

AUTISM ACT 2009

EXPLANATORY NOTES

COMMENTARY

Section 3: Local authorities and NHS bodies: duty to act under guidance

23. This section imposes on local authorities and NHS bodies a duty to act under the guidance issued by the Secretary of State under section 2 of the Act.

Local authorities

24. Section 7 of the Local Authority Social Services Act 1970 (“the LASS Act”) requires local authorities, in exercising their social services functions, to act under the general guidance of the Secretary of State (“section 7 guidance”). Case law has established that complying with this requirement involves more than simply taking account of the guidance. Rather, local authorities must “follow the path charted by the guidance, with liberty to deviate from it where the authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course” (*R v Islington Borough Council, ex parte Rixon* (1998 ICCLR 119)). A local authority which failed to comply with section 7 guidance without a compelling reason for doing so would be acting unlawfully and could find itself subject to judicial review or default action by the Secretary of State.
25. Subsection (2) of this section provides for guidance issued under section 2 to be treated as section 7 guidance, so that local authorities will be under the same duty to act under that guidance as they would be in the case of any other section 7 guidance.

NHS bodies

26. For NHS bodies, there is no existing provision equivalent to section 7 of the LASS Act. In order to create the same obligation on NHS bodies to act in accordance with guidance issued under section 2 of the Act, subsection (3)(a) stipulates that, for the purposes of that guidance, an NHS body is to be treated as if it were a local authority within the meaning of the LASS Act, and subsection (3)(b) specifies that the functions of an NHS body concerned with the provision of relevant services are to be treated as if they were social services functions within the meaning of the LASS Act.
27. This means that NHS bodies will be bound by the guidance to the same extent as local authorities, and the case law that has established the status of section 7 guidance as being more than just advice to be taken into account will apply equally in relation to NHS bodies.
28. These provisions will not apply to NHS foundation trusts. Although the Secretary of State is required by section 2(1)(b) to issue guidance to NHS foundation trusts, they are not covered by section 3(1).
29. This means that NHS foundation trusts will be expected to take the guidance into account in planning and providing services for adults with autistic spectrum conditions, but they will not have the same duty to act under it as local authorities and NHS bodies

*These notes refer to the Autism Act 2009 (c.15)
which received Royal Assent on 12 November 2009*

(the definition of NHS bodies in section 4(1) does not include NHS foundation trusts).
This reflects the greater autonomy of NHS foundation trusts.