*" for provision of those services.

86. Section 8(7) of the Disability Act 2005 provides that:

"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."*

87. The assessment officer then provides the assessment report to a liaison officer within the HSE (i.e. who is not independent, but rather has access to information regarding waiting lists, etc.), who prepares a service statement in " " terms in accordance with the requirements of s. 11 of the Act.

88. Section 11 provides in relevant part:

"11.—(1) ....

(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 a 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.

.... (7) Without prejudice to the generality of subsection (2), in preparing a service statement the liaison officer concerned shall have regard to the following—

(a) the assessment report concerned,

(b) the eligibility of the applicant for services under the Health Acts 1947 to 2004,

(c) approved standards and codes of practice (if any) in place in the State in relation to the services identified in the assessment report,

(d) the practicability of providing the services identified in the assessment report,

(e) in the case of a service to be provided by or on behalf of the Executive, the need to ensure that the provision of the service would not result in any expenditure in excess of the amount allocated to implement the approved service plan of the Executive for the relevant financial year,

(f) the advice of the Council, in the case of a service provided by an education service provider, in relation to the capacity of the provider to provide the service within the financial resources allocated to it for the relevant financial year.

…. (12) A liaison officer shall arrange with the person or persons charged with delivering the services specified in the service statement for the delivery of the services at such times and in such manner as he or she may determine….".

89. Unlike the assessment report, the service statement is not resource blind but instead sets out, *inter alia*, the health services which will be provided to the applicant, together with details as to the location, timeframe, etc. for provision of services (as per Regulation 18 of the 2007 Regulations). The s. 8 assessment report is therefore directed to identifying the full range of appropriate services to meet assessed needs, while the s. 11 statement addresses "*the practicability of providing the services identified in the assessment report*". It bears note that provision is made under s. 11(9) for the amendment of the service statement where there is a change in circumstances, acknowledging that needs may change post the conclusion of the AON report.

90. Under s. 10 of the 2005 Act, the respondent shall ensure that the assessment is carried out in a manner which conforms to such standards as may be determined. Standards for the assessment of need have been set out by the Health Information Quality Authority (HIQA) pursuant to s. 10 of the Act since 2007. Some focus was placed during argument in the CTM case on the fact that the respondent had initially filed a Statement of Opposition (October 2021) which denied that any standards had been determined by HIQA. It transpired, and it is accepted

by me, that the Statement of Opposition initially filed was an incorrect draft (corrected by the filing of an amended Statement of Opposition when the error was highlighted through correspondence from the applicant's solicitor) and it was not intended by the respondent to contend in opposing these proceedings that no standards were in place. However, it appears that while standards were adopted in 2007, their status as standards established pursuant to statute which apply in mandatory fashion to the conduct of assessments has only recently been acknowledged by the respondent.

91. Section 13 of the Act requires the respondent to maintain records of assessment of needs and report to the Minister in the following terms:

> *"13.—(1) The Executive shall keep and maintain records for the purpose of—*
>
> *(a) identifying persons to whom assessments or services are being provided pursuant to this Part or the Act of 2004,*
>
> *(b) identifying those services and the persons providing the services pursuant to this Part,*
>
> *(c) specifying the aggregate needs identified in assessment reports which have not been included in the service statements,*
>
> *(d) specifying the number of applications for assessments made under section 9 and the number of assessments completed under that section,*
>
> *(e) specifying the number of persons to whom services identified in assessment reports have not been provided, including the ages and the categories of disabilities of such persons,*
>
> *(f) planning the provision of those assessments and services to persons with disabilities.*
>
> *(2) The Executive shall, within 6 months after the end of each year, submit a report in writing to the Minister in relation to the aggregate needs identified in assessment reports prepared including an indication of the periods of time ideally required for the provision of the services, the sequence of such provision and an estimate of the cost of such provision.*

(3) A report under this section shall include such other information in such form and regarding such matters as the Minister may direct and shall be published by the Executive within one month of the date of its submission to the Minister. ...."

92. I will return to the reference to "*aggregate needs*" in s. 13(1)(c) and s. 13(2) below as relevant in establishing statutory intention.

Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (SI 263 of 2007)

93. The content of the statutory reports prepared are further regulated by the Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 ("the Regulations"). These Regulations were introduced pursuant to s. 21 of the 2005 Act by the Minister for Health. The Regulations make provision for procedures and timescales for the making of applications, the processing of applications and the preparation of a service statement. Assessments should be commenced "*as soon possible*" after the receipt of the application and in any event within three months (regulation 9). The AON report and service statement must be furnished within the statutory timeframe (generally within six months). The court's attention was drawn to the terms of regulations 13 & 14 from which it appears that the assessment officer is not required to be a clinician but the respondent must ensure that staff engaged in the process will be competent and knowledgeable in conducting or coordinating a "*high quality assessment of need and that they shall hold the appropriate qualifications and shall be up to date with developments in their area of disability and assessment*." Further, regulation 16 requires that reports be prepared in accordance with the standards for assessment as approved by the Health Information and Quality Authority.

The HIQA Standards adopted under section 10

94. The position of the respondent with regard to the status of the HIQA standards was the focus of repeated criticism during the course of the hearing. Section 10 of the 2005 Act provides for the fixing of standards in respect of the conduct of assessments. It transpires that

while standards were adopted by HIQA (the interim Health Information and Quality Authority) in 2007, the respondent was not aware of their subsequent formal adoption by HIQA, as the prescribed standard setting body pursuant to the statutory scheme, for many years. Indeed, in the Statement of Opposition filed in error (and subsequently corrected) it was claimed that standards had not been adopted. Whilst nothing turns on the human error which resulted in the filing of a factually inaccurate Statement of Opposition, it nonetheless warrants special note that the statutory body charged with responsibility for the conduct of the assessment process in accordance with the requirements of Part 2 of the 2005 Act are on record as having maintained, albeit from a position of ignorance, that no statutory standards adopted under s. 10 of the 2005 Act were in place for a period in the region of thirteen years between 2007 when the Standards were adopted by HIQA until January 2020 when the respondent says it first became aware that the Standards had in fact been adopted. It was pointed out in argument that as late as November 2019, the Head of Disability Services with the respondent had sworn (obviously incorrectly) in the CM case that no standards had been adopted by HIQA for the conduct of assessments.

95. I accept that the respondent only learned that the Standards had been adopted by HIQA (many years earlier) in 2020. I further accept a lack of knowledge as to the status of the Standards, a matter which undoubtedly reflects poorly on governance in terms of an responsibility to ensure informed statutory compliance in the assessment process, does not in itself mean that assessments conducted in ignorance as to the status of the Standards fell short of those Standards. The applicants contend that the assessments in their cases, which were both conducted in 2021 in accordance with the SOP, were non-compliant with statutory requirements under the 2005 Act. They do not anchor their argument on non-compliance with the Standards. They rely on the terms of the Standards only as a further expression of the statutory criteria which it is contended are not met under the SOP and in the reports compiled in the applicants' cases.

96. Although the respondent now accepts that the Standards apply to the assessment process, it was contended by the respondent that reliance on behalf of the applicants on the Foreword and Introduction as a statement of prescribed standards was wrong as these parts of the document did not constitute a statement of a standard. Having considered the objection, I consider that the statements relied upon by the applicants from the non-standard setting part of the Standards document, insofar as relevant, are re-statements or reformulations of what has

already been expressly provided for in the 2005 Act or are otherwise provided for in the terms of the standards themselves. As such that their further reflection in the HIQA Standards document, be it in the Foreword or Introduction or in the Standards themselves, is not of any great assistance to me in the issues which I have to decide as to the proper interpretation of the Act itself.

97. As stated in the Introduction to the Standards:

> *"The standards are intended to ensure that each Assessment of Need is conducted in a consistent manner in order to identify the needs of the person being assessed, accurately and efficiently."*

98. It seems to me that while objection was taken to reliance on this statement as a "*standard*", it does not in any event add substantively to what is otherwise mandated under the Act or the standards themselves (see Standard 1.7 which also identifies accuracy).

99. Six separate standards are identified in the HIQA Standards. There are a number of criteria specified for achieving each of these standards. The Standards document states:

> *"Each criterion outlines the mandatory level of performance that the intervention is required to meet".*

100. Standard 1 provides for a "*person centred approach*". An identified criterion for achieving Standard 1 is set out at 1.7 and provides:

> *"The Assessment of' Need report is a comprehensive, evidence based, up to date and accurate record of the findings of the person's Assessment of Need".*

101. Under criterion 1.7 the Standards further require that the Assessment of Need report contains the following information (fully in line with the terms already prescribed under ss. 8 and 11 of the 2005 Act):

a) Whether the applicant has a disability and/or special education need;
b) Nature and extent of the disability and/or special education need;
c) Health and special education needs (if any);
d) Prioritisation of these needs;
e) Interventions deemed appropriate and ideally, the period of time for provision;
f) Period within which a review of the Assessment of Need should be carried out, where relevant.

102. Standard 5 provides that the AON is effectively coordinated in order to accurately identify the needs of the person and to achieve a comprehensive report for the person. The criteria under Standard 5 include a criterion (5.1) that the Assessment Co-ordinator ensures that all aspects of the Assessment of Need process are effectively coordinated. It is further specified that:

"..the Assessment Co-ordinator ensures that:

a) *The Assessment of Need is as simple or as specialised as each person requires;*
b) *A multidisciplinary format for the Assessment of Need is used where appropriate;*
c) *All appointments which are part of the Assessment of Need are arranged in consultation with the person and are planned with a view to minimising duplication;*
d) *All information is collated and a single Assessment of Need report is compiled"*

103. Criterion 5.2 provides that the Assessment Co-ordinator ensures that where a number of professionals are involved in the AON, they work in a coordinated way to achieve a "*comprehensive*" AON report. Criterion 5.3 requires effective links with other services with particular reference to where AON reports indicate a requirement for referral beyond the health and education sectors. It is clearly acknowledged by the terms of Standard 5 that what is required to complete an AON under Part 2 varies as between cases but may require specialised

or multidisciplinary assessments depending on what is required to accurately identify the needs of the particular person.

Standards Operating Procedure (SOP)

104. The Assessment of Needs process under the SOP comprises of a two-stage process. The first stage is a desktop exercise during which stage a determination may be made that an applicant does not have a disability. It is noteworthy that it appears from the terms of the SOP that this assessment might be made without the child ever been seen by a clinician for the purpose of the assessment.

105. The second stage of the process is characterised by what is referred to as a "*Preliminary Team Assessment*", a term which does not appear in the 2005 Act, the 2007 Regulations or the HIQA Standards.

106. In its Glossary of Terms and Definitions, the SOP states that the Assessment of Needs is:

> *"An independent, person centred assessment of the health needs of an applicant, carried out under the criteria laid down in the Disability Act (2005). Operationally, this is defined as a 'Preliminary Team Assessment' that will identify initial interventions and any further assessments (e.g., diagnostic) that may be required."*

107. Great emphasis was placed in argument on behalf of the applicants on the fact that "*disability*" is defined in terms which do not conform with the definition in s. 2 of the 2005 Act but instead defines disability by reference to the definition of "*substantial restriction*" in s. 7(2) of the Act. Disability is thus defined in the glossary to the SOP in the following terms:

> *"A disability is defined, under the legislation as a "substantial restriction" which is permanent or likely to be permanent, results in significant difficulty in communication, learning or mobility or in significantly disordered cognitive processes <u>and</u> gives rise to the need for services to be provided continually to the person, or if the person is a child, to the need for services to be provided early in life to ameliorate the disability."*

108. This definition of disability which appears in the Glossary to the SOP (purportedly by reference to the definition of disability under the 2005 Act) is incomplete and excludes reference to an enduring physical, sensory, mental health or intellectual impairment in respect of the person. The SOP provides that under 7.2.1.a that for the purposes of an 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, with some exceptions but again does not identify the constituent parts of the test for a qualifying disability under the Act. The SOP later states (under s. 2 Interpretation of the Terms used in the Definition of Disability):

> *"It is important to emphasise that the Act focuses on difficulties in particular areas of functioning. It is also important to emphasise that the definition of disability contained in the Act does not make any reference to a diagnosis. Consequently, assessors are not asked to provide a diagnosis."*

109. The SOP, at Appendix IV addresses the omission from the definition of disability in the glossary by providing in wider terms for disability in its General Guidance to Assessors (hereinafter "the Guidance"). Unlike the Glossary at the commencement of the SOP, the Guidance Note contained in Appendix IV to the SOP correctly identifies the need to include a determination in the report as to whether a person has a disability as defined by the Act with reference to s. 2 of the Act. The assessor is further advised that what is required in the assessment report is a "*broad*" statement about the nature and extent of the disability.

110. The Guidance Note goes on, however, to treat of the assessment as preliminary in line with the body of the SOP. It states under the heading "*Assessment Process Preliminary Team Assessment":*

> *"A preliminary Team assessment will be the first step in every child / young person's interaction with a Children's Disability Service. In cases where an application has been made for an Assessment of Need (AON) under the Disability Act (2005), this preliminary assessment will fulfil the team 's obligations under AON."*

111. In this way, the Guidance issued to assessors is to the effect that the respondent considers the preliminary team assessment provided for under the SOP to discharge the assessment obligations of the respondent under Part 2 of the 2005 Act. The Guidance goes on to state:

> *"A preliminary team assessment may take up to I — 1.5 hours.*
>
> *It will involve a short discussion with the parents / guardians to establish case history information.*
>
> *Based on this assessment the team members will identify the next steps and appropriate care pathways. These may include:*
>
> - *Diagnostic assessment*
> - *Initial interventions*
> - *Further referrals*

112. The Guidance further states:

> *"The Disability Act does not require a diagnosis to be made as part of the Assessment of Need what is required is an assessment of the child / young person 's needs at the time."*

113. In clear terms therefore the SOP signals that a Part 2 assessment focusses on presenting difficulties in functioning and does not require a diagnosis. By re-defining "*disability*" in its glossary, it fails to address the fact that "*disability*" as defined under Part 2 of the Act refers to an enduring physical, sensory, mental health or intellectual impairment (being the categories of disability identified in s. 2 of the 2005 Act).

DISCUSSION

114. The assessment of need process under review did not include further diagnostic intervention and assessment to determine whether CTM or JA had Autism Spectrum Disorder, notwithstanding that these criteria are well known and documented (as clear from the affidavit evidence of the respondent).

115. It is maintained on behalf of the applicants that this is a radical departure from the previous assessment of needs procedure of the respondent whereby, a child with suspected autism would be comprehensively assessed to determine whether they had autism spectrum disorder or not. Indeed, the previous practice was summarised by the High Court (Barr J.) in *CM* in terms which reflect a full resource blind assessment as follows at para. 4:

> *"The 2005 Act provides a statutory mechanism whereby a person who is found to have a disability within the meaning of the Act, can apply for an assessment of their health and educational needs by an assessment officer. As part of this process assessments will be carried out of the applicant across a number of disciplines e.g. psychology, physiotherapy, occupational therapy, and speech and language therapy. Each of the assessors will furnish a report to the assessment officer setting out what the applicant's health needs are. This is done without regard to the availability of resources or the capacity of the system to satisfy these needs when the reports have been obtained from the various assessors, the assessment officer will issue an assessment report. That report will then be furnished to a liaison officer, who within one month, will issue a service statement which will set out what actual services will be provided to the individual applicant to satisfy the needs set out in the assessment report. However, it is important to note that the service statement is based upon what resources and services are actually available to cater for the particular applicant's needs in their locality. In short, the service statement sets out what services (if any) the applicant will get, when he or she will get them and where they will get them."*

116. The respondent's counsel points out, however, that previous practice (whether consistent throughout the country or not) is not determinative of what the legislation requires. This is a matter of statutory interpretation.

117. The applicants refer to a number of factors which they say support their position that there is a requirement to carry out a diagnostic assessment in the context of an assessment of need under the Act or that the preliminary assessment provided for under the SOP is *ultra vires* the 2005 Act because it fails to adequately determine the nature and extent of the disability.

118. Factors identified include:

i) The terms in which disability is defined in s. 2 of the 2005 Act requires a conclusion as to the cause of a substantial restriction in order to determine whether it qualifies as a disability under the Act;

ii) The terms in which "*substantial restriction*" is defined in s. 7(2) requires a determination to be made as to whether a restriction is permanent or likely to be permanent and such a determination is dependent on an understanding of the cause of the disability;

iii) "*Assessment*" is defined in s. 2 of the 2005 Act as requiring a determination of the health and educational needs occasioned by the disability and the services required to meet those needs and does not envisage that assessment to determine needs could be deferred for further assessment;

iv) Section 8(5) of the Act provides for a resources blind assessment of need or an "*ideal world*" assessment of need;

v) Section 8(7) requires that the statutory assessment report provides a statement of the nature and extent of the disability and not merely a description of the restrictions observed together with a statement of health and education needs from which services appropriate to meet those needs may be specified;

vi) Section 13 mandates the respondent to maintain records in a manner which permits an annual report to be submitted to the Minister which identifies aggregate needs for services identified in assessment reports, the periods of time ideally required for the provision of such services. The statutory intention reflected in this provision of informing the Minister as to the level of unmet need and the resource implications of such unmet need is undermined where needs are not fully assessed in a manner which permits the accurate identification of service needs;

vii) The statutory scheme established pursuant to s. 10 of the 2005 Act requires that the assessment be comprehensive, accurate and up to date (HIQA Standards);

viii) The 2007 Regulations require the respondent to provide competent and knowledgeable staff to conduct or coordinate a high quality assessment of needs and to ensure that assessments are carried out in accordance with HIQA standards.

119. The applicant also relies on the decision of Faherty J. in *J.F. v HSE* [2018] IEHC 294, a case involving a failure to comply with statutory time limits in the assessment of needs under the 2005 Act, where she noted that there was no dispute by the HSE that a diagnosis of a disability was not only required by the Act but that such a diagnosis was required with a significant degree of urgency. Ms. Justice Faherty pointed out at para. 5 of her judgement that the importance of early intervention, where autism is diagnosed, was comprehensively addressed in *O'C v. Minister for Education* [2007] IEHC 170 where Peart J., in the context of a claim for damages (in a case where the facts pre-dated the statutory time frames set out in the 2005 Act), held as follows at para. 978:

> *"That duty extended at that stage to completing a diagnosis within a time-frame which was reasonable given his age and the recognised importance of early intervention should a positive diagnosis be made in due course. The fact that diagnosis was not completed until the end of November 2002 and reported on the 9th December 2002 means a delay from referral to diagnosis of about seven months. That is a long time in the plaintiff's life at that stage. It follows in my view that a delay of seven months in formal diagnosis is an unreasonable delay, and does not adequately address the duty of care owed. 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. In my view it was foreseeable by them that delay in diagnosis would as a matter of probability impact adversely on the rate at which any deficits would be reduced, and that his progress would be delayed as a result."*

120. Ms. Justice Faherty in *J.F.* continued at para. 56*:*

> *"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 the 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."

121. On the other hand, the respondent contends that the AON process does not require that a diagnosis be attached to an applicant. Much emphasis was placed in argument during the hearing on the fact that the 2005 Act does not use the word "*diagnosis*" in providing for an assessment of need. The respondent contends that it is not necessary to attach a clinical diagnosis to the child in order to complete his assessment of needs and to determine that he has a disability, or the nature and extent of that disability. The respondent submits that the Oireachtas has chosen to frame the definition of disability by reference to a restriction in a person's capacity to engage and participate and not by reference to an applicant's impairment, i.e. to the condition that has led to the restriction. It is contended that the approach to the definition of disability in the 2005 Act falls to be contrasted with a different, more medicalised approach in legislation such as the Equal Status Act 2000 and that this supports the view that the AON under Part 2 is directed to an assessment of the restrictions rather than the cause of them. It is contended that from a purely legal perspective the definitions of disability in s.2(l) and s. 7 are formulated so as not to create a nexus with any particular condition or diagnosis.

122. The respondent further submits, by reference to the language of s. 8(7) that the Oireachtas envisaged that it should be possible to state the nature and extent of a disability (i.e. a qualifying "*substantial restriction*"), without requiring a diagnosis of the underlying condition giving rise to that restriction.

123. The respondent contends that had the Oireachtas intended to require a diagnosis they would have expressly so provided citing other statutes where diagnoses are expressly referred to and taken account of diagnoses, including the Health Act 1947 (Section 31 A-Temporary Restrictions) (Covid*19) (No. 2) Regulations 2021 ("a person who has a diagnosis of previous COVID-19..."), the CervicalCheck Tribunal Act 2019 ("a woman who received a diagnosis of cervical cancer"), the Hepatitis C Compensation Tribunal Act 1997 ("a person who has been diagnosed positive for Hepatitis").

124. The respondent accepts that the 2005 Act is a remedial statute but it is on the dicta of O'Donnell J. in *JGH. v Residential Institutions Review Committee* [2018] 3 I.R. 68 at para. 117, in a passage adopted by this Court in the context of the Disability Act 2005 in *G v HSE* [2021] IECA 101 where he says:-

> *"The process of statutory construction cannot be treated as an exercise where the words of the statute are fed in to 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 v St Otteran 's Hospital (2001), the limits of construction are reached when a court is asked to rewrite a statute or supplement it."*

125. On reliance on this dicta, the respondent makes the case that this it is not permissible to import a requirement for diagnosis where no such express requirement was inserted in the language of the Act and where, as they submit, this would have run contrary to the language of the Act which they contend is directed at restrictions on participation rather than the underlying cause of the restrictions. While the respondent accepts that it is uncontroversial that the earlier a diagnosis can be attached to a person, the better for him or her it is, its position remains that the 2005 Act does not create an entitlement to diagnostic testing.

126. Further, the respondent objects that interpreting the Act in the manner contended by the applicant would result in a sector of the population gaining priority in clinical waiting lists for assessment because the conduct of these assessments would then be subject to statutory time limits, whereas persons on the waiting list with no entitlement to a statutory assessment but without an entitlement to an assessment within a prescribed period would find themselves leapfrogged.

DECISION ON WHETHER ASSESSMENT REPORTS ULTRA VIRES FOR FAILURE TO PROPERLY ASSESS NATURE AND EXTENT OF DISABILITY

127. My starting point in approaching the task of statutory interpretation in these cases is the fact that the assessment of health and educational needs of children through the Part 2 process involves the respondent on behalf of the State in the protection and vindication of both statutory and constitutional rights of the children concerned, including their rights to bodily integrity through necessary health interventions and to education. The respondent is required under Article 42A of the Constitution to discharge the State's duties as provided for in the laws of the State, including under the 2005 Act, "*as far as practicable*". This does not create a more expansive right to assessment than that provided for under the Act but the constitutional imperatives on the State are relevant to the proper interpretation of the laws which provide for assessment. Afterall, the respondent is required to discharge its statutory functions in a manner which conforms with the Constitution and is consistent with the rights guaranteed under the Constitution.

128. All parties in these proceedings urge a literal interpretation of the provisions of Part 2 on me. The purpose of the literal interpretation, addressed by the Court of Appeal in *CM v. HSE* at para. 52 to 55 is to determine, upon a plain reading of the statute, the objective intention of the Oireachtas. While the literal approach to interpretation focuses on the ordinary meaning of words, it also permits a view to be taken not only of the sections in question but of the Act as a whole.

129. Hereinafter I draw on the literal meaning of the words of the 2005 Act in the long title to the Act, the definition of disability and the provisions of Part 2 of the Act separately and together, in arriving at conclusions as to what is required in a Part 2 assessment. These conclusions are then tested by reference to the purpose of the legislation to ensure that the legislative intent identified through the literal and purposive approach are aligned and support conclusions reached as to the true statutory intention behind this statutory assessment process.

130. The long title to the Act states a central purpose of the Act to be to enable provision to be made for "*the assessment of the health and education needs occasioned to persons with disabilities by their disabilities*". From this is appears that the regime established under the 2005 Act is directed to providing particularly for people with disabilities as defined under the Act as opposed to a wider cohort of people who have a need for disability services.

131. Each side refers to the definition of "*disability*" under the Act to support their respective positions as to the requirement for there to be a diagnostic element to an assessment under Part 2 of the Act. While the definition of disability in s. 2 of the 2005 Act focusses on "*a substantial restriction*" to participate in work or social or cultural life, this restriction is specifically expressed to be "*by reason of an enduring physical, sensory, mental health or intellectual impairment*". From the language used it appears that a significant restriction impacting on functioning or participation on its own does not constitute a disability. What is required is that this significant restriction is also caused by an enduring physical, sensory, mental health or intellectual impairment (being the categories of disability identified in s. 2 of the 2005 Act).

132. A determination as to whether a person has a disability requires a finding to be made as to whether a disability as defined in the Act is present. In order to assess whether a disability within the meaning of Part 2 is present, it is therefore necessary to determine a cause of the restriction (whether it be physical, sensory, mental health or intellectual impairment) and to determine that the cause is enduring. The requirement to determine cause as part of the assessment is further signalled by the plain language of s. 7(2) which requires a determination that a "*substantial restriction*" is "*permanent or likely to be permanent such as to give rise to a continual need for the provision of services*". This language reinforces the requirement that the cause of the restriction be determined in order to establish whether it is "*permanent or likely to be permanent*." It is difficult to see a determination being made as to whether a restriction is permanent or likely to be permanent being determined in the absence of a diagnosis, even if the diagnosis is tentative or open where it is not possible to arrive at a concluded diagnoses.

133. Under s. 8(7) of the 2005 Act, in order for an assessment to be complete, it must include a determination as to whether the applicant has a disability (s.8(7)(a)) and, if so, it must contain a statement of "*the nature and extent of the disability*" (s. 8(7)(b)(i)). A statement as to "*the nature and extent of the disability*" requires the assessment officer to identify the disability in addressing its "*nature*" and to reach a view as to its severity in addressing its "*extent*". It is extremely difficult to see how the assessment officer can make determinations of the type required under s. 8(7) without diagnostic assessment of the child to establish the nature of the child's disability which in turn impacts on the ability to measure its extent.

134. Then, s. 8(7)(b)(ii) requires a statement of the needs – health and educational – occasioned by the disability. To my mind, such a statement can only be made where the disability has been identified in a manner which allows the experts to specify relevant and necessary services. This cannot be achieved by merely identifying a need for further assessment and in the absence of a determination as to the nature of the disability which gives rises to the need for services.

135. The additional requirements of s. 8(7)(b)(iii) are specific in requiring that the AON report shall specify the services considered appropriate to meet the needs of the applicant and the period of time ideally for the provision of those services and the order of such provision. It is manifestly the case that the requirements of s. 8(7)(b)(iii) are not met by a referral for further assessment to identify required services. More fundamentally, however, it is impossible to see how an assessor can identify the full extent of appropriate services required to meet needs without a diagnosis which establishes what those needs are by reference to the cause of the disability, its nature and its extent.

136. An interpretation that a comprehensive assessment as opposed to a preliminary assessment is required under Part 2 is further supported by the terms in which the legislature has prescribed that the assessment of need should 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 (s. 8(5)). In identifying services for the child with the disability, the assessment officer is required to disregard resource considerations and identify services considered appropriate.

137. In discharging duties under s. 8, the assessor is required not to consider practicability or whether services are available but to identify what would be appropriate, presuming all services were available. This is clear when one contrasts the language of s. 8 which speaks of appropriate services in aspirational terms with the language of s. 11 which is focussed on practicability (see s. 11(7)(d) where the liaison officer is expressly mandated to have regard to the practicability of providing the services identified in the assessment report in preparing a service statement) and delivery of services in real terms and s. 11(7)(e) which requires consideration of budgetary allocation and available resources.

138. Despite this requirement that the assessment be conducted without regard to the reality of resources available or the practicability of service provision in conducting a resource blind assessment, it is clear from the respondent's affidavits that a factor that influenced the development of the SOP was a concern that AONs conducted under Part 2 were diverting resources from the provision of intervention services and were making the problem of lack of service provision directed at interventions worse. If a proper AON process conducted without regard to cost or resources is to the detriment of actual service provision, however, this is because the Oireachtas recognised the importance of early assessment and prioritized it accordingly. By allowing a concern as to service provision to dictate the form and content of an assessment through the terms of the SOP, the respondent ignores the exhortation of the legislative in s. 8(5). As Donnelly J. states in *CM v. HSE* [2021] IECA 283 (at para. 23):

> *"Under section 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. It thus will indicate the "gold standard" of service requirements. Budgetary constraints etc. are addressed later in the Disability Act under the heading of "service statement". The identification of services in the course of the assessment which might meet the needs of an applicant is a utopian position, whereas the "service statement" remains grounded in the reality of what may be available having regard to the resources of the respondent."*

139. The Court of Appeal (Donnelly J.) contrasts the function of identifying services through AON in s. 8(7) with that of providing a service statement under section 11. At para. 32 of the judgment, the Court states:

> *"The liaison officer in providing the service statement must have regard inter alia to the eligibility of the applicant for services under the Health Acts 1947 to 2004, the practicability of providing the services identified in the assessment reports and "to the advice of the Council, in the case of a service provided by an education service provider, in relation to the capacity of the provider to provide the service within the financial resources allocated to it for the relevant financial year". These requirements limit the service statement to those services which are in practice available to a person with disabilities, unlike the "gold standard" described in the assessment of needs".*

140. In this way and in clear and unambiguous terms, the Oireachtas has mandated that the report be prepared in a manner which identifies the services which would be available to meet the disabled child's needs were we living in an ideal world scenario. This is only possible where the child's needs are assessed fully. In construing the nature of the assessment duty it is important to recall that "*Assessment*" is defined in s. 2 of the 2005 Act as requiring a determination of the health and education needs occasioned by the disability and the services required to meet those needs within the Part 2 process. Addressing the interaction of ss. 8(3) and 8(9) in *CM* in relation to the assessment of education need, the Court of Appeal observes at para. 104:

> *"It is entirely in keeping with the natural and ordinary meaning of the provisions of section 8(3) and 8(9) that indicate that the referral made under section 8(9) is made after the assessment has been completed and has identified the need for the provision of an educational service to a child".*

141. The Court of Appeal in its conclusions refer to the s. 8(9) referral, in its literal meaning, as dealing with a post-assessment situation as regards a child's educational needs which have been identified during the course of the assessment itself. The Court did not accept that the Part 2 assessment could be deferred to the s. 8(9) referral process. The logic and reasoning which informs this conclusion of the Court of Appeal supports my conclusion that the approach adopted in reliance on the SOP of deferring diagnosis where diagnostic assessment is possible and appropriate is similarly incompatible with Part 2 requirements.

142. As the Court of Appeal found in *CM* in relation to assessment of education needs, it is not envisaged under s. 8 that assessment to determine needs can be deferred. Where it is being deferred so as not to reduce the services available to address assessed needs, as Professor McLachlan's expert report would suggest, then it is clear that the requirement to provide an assessment which does not have "*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*" in accordance with s. 8(5) is trammelled upon.

143. My conclusion as to the requirement to determine cause when conducting a Part 2 assessment in reliance on the literal meaning of the provisions contained in Part 2 of the Act is further supported by the reasoning underpinning the decision in *G (A Minor) v. HSE* [2021] IECA 101, where the Court of Appeal (Ní Raifeartaigh J.) found (at para. 40) that:

> *"[It is clear], in my view, that the determinations in (b)(i)-(iii) inclusive are reached only if there has been a prior determination that the applicant has a disability."*

144. Referring to the service statement under s. 11(2) in *G (A Minor) v. HSE* the Court of Appeal goes on to state (at para. 41):

> *"In my view, it is clear that the term "determination" is intended to have a common meaning across the provisions and that when s. 11(2) speaks of a service statement being prepared when there has been a determination that the provision of health services or education services is appropriate, this refers to a person in respect of whom there has been both a determination that he or she has a disability and that health and education needs referred to have been occasioned by the disability."*

145. Interpreting the Part 2 assessment process as including a diagnostic requirement is more consistent with the statutory scheme established pursuant to s. 10 of the 2005 Act than the terms of the SOP where referral for further assessment and without a diagnosis is envisaged. A preliminary team assessment as provided for other than the SOP does not sit comfortably with a requirement under s. 10 that the assessment be "*comprehensive*", "*accurate*" and "*up to date*" (HIQA Standards). Furthermore, the 2007 Regulations require the respondent to provide competent and knowledgeable staff to conduct or coordinate a "*high quality assessment of needs*" and to ensure that assessments are carried out in accordance with HIQA standards but an assessment of needs which is not complete or comprehensive falls short of providing a "*high quality assessment of needs*".

146. Both the requirements of Standards and the Regulations reflect the understanding of HIQA as a statutory authority and the Minister as member of the Executive with statutory competence as to the intention or purpose of the legislation. In its own terms, an assessment which does not identify needs and specific services to meet those needs but defers the identification of needs and services for further assessment cannot properly, in my view, be

described as "*comprehensive*", "*accurate*" or "*up to date*". While neither the Standards nor the Regulations can amend or extend the 2005 Act other than as provided for under the Act itself, it is clear that both the Minister in adopting regulations and HIQA in adopting standards understood the Part 2 process to require a comprehensive, accurate, up to date assessment conducted or coordinated in a manner which ensures a high quality AON.

147. Turning then to the purpose of the legislation, the Part 2 statutory framework makes entitlement to an assessment and a services statement contingent upon a determination of disability where a finding of the existence of a disability is governed by a high threshold in respect of what constitutes a disability. The respondent itself has argued that this makes it clear that the Oireachtas (see respondent's argument as recorded in the judgment in *G(A Minor) v. HSE* [2021] IECA 101) made a deliberate choice that the benefits of an AON and service statement under Part 2 would be delivered to a minority of children with a disability (as defined) as opposed to the far larger cohort who have a need for a health or education service but without having a disability within the meaning of the Act. This purpose is frustrated where full assessment is deferred to general disability services such that persons determined to have a disability under the Act join the general waiting list for assessment of need for services with others who do not have a disability within the meaning of the Act.

148. As alluded to above, the statutory purpose which I consider to be clearly reflected in s. 13 is also of assistance in discerning what is required in a Part 2 assessment. Section 13 mandates the respondent to maintain records in a manner which permits a periodic report to be submitted to the Minister which identifies aggregate needs for services identified in assessment reports and the periods of time ideally required for the provision of such services. The intention reflected in this provision of informing the Minister as to the level of unmet need and the resource implications of such unmet need is seriously undermined where needs are not fully assessed in a manner which permits the accurate identification of service needs. If a failure to properly maintain records of assessed service needs undermines the purpose of s. 13 (as found by the High Court in *CM*) in planning the provision of those assessments and services to persons with disabilities and ultimately undermines the State's ability to plan to meet those needs to the detriment of the children concerned, so too surely, by the same logic, does a failure to fully assess those needs also undermine the statutory purpose and intent.

149. The s. 13 record is only effective in measuring unmet need where it is based on an assessment report which is comprehensive and complete. A preliminary assessment which defers the complete identification of need to a future date means that the ability to record unmet need under s. 13(1)(c) is undermined and the statutory purpose thereby frustrated.

150. I follow (without endorsing) the logic to Professor MacLachlan's position as set out on affidavit in relation to assessment practices which focus resources on assessment at an early stage with adverse implications for service delivery post-assessment. It is recognised that this same logic permeates the terms of the SOP and its application in these. There is, however, an obvious difficulty with the logic as expressed. Indeed, this difficulty is acknowledged at least to some degree by Professor MacLachlan when he advocates for amendment of the 2005 Act in his 2019 Report. The difficulty is that it is not consistent with the provisions of the 2005 Act which mandate a first class assessment process which is blind to resource implications. To borrow from the language of the High Court (Barr J.) in *CM* at p. 117 (with regard to the s. 13(2) duty):

> *"the applicants are right in their submission that the respondent cannot unilaterally elect to disregard a statutory duty placed upon it simply because it is inconvenient or onerous for it to comply with that duty. If the respondent wishes to be relieved of the obligation [to provide reports as set out in s. 13(2) of the 2005 Act, they will have to lobby the Minister for a change in the legislation until such changes enacted the respondent must comply with its statutory duty"*

151. Whether the position of the respondent is correct or not in viewing the 2005 Act as contributing to rather than helping address difficulties by requiring that assessments be carried out "*without regard to the cost of, or the capacity to provide services identified in the assessment as being appropriate to assess the needs of the applicant concerned*," this is what the Act requires. It is not permissible for the respondent to hollow out these rights by adopting a SOP which seeks to convert an AON into a preliminary assessment contrary to the requirements of the Act, without the Act being amended. Indeed, at the time of writing his report, the question of an amendment of the 2005 Act is canvassed by Professor McLachlan in a manner which suggests his own acceptance that the changes which he advocated would require such an amendment. It is worthy of note that the changes urged by Professor

McLachlan are reflected in the terms of the SOP without any statutory amendment of the kind he seemed to envisage as necessary in his Report. Of course, if the terms of the SOP were properly in line with the requirements of the 2005 Act, then statutory amendment would not be necessary to operate a new practice lawfully. However, it is my view that the new practice does not align with what is prescribed under the 2005 Act and the applicants are correct in their contention that the SOP in its terms seeks to impermissibly cut across or hollow out the mandated "*gold standard*" right to an assessment of need, without regard to resources, as provided for under Part 2 of the 2005 Act.

152. The 2005 Act does not use the word "*preliminary*". The introduction of the word "*preliminary*" into the SOP when no such language appears in the 2005 Act whilst maintaining that this assessment meets the requirements of Part 2 serves to dilute the extent of the assessment duty under Part 2. I do not consider that a "*preliminary*" assessment which defers the identification of needs and services to a further assessment could be considered to meet the requirements of the Oireachtas in directing the assessment of needs in a manner which identifies optimal service provision for a child. I am satisfied that the Part 2 process does not envisage a "*preliminary*" assessment only with further assessment deferred to identify needs and specific services. The statutory scheme makes clear that it is intended that the assessment of need to identify appropriate services is concluded within the time-frame fixed under the Act and not deferred for further assessment outside the protections of the statutory framework.

153. The effect of introducing a lower standard of assessment is significant. It results in delayed assessment when the value of early diagnosis and intervention is well established ("*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*" in *O'C v. Minister for Education* [2007] IEHC 170 at para. 978 and "*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*" in *J.F. v. HSE* [2018] IEHC 294 at para. 56). Furthermore, the deferral of full assessment so that it is outside the Part 2 process results in the removal or diminution of the statutory protection prescribed to safeguard the rights of the child with a disability to police the conduct of the AON under the provisions of Part 2, including through the recording function vested in the respondent and the complaints and enforcement process provided for.

154. The Act envisages that the AON will assess the nature and extent of the disability; will identify needs; will identify the services appropriate for those needs and further the ideal time-frame for the delivery of the said services. The Act further envisages that records will be maintained by the respondent specifying the aggregate needs identified in assessment reports which have not been included in service statements and the number of persons to whom services identified in assessment reports have not been provided. The respondent is obliged to report to the Minister for Health in relation to the aggregated needs identified in assessment reports prepared including an indication of the periods of time ideally required for the provision of the services, the sequence of such provision and an estimate on the cost of such provision. Through the Act's redress mechanism a failure by the respondent to provide or to fully provide a service specified in the service statement may also be made the subject of the statutory complaints mechanism (s. 14). A failure to fully assess needs through the AON therefore undermines an ability to operate the statutory redress mechanism fully and effectively.

155. Further and manifestly, the proper discharge of the s. 13 recording and reporting function can only be achieved through the conduct of a full and comprehensive assessment which is capable of identifying the services required and the time-frame within which they should be provided. This level of information is not available following a preliminary assessment with the result that inadequate reporting of the level of unmet need are made in a manner which impacts on the State's ability to plan for meeting this need.

156. Therefore 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.

157. I am thus satisfied that to determine the existence of a disability and its nature and extent, it is necessary to consider and reach a decision on the cause of the restrictions through appropriate and indicated diagnostic assessments.

158. To be clear, I do not construe Part 2 of the 2005 Act as requiring a definitive diagnosis in every case. 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.

159. In the cases under review, there is no evidence from the AON conducted in either case that the assessment officer asked themselves whether the restrictions were caused by reason of an enduring physical, sensory, mental health or intellectual impairment, and if so, which one. Indeed, the determination of a disability in JA's case is expressly made by reference to the 7.2.1.a of the SOP which is couched incomplete terms and not ss. 2 and 7(2) of the 2005 Act where the statutory test is set out. Indicators of autism were identified in both cases such that a full assessment to identify needs in line with Part 2 of the 2005 Act requires the conduct of the recognised standard tests as part of the assessment process so that where a diagnosis is possible it is made within the timeframe envisaged under Part 2 and in a manner which ensures that a child assessed with autism has an early identification of services appropriate to his or her needs. In my view the assessment officers are led into error of law in the discharge of their statutory functions under Part 2 of the 2005 Act by the terms of the SOP.

PART II – ADEQUATE ALTERNATIVE REMEDY

160. In the JA case the respondent pleads that the applicant is precluded from obtaining relief by way of judicial review where the Oireachtas has enacted a redress mechanism in the 2005 Act. Questions as to the scope of what can be pursued through a statutory remedy must always be determined by reference to the terms of the statute creating the jurisdiction. The question I must determine is whether the complaint advanced in these judicial review proceedings is one which could properly or effectively be pursued under the 2005 Act.

161. Section 14 provides for various grounds of complaint to be made to an independent statutory complaints officer in the following terms:

> *"14.—(1) An applicant may, either by himself or herself or through a person referred to in* section 9 *(2), make a complaint to the Executive in relation to one or more of the following:*

> *(a) a determination by the assessment officer concerned that he or she does not have a disability;*
>
> *(b) the fact, if it be the case, that the assessment under section 9 was not commenced within the time specified in section 9 (5) or was not completed without undue delay;*
>
> *(c) the fact, if it be the case, that the assessment under section 9 was not conducted in a manner that conforms to the standards determined by a body referred to in section 10 ;*
>
> *(d) the contents of the service statement provided to the applicant;*
>
> *(e) the fact, if it be the case, that the Executive or the education service provider, as the case may be, failed to provide or to fully provide a service specified in the service statement.*
>
> *(2) A complaint under subsection (1) shall be made by the applicant concerned or a person referred to in section 9 (2) as soon as reasonably may be after the cause of the complaint has arisen and in any case within such time (if any) as may be prescribed under section 21 ."*

162. In the Statement of Opposition filed in the JA case, the respondent points to a remedy under s. 14 where an assessment has not been completed. The applicant's mother clarified on affidavit, however, that the complaint made on behalf of the applicant is not that the assessment was not completed but rather than it was not completed in accordance with the requirements of Part 2 of the 2005 Act. This clarification notwithstanding, the respondent maintains its objection to the application being pursued by way of judicial review in circumstances where there is a statutory redress mechanism which it is argued provides an adequate remedy.

163. The respondent in its written submissions takes a slightly different approach and relies on the established principles set out in cases such as *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 and *EMI Records v. The Data Protection Commissioner* [2013] 2 I.R. 669 at p. 728, to submit that insofar as the applicants are apparently now seeking to assert that the assessment report herein was deficient by reason of a failure to comply with HIQA standards, then there exists an adequate alternative remedy provided for in statute to address precisely that

complaint, and accordingly it is not open to the applicants to ask this Court in judicial review proceedings to mirror that process. It is noted in this regard that the HIQA Standards provide in respect of each Standard that the person is informed of the complaints/appeals process and of his/her entitlements to make a complaint/appeal, specifically that the person is entitled to make a complaint under s. 14 of the 2005 Act and is further entitled to make an appeal under ss. 18 and 20 of the Act.

164. Frankly, the approach taken in the written submission of the respondent sits uncomfortably with what has emerged through argument with reference to the caselaw and what was said on affidavit in these cases in relation to the respondent's ignorance as to the applicability of any HIQA Standards. There is a lack of reality to the respondent's assertion that a remedy exists under s. 14 of the 2005 Act where there is a failure to comply with the HIQA Standards when they admit that, for some thirteen years and until quite recently, the respondent itself was unaware that such standards had in fact been adopted. Indeed, given that the respondent was unaware that standards had been adopted under s. 10 for many years and the position has been clarified only relatively recently, its reliance on it for the purpose of these proceedings is questionable.

165. In this case, it is evident that the applicant's claim is more far reaching than a failure to comply with HIQA Standards and turns on a question of what the 2005 Act itself requires and whether those requirements are respected through the terms of the SOP. The remedy provided under s. 14 is limited in the manner identified at s. 14(1)(a)-(e). Notably, no provision is made for a complaint that the assessment has not been conducted in accordance with the requirements of Part 2 of the 2005 Act, which is the essence of the complaint made in these proceedings. It might also be observed that the respondent's reliance on s. 14(1)(c) is somewhat anomalous in circumstances where it was pointed out during the course of argument, in response to the controversy raised on behalf of the applicant as to the respondents' position of professed ignorance with regard to the status of the HIQA standards adopted under s. 10, that it was not part of the case pleaded against the respondent that the assessment under s. 9 was not conducted in a manner that conforms to the standards determined by HIQA under section 10. This being the respondent's position during argument, it is not immediately obvious how this provision

could be relied upon to provide a mechanism of redress in respect of the complaint advanced in these proceedings which the respondent acknowledges to be a different complaint.

166. Further, under s. 15(8) of the 2005 Act, the complaints officer seised of a complaint under s. 14 has a power to do the following in his or her report:

> *"(8) A report of a complaints officer may contain one or more of the following:*
>
> *(a) a finding that the complaint was or, as the case may be, was not well founded whether in part or in whole;*
>
> *(b) if the report contains a finding that the Executive failed to commence an assessment within the period specified in section 9 (5) or to complete an assessment without undue delay, a recommendation that the assessment be provided and completed within the period specified in the recommendation;*
>
> *(c) if the report contains a finding that the person may have a disability, a recommendation that the person be the subject of a further assessment under section 9 within the period specified in the recommendation;*
>
> *(d) if the report contains a finding that the Executive failed to carry out an assessment under section 9 in conformity with the standards referred to in section 10 , a recommendation that the Executive cause the assessment or a specified part of it to be carried out in conformity with those standards within the period specified in the recommendation;*
>
> *(e) if the report contains a finding that the contents of the service statement concerned are inaccurate or incorrect, a recommendation that the statement be amended, varied or added to by the liaison officer concerned within the period specified in the recommendation;*
>
> *(f) if the report contains a finding that the Executive or an education service provider failed to provide or to fully provide a service specified in the service statement, a recommendation that the service be provided in full by the Executive or the education service provider or both as may be appropriate within the period specified in the recommendation.*

167. The complaints officer's powers are clearly referable to the complaints that it has competence to address under s. 14 and are limited in the terms identified in section 15(8). There is no enlargement in subject matter competence beyond what is provided for under s. 14.

168. It is possible to conceive of a presentation of a complaint under s. 14(1)(c) in relation to the quality of an assessment conducted in the JA case having regard to the HIQA Standards. A complaint might have been made on behalf of JA under s. 14(1)(c) to the effect that the assessment report completed in his case was not accurate or comprehensive or evidence based and was not conducted appropriately by reason of the absence of multidisciplinary involvement. There is an overlap between a complaint constructed in this manner and the complaint made in these proceedings insofar as both concern the adequacy of the assessment carried out. However, the essence of the complaint advanced in the JA case relates to the vires of the assessment officer in discharging the statutory assessment function by reference to the SOP and in a manner which does not meet the higher assessment duties established under the Act. This is a complaint which turns on the proper interpretation of the statutory requirements pertaining to a Part 2 assessment. Indeed, the respondent seeks to have this point of statutory interpretation addressed and to this end has not pleaded an alternative remedy argument in the first of the two cases. No provision is made under s. 14 for a complaint of the nature pursued in these proceedings and the complaints officer has no power to provide any remedy in respect of a complaint that there is an error of law as to the interpretation of Part 2 assessment requirements, as reflected in the terms of the SOP, which renders the assessments unlawful.

169. To the extent that an applicant pursues a complaint under the statutory mechanism which hinges on an interpretation of the provisions of the 2005 Act, that applicant risks a proper finding that the complaints officer simply has no jurisdiction to entertain or determine the complaint as it exceeds the clearly prescribed parameters of what the complaints officer can deal with. It may be that a complaints officer or a court on appeal proceeds to deal with a complaint without a question as to jurisdiction arising but where an issue is raised and there is no acquiescence regarding the lack of jurisdiction, then a finding on such a complaint is potentially liable to be quashed as *ultra vires* and/or rendered unenforceable. The complaints

officer is confined by law to dealing with complaints which come within the four corners of the jurisdiction vested on that office under s. 14 of the Act.

170. It is true that where a complaints officer makes a recommendation under s. 15(8) which is not complied with, then the applicant may apply to the Circuit Court for an order to enforce the recommendation in accordance with the terms of s. 22 of the Act. Such an application can only properly be pursued, however, in respect of a recommendation which the Complaints Officer had power to make having regard to the jurisdiction vested in ss. 14 and 15 of the 2005 Act.

171. The possibility of a consultative case stated arising in the context of an application to the Circuit Court in reliance on s. 22 of the 2005 Act was canvassed before me as part of the alternative remedy argument. This was canvassed in circumstances where there was at the time of hearing a consultative case stated from the Circuit Court pending before the Court of Appeal which raised very similar issues to those in these proceedings. It is well established, however, that where a right of recourse to a court exists as part of a statutory remedy, the court will decline to rule on a matter where it does not properly arise from the jurisdiction it exercises. The court's jurisdiction on appeal or by way of case stated is tied to those issues which could have been determined within the parameters of the statutory remedy (see *Petecel v. Minister for Social Protection & Ireland* [2020] IESC 25).

172. I am, of course, mindful of a legitimate concern that the proper utilisation of the statutory remedy might be sidestepped in favour of more costly proceedings by way of judicial review through the raising of specious points of law or statutory interpretation and causing resources to be directed to the defence of litigation rather than the provision of services. There is no suggestion here that these are such cases and, as noted above, the respondent made it clear that it was anxious for a court ruling on the question of statutory interpretation which arises in these two cases. This, it seems to me, is an implicit acknowledgement that it is appropriate for the High Court to rule on the issue of law arising.

173. Indeed, it was properly acknowledged during the hearing that the fact that the respondent wishes clarity on the question of statutory interpretation which arises together with the uncertainty around the status of the HIQA Standards amongst the HSE itself might mean that the court would exercise its discretion to proceed to grant relief by way of judicial review in this case even though satisfied that an alternative remedy existed. The respondent was desirous nonetheless, despite the unusual circumstances which arise in this case, of a pronouncement as to the existence of an effective, alternative remedy and a reiteration of established principles that where such remedies exist, it is not appropriate to proceed by way of judicial review.

174. Where a complaint falls within the terms of s. 14 of the 2005 Act then clearly an issue arises as to whether the Court should decline to grant relief by way of judicial review. There will be circumstances where the statutory remedy is the more appropriate remedy. In those cases the Court has a discretion to refuse to grant relief in judicial review proceedings (see *J.F. v. HSE* [2018] 294 where Faherty J. considered this question in the context of a complaint about delay in completing assessments, a complaint which falls within the ambit of s. 14 of the 2005 Act).

175. Now that it is clear that Standards have been adopted pursuant to s. 10 of the 2005 Act and presuming that parties are properly alerted, in accordance with the terms of the Standards to their right of appeal, then a complaint as to the adequacy of an AON may be pursued under the statutory redress scheme where the issue is one of non-compliance with the Standards. Where this is the case, a party proceeding by way of judicial review is on hazard as the court would be properly entitled to refuse discretionary relief and the party pursuing judicial review proceedings in those circumstances would find themselves exposed in terms of adverse costs orders. Where there is sufficient overlap between the issues sought to be ventilated in judicial review proceedings and a complaint which might otherwise have been pursued through the statutory complaints process, the extent of such overlap and the court's view as to whether one remedy was more appropriate than the other in all the circumstances, are relevant factors informing the court's exercise of discretion.

176. While I was urged to address issues of principle in relation to the existence of an adequate, alternative remedy, it seems to me that it is not appropriate to seek to lay down general principles in relation to the scope of the remedy under the 2005 Act and the desirability of utilising that remedy in a case where the remedy does not provide for the resolution of a complaint of the type advanced in these proceedings. As the Supreme Court found in *Petecel v. Minister for Social Protection & Ireland* (O'Malley J.) (at para 112):

> *"…it seems to me that this is an issue best dealt with on a case by case basis, given the discretionary nature of judicial review relief".*

177. Having said that, the principles are already well established. The default position is that a party should pursue a statutory remedy rather than institute judicial review proceedings where one is available and fit for purpose. As explained by Hogan J. in *Koczan Financial Services Ombudsman* [2010] IEHC 407, this is because it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which those dissatisfied with a decision might be entitled to have that decision questioned. This is, of course, subject to the caveat that the provisions establishing the appeal provide for a "subject matter jurisdiction" (as Hogan J. characterized it in *Koczan v. Financial Services Ombudsman* [2010] IEHC 407) which ensures that the statutory remedy is, in fact, an appropriate and adequate alternative to judicial review proceedings.

178. I consider that the issue at the heart of these cases could not have been properly determined within the parameters of a s. 14 complaint, nor on any consequential or derivative enforcement application to the Circuit Court because of the terms in which ss. 14, 15 and 22 are framed. The issue which arises for determination in these proceedings with regard to the requirements of Part 2 of the 2005 Act falls outside the "*subject matter jurisdiction*" of the complaints officer under section 14. The court under the statutory redress scheme also derives its jurisdiction in turn from within the parameters of the s. 14 subject matter jurisdiction with the result that on any application deriving from the s. 14 application limited as to its subject matter jurisdiction by the terms of s. 14 itself. The subject matter jurisdiction under s. 14 is limited by the terms in which that provision has been drawn.

179. In my view, the applicants cannot be faulted for not pursuing that remedy in the circumstances. If I am wrong in this, however, then it seems to me that this is not a case in which I would exercise a discretion to disallow relief in judicial review proceedings notwithstanding the existence of an alternative remedy having regard to the state of confusion evident as to the status of the HIQA Standards. Where the respondent as a statutory body charged with statutory duties under the 2005 Act was for so long unaware that the Standards had been adopted, it seems to me that it would be unfair to expect an applicant to pursue a complaint under s. 14 instead of by way of judicial review while any uncertainty as to the status of the Standards persisted. Hopefully, one consequence of these proceedings may be to dispel any such uncertainty for once and for all.

CONCLUSION

180. The AON process as provided for within the statutory framework is quite unique in requiring that an assessment be done without regard to resources. The 2005 Act clearly distinguishes between appropriate services which should ideally be available (ss. 8(5), 8(7) and 13(1) & (2)) and the practicability of service provision (s. 11). The reason for this is clear when regard is had to the terms of s. 13 of the 2005 Act. The AON is integral to the identification of need by the State in the discharge of its duties to vindicate and respect the rights of children with disabilities. It is only through the identification of need that the State is then equipped to measure the resources required to meet those needs and to deploy those resources in accordance with priorities determined by government in discharge of a duty to vindicate and respect rights. In the absence of sufficient information to make decisions in relation to competing interests and having regard to the limited resources available, the State is hampered in properly discharging its constitutional mandate to vindicate the rights of a child with disabilities "*as far as practicable".*

181. The assessments in the case of CTM and JA were "*preliminary team assessments*" conducted in accordance with the newly introduced SOP. The respondent has impermissibly sought through 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 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. Whilst preparing a report in full compliance with the SOP, they failed to determine that the significant restrictions presenting on initial assessment were caused by an enduring physical, sensory, mental health or intellectual impairment (being the categories of disability identified in s. 2 of the 2005 Act) but proceeded on the basis that diagnostic assessment of the nature and extent of the disability was not required.

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. The fact that this may place the respondent in "*an invidious position of having a legal obligation to assess needs without necessarily having the means to address them*" as identified by Professor MacLachlan is admittedly frustrating and likely also stressful for staff of the respondent as well as for parents of disabled children. It remains the case, however, that 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 statutory assessment duty because it may lead to heightened awareness of and frustration with deficits in the actual provision of services.

183. The consequence of the failure to properly define the statutory parameters of the extensive, gold standard, assessment required under the 2005 Act is not alone that it undermines the ability of the respondent to itself plan for service provision. It also undermines parents and guardians in advocating for appropriate and timely service provision to better secure the vindication of statutory and constitutionally safeguarded personal rights.

184. Whilst a redress mechanism is provided for under the 2005 Act, the jurisdiction of the complaints officer and the Circuit Court on an enforcement application, is limited by the terms in s. 14(1) which prescribes in clear terms the types of complaint which may be pursued before the complaints officer. The issue of statutory interpretation and complaints of error of law leading to *ultra vires* actions of the respondent advanced in these proceedings could not be pursued under s. 14 and no adequate or alternative remedy was available to the applicants

under the 2005 Act. It is clear that where the complaint is that the HIQA Standards have not been complied with, then the complaints officer has jurisdiction to determine that complaint under the 2005 Act. It is only where the statutory remedy can be demonstrated to be ineffective that it would be appropriate to resort to the court by way of judicial review without exhausting the available statutory remedy.

185. For the reasons set out above and consequent upon an error of law relied upon in completing the assessment reports, I will grant an order of certiorari quashing the assessment report completed on the 1st February, 2021 in CTM's case and 20th April 2021in JA's case.

186. Having been wholly successful in these proceedings, the applicants in both cases appear to be prima facie entitled to an order for their costs to be adjudicated in default of agreement having regard to the principles set down under Part 11 of the Legal Services Regulatory Authority Act, 2015. Should it be contended that a different form of order is appropriate, I direct written submissions addressing the order sought be provided by the Respondent within ten days delivery of this judgment. I will direct that in the event that such submissions are received, the applicants will have a period of ten days to file submissions in response thereto.