

Policy and campaigns



The Down Syndrome Act

A briefing

June 2022

A Down's Syndrome Association publication

Please note

This briefing is provided for general information and cannot be relied upon as providing legal advice.

This is a briefing on the content and substance of the Down Syndrome Act for the Down Syndrome Association by Steve Broach, Barrister, 39 Essex Chambers.

The subsequent guidance released as a result of the Act may help clarify some of the issues raised below.

The Down Syndrome Act 2022 ('DSAct') is a strikingly short piece of legislation. It has only one substantive section, and that section does one thing – require the Secretary of State¹ to issue guidance, to which various public bodies must have 'due regard'.

The Long Title of the DSAct, which was amended as the Bill went through Parliament, is very general; 'An Act to make provision about meeting the needs of persons with Down syndrome; and for connected purposes.'

Section 1(1) of the DSAct provides that 'The Secretary of State must give guidance to relevant authorities on steps it would be appropriate for them to take in order to meet the needs of persons with Down syndrome in the exercise of their relevant functions'.

Some key points in relation to this sub-section are as follows:

1. It requires the Secretary of State to do something (give guidance) which he would already have had the power to do, if he chose.
2. The guidance must be given to 'relevant authorities' – this term is to be defined later in the DSAct.
3. The guidance must be on the steps which these authorities should take 'in the exercise of their relevant functions'. These are their existing functions under (for example) the Chronically Sick and Disabled Persons Act 1970, or the Care Act 2014. The DSAct does not create any new functions (including any new powers and duties, other than the duties to issue and have due regard to the guidance).

Sub-section 1(2) mandates that 'Relevant authorities must have due regard to the guidance in the exercise of their relevant functions.' The duty to have 'due regard' is the same as the duty which is imposed by section 149 of the Equality Act 2010, known as the 'public sector equality duty' or 'PSED'. In that context, 'due regard' means 'the regard that is appropriate in all the circumstances', see *R (Baker) v SoS for Communities and Local Government* [2008] EWCA Civ 141 at [31]. It is well established that the PSED requires public bodies to take into account the relevant matters specified in section 149(1); it does not require any particular result to be achieved.²

¹ There is a legal fiction that there is only one 'Secretary of State' – in practice the DSAct and its guidance will cover policy areas for which there are numerous Secretaries of State.

² See the discussion in *Baker* at [31]; 'it is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to

It is very likely that the duty of 'due regard' in the DSAct will be interpreted in the same way. It will require relevant authorities to take into account the guidance, to the extent appropriate in all the circumstances. It will not require any relevant authority actually to follow the guidance, and certainly will not require any relevant authority to achieve any particular result from the exercise of its functions.

In this regard, the guidance which will be issued under the DSAct can be clearly distinguished from guidance such as Working Together to Safeguard Children, which is issued under statutory provisions (such as section 7 of the Local Authority Social Services Act 1970) which require the recipients of the guidance to 'act under' it. In relation to 'act under' guidance, those subject to it must follow it, unless they take a considered decision that there is good reason not to do so; see *R (TG) v Lambeth LBC* [2011] EWCA Civ 526 at [17].³

It would therefore most likely be unlawful for a relevant authority entirely to ignore what is said in the DSAct guidance, assuming the guidance is relevant to the exercise of one of the functions of that authority at the relevant time. It is highly unlikely that no regard can amount to 'due regard', in that context. But if a relevant authority can evidence some consideration of the guidance, it will be difficult to mount a challenge via judicial review that this consideration has been insufficient, and harder still to bring a claim based on an alleged failure to achieve any particular result.

Subsections 1(3)-(6) impose four procedural requirements:

- Before giving the guidance, the Secretary of State must consult such persons as he considers appropriate. Any challenge to the identity of these consultees would most likely need to be on the basis that the Secretary of State has made an irrational decision, which would be a very high hurdle for a claimant to surmount.
- The Secretary of State must publish the guidance, in such manner as he considers appropriate.
- The Secretary of State must lay the guidance before Parliament **once it is published**. It is not obvious what the benefit of this provision is, and the guidance would in any event be accessible for MPs, Peers and their researchers, as it will be for the general public.
- The Secretary of State may revise the guidance from time to time (and must consult again as he thinks appropriate before so doing).

Sub-section 1(7) then provides that the terms 'relevant authorities' and 'relevant functions' are defined in the schedule to the DSAct.

achieve these goals. The distinction is vital. Thus the inspector did not have a duty to promote equality of opportunity between the applicants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have due regard to it.'

³ 'It is inaccurate to describe guidance given under section 7 of the 1970 Act, ie guidance under which local authorities "shall ... act", as apt to be followed "probably" or only "as a matter of good practice". In the absence of a considered decision that there is good reason to deviate from it, it must be followed: see the classic exposition by Sedley J in *R v Islington London Borough Council, Ex p Rixon* (1998) 1 CCL Rep 119 , 123 j – k'

Section 2 is entirely procedural – providing that the DSAct extends to England and Wales, allowing the Secretary of State to bring the DSAct into force by making regulations, and giving the Short Title ('the Down Syndrome Act 2022').

The schedule then defines 'relevant authorities' and 'relevant functions' under four headings:

- National Health Service
- Social care
- Housing
- Education and youth offending

The DSAct guidance will therefore apply to the exercise of functions by:

- All relevant NHS bodies, including NHS England.
- Local authorities exercising social care functions under section 117 of the Mental Health Act 1983 ('after care'), the Children Acts, the Care Act 2014 and 'Part 3 of the Children and Families Act 2014'. However as this appears under the heading 'social care', it would appear that the functions covered by the last of these provisions are restricted to social care functions.
- Local authorities exercising functions in relation to the provision or allocation of housing and homelessness functions.
- Schools (including Academies), colleges, PRUs, early years settings, youth offending teams and 'persons in charge of relevant youth accommodation in England', when they are exercising functions under Part 3 of the Children and Families Act 2014.

Two points arise from the final bullet above. First, the guidance will not be able to seek to influence the exercise of **general** functions by schools, colleges, youth offending teams etc. The 'relevant functions' to which the guidance can attach is restricted solely to those specialist functions given to them in relation to children and young people with SEND under the CFA 2014 (so, for example, the duty on schools etc to use their best endeavours to ensure that children and young people receive the special educational provision they require, found in CFA 2014 s 66).

Second, the 'Education and youth offending' paragraph in the schedule does **not** include local authorities, in relation to their education functions (for example, their SEN team).

The Down's Syndrome Association provides information and support on all aspects of living with Down's syndrome.

We also work to champion the rights of people with Down's syndrome, by campaigning for change and challenging discrimination.

A wide range of Down's Syndrome Association publications can be downloaded free of charge from our website.

Contact us

Down's Syndrome Association

Langdon Down Centre,
2a Langdon Park, Teddington,
Middlesex, TW11 9PS

t. 0333 1212 300

e. info@downs-syndrome.org.uk

w. www.downs-syndrome.org.uk

Wales

e. wales@downs-syndrome.org.uk

Northern Ireland

e. enquiriesni@downs-syndrome.org.uk



Activities for people
with Down's syndrome

www.dsactive.org



www.dsworkfit.org.uk



www.langdondownmuseum.org.uk

**LANGDON DOWN
CENTRE**

www.langdondowncentre.org.uk



© Down's Syndrome Association 2022

WorkFit® is a registered trade mark of the Down's Syndrome Association. Photograph ESB Professional on [shutterstock.com](https://www.shutterstock.com)