

maintaining standards

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Interim Report of a Formal Investigation into Fitness Standards in Nursing, Teaching and Social Work

(November 2006)

The Disability Rights Commission (DRC) is conducting a formal investigation into fitness standards in nursing, teaching and social work. The investigation is reviewing the regulatory frameworks governing these professional occupations and carrying out research to see how these regulations and guidance are put into practice by higher education institutions, regulatory bodies and employers.

This is our interim report, giving an update on the investigation's progress and on our emerging findings. The investigation, which commenced in May 2006, still has a considerable way to go and we will be publishing our final conclusions and recommendations in the summer of 2007.

Summary

The formal investigation is looking at three main themes:

1. The regulatory frameworks in relation to fitness standards that operate within the nursing, teaching and social work professions
2. The way that fitness is assessed in practice, at various stages during the process of studying, qualifying, registration and working within these professions
3. The approach that disabled people and people with long-term health conditions take towards disclosing their conditions to colleges, regulatory bodies and employers; and the policies and practices of these organisations in relation to disclosure

This is a general formal investigation and is made up of a variety of different evidence gathering methods. Stage 1 of the investigation involved a review of the existing regulatory frameworks relating to fitness standards. Stage 2 comprises the following three elements:

- independent research into decision-making about fitness at different stages of the employment journey for teaching, nursing and social work – including entry to training, registration and employment
- independent research into the issues of disclosure of impairments and long-term health conditions at different stages of the employment journey

- a call for written evidence on the issues under scrutiny from organisations involved in the implementation of fitness standards, and other relevant organisations (such as disability organisations and trade unions).

Stage 1 of the investigation has now been completed (and we outline its principal findings in the next section of this report). All the elements of stage 2 are also well underway, and we give more details about each of them below. The results of this work will provide a wealth of information, not only on the legal framework of fitness standards, but also on the way in which those standards are applied and perceived. This will enable us to form a view about whether the current arrangements are themselves fit for purpose as far as disabled people are concerned, and to decide what recommendations to make for future changes to the regulatory framework and to policy or practice.

To assist with this process, in Stage 3 of the formal investigation we will be convening an Inquiry Panel to consider the evidence which the investigation has revealed, and to discuss possible options for reform with key stakeholders.

About the Review of Regulatory Frameworks and its Findings

Stage 1 of the investigation has now been completed. It comprised a review of the statutory and regulatory frameworks governing the three core professions of nursing, social work and teaching and, for comparative purposes, those governing medicine, dentistry and the 13 professions regulated by the Health Professions Council.

The review has been carried out on behalf of the DRC by a team led by Levenes solicitors. It is the first systematic consideration of the issue of fitness standards and their impact on the contribution which people who are disabled or have long-term health conditions can make in teaching, nursing and social work. The full report of the review is available at Findings and Reports.

Relevant legislation, regulations and statutory guidance covering

higher education, registration and employment were looked at across England, Scotland and Wales. Regulations for professionals wanting to work in Great Britain from EU and non-EU countries were also covered, as was other relevant legislation, such as health and safety legislation. The main themes of this review were:

- the interaction of the statutory / regulatory frameworks with the DDA; and
- differences and similarities in approach between professions, career stages and jurisdictions (i.e. England, Scotland and Wales).

The review also looked at actual cases and some complaints concerning disability discrimination or fitness standards within the (wider) group of professions. Case sources included law reports, the Employment Appeals Tribunal website, the DRC itself and information provided by regulatory bodies, professional associations and legal advisers. This information is not comprehensive but provides an illustration of some of the issues identified and indications of where further problems may lie that can be explored through other parts of the investigation.

Main Findings of the Review

Professional regulatory frameworks and the DDA

There is a significant amount of primary and secondary legislation and guidance likely to impact on disabled people, including people with long-term health conditions, at various career stages, such as entry to education, registration or employment.

There are very few references to the DDA, except within the regulatory framework for the teaching profession. There is no mention of the DDA in the legislation, regulations or statutory guidance relating to social work and only two references in all the nursing legislation and guidance (with additional reference in the new guidance about to be approved concerning good health and good character). While the various duties of the DDA have come into force over time since 1995, it is nevertheless still surprising that there are so few references to it.

The profession-specific legislation places varying degrees of emphasis on the duties of the Councils to have regard to their obligations towards disabled people. None of the Health Councils (Nursing and Midwifery Council, Health Professions Council, etc) have such an obligation written into their profession specific legislation.

Fitness standards

In the three core professions, and in the additional health professions, this review has found an array of fitness standards with a statutory basis. For all the health professions across England, Scotland and Wales, “fitness” is a requirement of registration. For teaching there are no fitness standards for registration across England, Scotland or Wales and for social work there is a fitness standard at registration in England and Wales only. However, when combined with the regulations and guidance covering entry to education and to employment, all the professions reviewed have some fitness standards with a statutory basis in each of the three jurisdictions, with the exception of teaching in Scotland.

This review has found that the concept of “fitness” is described and defined in many different ways throughout the legislation, regulations and guidance – with some wording being more or less specific than other wording.

For example, the ‘Nursing and Midwifery Council (Education, Registration and Registration Appeals) Rules 2004’ mention “good health” while the ‘Registration of Social and Independent Health Care, Wales, Regulations 2002’ requires a statement confirming that the applicant is “physically or mentally fit for the purposes of the work which he or she is to perform”. Dentists must be “in good health, mentally and physically”.

In teaching there is the statutory guidance (currently being reviewed), which places students or employees into three categories of fitness – those who are in good health and free from conditions which might interfere with their efficiency; those who are in generally good health but who have conditions; and those whose condition is such as to make them unfit because they have a “psychiatric or physical disorder”.

The review of legislation and statutory guidance has shown that it is possible to frame fitness standards in such a way that they are related to specific tasks, rather than categories of jobs or access to a profession in general. It is also possible to frame fitness standards in a way that has regard to organisations' duties under the DDA, and in particular the requirement to make reasonable adjustments.

However, even this more DDA-aware approach to fitness standards can still be problematic for people with mental health conditions and other impairments, where stereotypical assumptions are often made about the person's fitness to carry out any role, even with adjustments. Cases where such assumptions were made were identified through the case review.

Analysis of the way that the DDA operates in relation to competence standards would suggest that the more general the fitness standard, the more likely it is to give rise to direct discrimination or disability-related discrimination and the less likely it is to be a legitimate standard. It has already been noted that there are no health registration conditions for teaching across the jurisdictions, and in Scotland there is additionally no health registration condition in social work.

Closer consideration could be given to whether health-related criteria are necessary, whether they can ever be non-discriminatory and whether standards should instead relate to the ability of individuals to carry out tasks competently and safely. Cases looked at in nursing, teaching and social work showed examples of how disabled applicants have been discriminated against because of doubts about their "fitness". This raises the question of the link between statutory fitness standards and discrimination within these professions.

English language standards

Across the professions the review has also identified some academic standards that may adversely impact on disabled people, particularly those standards that relate to English language. Once again, there is a variation in the way that this requirement is specified within legislation or guidance. The imprecise wording used in some documents is more likely to amount, or give rise, to disability discrimination (particularly disability-related discrimination).

For example, the NMC refers to language testing to cover listening, reading, writing and speaking. In social work there are requirements to “communicate clearly, accurately and precisely (both orally and in writing), and to use “verbal and non-verbal cues”.

Requirements for specific standards of English language or communication skills may be legitimate competence standards, but the wording of these standards may unnecessarily exclude groups of disabled people.

Disclosure of health conditions and impairments

The review of legislation and guidance has shown that the requirement for disclosure of health conditions or impairments relevant to fitness to practise often has a statutory basis. However, the case review has shown that this is problematic for several reasons. Some people may not regard themselves as disabled at all or not disabled for the purposes of the DDA or not disabled according to the meaning they interpret the professional body or higher education institution is giving to ‘disability’. Others may consider that their disability is irrelevant for the purpose of the position for which they are applying or decide not to disclose their disability for fear of the consequences, such as rejection.

The Disability Equality Duty (DED)

The DED has the potential to be a catalyst for changes that will enhance the opportunities for disabled people to enter into the three professions of this formal investigation and the other professions under the legal review. Higher education institutions, qualifications bodies and public sector employers will be subject to the general DED and the majority of these will also be subject to the specific duties, at the heart of which lies the requirement to produce, publish and keep under review a Disability Equality Scheme. The DRC’s Statutory Code of Practice, ‘The Duty to Promote Disability Equality’ (one for England and Wales, and one for Scotland), emphasises that public bodies will need to take action to tackle the consequences of decisions in the past that failed to give due regard to disability equality.

The disability equality scheme must contain in it measures for assessing the impact of practices and policies upon disability equality.

Impact assessment is also key to the general duty. Requirements and conditions established by government departments, education providers, qualifications bodies and public sector employers should be reviewed to ensure that they not only meet the requirements of the anti-discrimination provisions of the DDA but also that the opportunity is taken within them to promote participation in these professions by disabled people. Where any adverse impact on groups of disabled people is identified, consideration should be given to how these impacts may be ameliorated. Any standards, including fitness standards or English language standards would need to be monitored for their ongoing effect upon disabled people.

Private providers of health and care services

The definition of public authority under the DED should have, as the DRC has argued in *R (Johnson) v Havering Borough Council*, the broadest interpretation possible so as to be capable of covering those employers providing health care services contracted by the public sector.

There is an array of regulations covering care home registration, including fitness standards for managers and employees of care homes. The registration conditions of social care providers (including conditions for their employees who may be nurses, care workers or occasionally social workers), make no reference to fitness being assessed having regard to the provider's obligations under the employment provisions of the DDA (as regulations in teaching, for example, do). This may prove a particularly important barrier to employment in this sector, where many providers are small organisations that may have lower awareness of their DDA obligations.

Health and Safety Legislation

The obligation upon employers under the 1999 Management of Health & Safety at Work Regulations and, specifically, the obligation to undertake risk assessments as to the health and safety of employees and the public could tie in well with the obligation to make reasonable adjustments under Part 2 of the DDA.

Since the DDA does not override the HSWA and legislation made under it (section 59 of the DDA), it is particularly important that the reasonable adjustments duty under Part 2 DDA is taken seriously, so as

to ensure that disabled professionals are not placed at a substantial disadvantage in comparison with non-disabled professionals. Adjustments can often overcome health and safety risks so that if the right adjustment is made, a health and safety risk can be avoided.

Additional Research

As we have explained above, our review of the regulatory frameworks is being supplemented in Stage 2 of the investigation by two additional research projects. We expect to have the results of this research by February 2007.

The first of these research projects is being undertaken by a team based at the University of Hull, and focuses on the ways in which fitness standards are applied in practice. The project aims to:

- find out how (and by whom) assessments and decisions are made about whether disabled people are considered mentally or physically fit to train, qualify or work in the nursing, teaching and social work professions
- investigate how a range of guidance, policies and regulations related to fitness are implemented and interpreted in practice
- identify types of guidance material that decision-makers are aware of and/or use, and any relevant advice from regulatory bodies
- explore knowledge and awareness of the DDA and of relevant regulations
- identify key issues in admitting, qualifying and employing disabled people
- explore attitudes of decision-makers, and the extent to which variations in perceptions of different impairments impact upon decisions about fitness
- identify examples of good practice

The second research project is concerned with attitudes towards disclosing impairments and long-term health conditions. It is being carried out by researchers from Kings College London and the

University of Central Lancashire and aims to:

- discover why people choose to disclose (or not to disclose) impairments and long term health conditions when studying or working in nursing, teaching or social work
- identify the practical implications of disclosing such matters
- identify the barriers which are encountered when a person discloses that they have an impairment or health condition
- capture disabled people's perceptions of the attitudes of their employers, educational institutions and regulatory bodies
- identify positive experiences and good practice where people have disclosed their impairment or health condition
- find out what disabled people understand by the terms "disability", "impairment" and "long-term health condition" in relation to disclosure

The Call for Evidence and the Inquiry Panel

We also want to know the views of organisations which have practical experience of applying fitness standards, and we have therefore put out a call for evidence to approximately 250 national organisations, including the main organisations concerned with teaching, nursing, social work, occupational health and higher education, as well as disability organisations. We have asked these organisations to tell us about:

- whether they consider the regulatory frameworks to be enabling or disabling for disabled people wanting to enter or stay in nursing, teaching or social work
- any non-statutory guidance about fitness which was not captured by our review of regulatory frameworks
- any statistics which they have collected about people with impairments or long-term health conditions
- any other relevant research or surveys which they have undertaken

Towards the end of the investigation, all the evidence which has been collected in the earlier stages will be brought together for consideration by a formal investigation Inquiry Panel. Key organisations and individuals will also be invited to give evidence in person, with a view to assisting the Inquiry Panel to explore possible recommendations, based on the investigation's findings, and to ensure that the final recommendations of the investigation are both realistic and achievable.

The Inquiry Panel will be chaired by barrister Karon Monaghan, and will comprise people with knowledge, experience and expertise within the three core professions, and across England, Scotland and Wales, as well as people representing the perspectives of disabled people. The Inquiry Panel will meet in the spring, and its conclusions will feed into the DRC's final report.

Case Studies

Since August 2006 the DRC has been inviting people with personal experience of the issues covered by the investigation to fill in an on-line questionnaire to tell the DRC their stories about entering (or trying to enter) teaching, nursing or social work or working in these professions.

To date there have been over a hundred responses, coming from students, employees and those retired or no longer working within these professions. These personal stories will be used anonymously to illustrate the issues emerging out of the research projects of the investigation. Questionnaires can be filled out on-line at [Tell us your story](#).

How to keep in touch and find out more

The emerging findings from our regulatory review are important, but they are provisional at this stage. We have a busy and exciting programme of work planned for the remainder of the formal investigation. Central to this will be our formal investigation Inquiry Panel, and the completion of the research projects which are now in progress. There are a number of ways in which you can keep up to date with the investigation:

- Visit the Fitness Standards Formal Investigation website www.drc-gb.org/fitness for general background information and links to some of the evidence we have collected (including the regulatory review)
- Contact the investigation team at investigations@drc-gb.org if you have any questions or issues you would like us to take into account, or if you would like us to add your name to our database for future mailings
- Look out for the Fitness Standards investigation final report which will be published in summer 2007.

For more information about the DRC, including publications, visit our website at www.drc-gb.org or telephone 08457 622633 or textphone 08457 622644.

