

AUTISM ACT 2009

EXPLANATORY NOTES

COMMENTARY

9. Sections 1 to 3 contain the substantive provisions of this Act. This commentary therefore focuses on these three sections.

Section 1: Autism Strategy

10. Subsection (1) places a duty on the Secretary of State to prepare and publish a document, to be called “the autism strategy” (subsection (2)), setting out a strategy for meeting the needs of adults in England with autistic spectrum conditions by improving the provision of relevant services by local authorities, NHS bodies and NHS foundation trusts. Under subsection (3) the autism strategy must be published no later than 1 April 2010.
11. Autistic spectrum conditions are lifelong conditions which affect how a person communicates with, and relates to, other people and the world around them. The word “spectrum” is used because the characteristics of the condition vary from one person to another. As research and experience refines the understanding of autism, so the range of characteristics will change. It is because of this that no definition of the term “autistic spectrum condition” has been included in the Act. The intention is that definitional issues will be dealt with in the autism strategy, which, as it has to be kept under continual review, will allow for changes to be made much more quickly in response to new developments than if the definition were to be included in primary legislation.
12. Subsection (4) requires the Secretary of State to keep the autism strategy under review and allows the strategy to be revised, in which case it must be re-published (subsection (5)).
13. Under subsection (6)(a), the Secretary of State must consult and seek the participation of such persons as the Secretary of State considers appropriate in preparing the autism strategy. Persons and organisations whose participation is sought will be actively involved in the development of the autism strategy, rather than only being able to respond through the consultation process.
14. Consultation and steps to seek participation are also required if the Secretary of State proposes to undertake substantial revision of the strategy (subsection (6)(b)).
15. The Secretary of State began an extended public consultation exercise on the proposed content of the autism strategy on 29 April 2009¹. This ran until 15 September 2009: it is envisaged that the strategy itself might be published before the Act comes into force. Subsection (7) therefore contains provisions to ensure that a document prepared and published before the Act comes into force is as effective for the purposes of fulfilling the Secretary of State’s duty in this section as a document published after that time. Similar provisions are contained in subsection (8) in relation to consultation and steps to seek participation on the preparation of the autism strategy.

¹ *A Better Future – A consultation on a future strategy for adults with autistic spectrum conditions*, Department of Health, 29 April 2009

Section 2: Guidance by the Secretary of State

16. Subsection (1) places a duty on the Secretary of State to issue guidance on implementation of the autism strategy to local authorities, NHS bodies and NHS foundation trusts. The guidance must be issued no later than 31 December 2010 (subsection (2)).
17. Subsection (3) requires the Secretary of State to keep the guidance under review and allows revisions to be made. In keeping the guidance under review, the Secretary of State must give particular consideration to the extent to which the guidance has effectively secured the implementation of the autism strategy (subsection (4)).
18. Subsection (5) stipulates a range of matters that must be addressed in the guidance issued by the Secretary of State. These are –
 - the provision (or commissioning; see section 4(2)) of diagnostic services for adults with autistic spectrum conditions;
 - the identification of adults with autistic spectrum conditions;
 - the assessment of the needs of adults with autistic spectrum conditions for relevant services;
 - planning in relation to transition arrangements for children with autistic spectrum conditions as they move into adulthood;
 - other planning in relation to the provision of relevant services;
 - training of staff who provide relevant services to adults with autistic spectrum conditions; and
 - local leadership arrangements in relation to the provision of relevant services.
19. The list is not exhaustive, and the Secretary of State is free to include other matters in the guidance as well as those contained in this subsection.
20. The guidance to local authorities, NHS bodies and NHS foundation trusts on the identification of adults with autistic spectrum conditions and the planning of service provision for them may, for example, cover the collection of information about the numbers of adults requiring services and the kinds of services they need.
21. Subsection (6) requires the Secretary of State to consult and seek the participation of local authorities, NHS bodies and NHS foundation trusts before issuing guidance on the implementation of the autism strategy, and before making substantial changes to the guidance once issued. There is nothing to prevent the Secretary of State from consulting more widely or seeking the participation of organisations or individuals other than those stipulated in this subsection.
22. Subsection (7) contains provisions to ensure that consultation and steps to seek participation before issuing the guidance that take place before the Act comes into force are as effective for the purposes of fulfilling the Secretary of State's duty in this section as consultation and steps to seek participation after that time. (See also paragraph 15 above.)

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

Section 4: Interpretation

30. Subsection (2) ensures that where a local authority or NHS body exercises its functions in relation to providing relevant services for adults with autistic spectrum conditions by arranging for those services to be provided by a third party (commonly referred to as “commissioning” services), those services fall within the scope of the Act in the same way as if they were being directly provided by the local authority or NHS body.