

AUTISM BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Autism Bill as brought from the House of Commons on 22nd June 2009. They have been prepared by the Department of Health with the consent of Baroness Pitkeathley, the Lord in charge of the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. The Bill places a duty on the Secretary of State to prepare and publish an autism strategy, by 1st April 2010. That puts Ministers' existing commitment to doing this on a statutory footing. Public consultation on the content of the strategy is already under way.
4. The Bill provides that the autism strategy is to be a strategy for meeting the needs of adults in England with autistic spectrum conditions, by improving the provision by local authorities and National Health Service bodies of health and social services (these are "relevant services", defined in clause 4(1)) to such adults. The Secretary of State will be required to keep the autism strategy under review and will be able to revise it. The Secretary of State will have a duty to consult and seek the participation of such persons as he considers appropriate in both preparing the autism strategy and revising it.
5. In addition, the Bill will require the Secretary of State to issue guidance, by 31st December 2010, to NHS bodies (as defined in clause 4(1)), NHS foundation trusts and local authorities on implementation of the autism strategy. The Secretary of State will have to keep the guidance under review, and to consult with the NHS and local authorities both before issuing the guidance and before revising it in any way that would result in a substantial change.

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6. The Bill also contains provisions that will require NHS bodies and local authorities to act under the guidance.

OVERVIEW OF THE STRUCTURE OF THE BILL

7. The Bill has six clauses. Clause 1 contains provisions concerning the duty to prepare and publish an autism strategy. Clause 2 covers the duty to issue guidance on implementation of the autism strategy, whilst clause 3 deals with the duty on local authorities and NHS bodies to act under the guidance. Clauses 4, 5 and 6 cover interpretation, expenses, and extent, commencement and short title respectively.

TERRITORIAL EXTENT AND APPLICATION

8. The Bill will extend to England and Wales, but will apply only to England. Clause 1(1) specifies that the autism strategy will relate only to adults in England. Clause 4(1) defines “local authority” and “NHS body” so as to include only bodies based wholly or mainly in England.

COMMENTARY

9. Clauses 1 to 3 contain the substantive provisions of this Bill. This commentary therefore focuses on these three clauses.

Clause 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 1st 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 Bill. 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.

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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 (which might include the National Autistic Society, for example) 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 29th April 2009¹. This will run until mid- September, and it is Ministers' intention that the strategy itself will be published by the end of December 2009. Subsection (7) therefore contains provisions to ensure that a document prepared and published before the Bill comes into force is as effective for the purposes of fulfilling the Secretary of State's duty in this clause 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.

Clause 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 31st 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 –

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

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- the provision (or commissioning: see clause 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 will be free to include other matters in the guidance as well as those contained in this subsection.

20. Because it must include 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, the guidance will be able to 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 Bill comes into force are as effective for the purposes of fulfilling the Secretary of State's duty in this clause as consultation and steps to seek participation after that time. (See also paragraph 15 above.)

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

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

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 clause provides for guidance issued under clause 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 clause 2 of the Bill, 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 clause 2(1)(b) to issue guidance to NHS foundation trusts, they are not covered by clause 3(1).

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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 clause 4(1) does not include NHS foundation trusts). This reflects the greater autonomy of NHS foundation trusts.

Clause 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 Bill in the same way as if they were being directly provided by the local authority or NHS body.

FINANCIAL EFFECTS

31. The obligations placed on the Secretary of State to prepare and publish an autism strategy and to issue guidance on implementation of that strategy are actions that Ministers are already embarking on – the Bill effectively puts on a statutory footing commitments that Ministers have already made. The costs of issuing the strategy and guidance have already been factored into the Department of Health’s funding forecasts.

32. There will be almost certainly be costs for local authorities and the NHS in implementing the autism strategy once published. However, at this stage in the development process, where Government is conducting a wide-ranging consultation on the appropriate themes and priorities for the strategy, there are no firm proposals or recommendations for what the strategy should contain, so it is not possible to make any accurate assessment of the potential costs of implementation.

PUBLIC SECTOR MANPOWER

33. It is not expected that the Bill will have any implications for the staff of any Government department. Work on preparing the consultation exercise and the autism strategy itself, together with the guidance, is already factored into the business plans of the Department of Health.

34. Again, since the autism strategy is not yet written, it is not possible to predict what, if any, implications there may be for local authority and/or NHS staffing levels. Even if it were possible to speculate at this stage, each locality will need to respond differently to the autism strategy according to the current state and level of services for people with autistic spectrum conditions in that area. Whilst some may choose an approach that involves changes in staffing

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levels, others may opt for alternatives such as service reconfiguration, or re-training of existing staff, which do not have direct manpower implications.

IMPACT ASSESSMENT

35. The Bill will impact only on the Secretary of State, and on local authorities and NHS bodies (as defined in the Bill) to the extent that it imposes a duty on them to act in accordance with the guidance for implementation of the autism strategy.

36. It is possible that the autism strategy will impact on businesses, particularly in social care where it is common for local authorities to commission services from independent or voluntary sector providers, rather than to provide them directly. However, as indicated above, at this stage the content of the autism strategy is not settled, so an impact assessment cannot be made. The consultation document on the autism strategy makes the following statement:

As this consultation document does not set out proposals or recommendations, it is not accompanied by an impact assessment of costs, risks and benefits; the final strategy to be published at the end of the year will be accompanied by an impact assessment considering those issues.

37. As regards an equality impact assessment, the consultation document is accompanied by an initial screening assessment which concludes that the autism strategy is explicitly intended to have a positive impact and is very likely to do so. The consultation document asks for feedback on this initial equality impact assessment in order to inform a full impact assessment which will accompany the autism strategy.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

38. The Government considers that the provisions of the Autism Bill are compatible with the Convention rights (as defined in section 1 of the Human Rights Act 1998).

COMMENCEMENT DATE

39. Clause 6(2) provides for the Bill to come into force two months after Royal Assent is given. This means that a Commencement Order will not be required in order to bring the provisions of the Bill into effect.

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