In its dying months, the Disability Rights Commission (now subsumed into the Commission for Equality and Human Rights) published the report of its formal investigation into professional regulation within teaching, nursing and social work and disabled people’s access to those professions. The full report can be found online at www.maintainingstandards.org. A summary is available at www.cehr.org.uk. An inquiry panel was chaired by Karon Monaghan, barrister, and included Dr John Sorrell, who at the time was chairman of the Association of Local Authority Medical Advisers. The investigation covered England, Scotland and Wales. It disclosed that there is still a considerable body of legislation and guidance for these professions which lays down generalized standards of good health or fitness for entry and frequently undermines disability equality. For example, the Nursing and Midwifery Order 2001 makes provision for the Nursing and Midwifery Council to prescribe requirements to be met by nurses and midwives applying for registration as to evidence of good health and character and gives power to investigate whether fitness for practice is impaired. Guidance emphasizes the need for disclosure and implies that failure to disclose a health condition may constitute professional misconduct. Another example is the Education (Health Standards) (England) Regulations 2003 which provide that an employer may investigate an allegation that a teacher no longer has the health or physical capacity to carry out a relevant activity; this may lead to the Secretary of State directing that he or she may not carry out various prescribed activities. It is interesting to note that such generalized health standards for teachers and trainee teachers were abolished in Scotland in 2004.

The question is whether these legal provisions are necessary now that comprehensive disability discrimination laws affect all employers, education providers and qualifications bodies. The structure of the Disability Discrimination Act (DDA) is to prohibit discrimination against disabled persons simply because of a medical diagnosis. This is direct discrimination which cannot be justified. Thus, the rejection of a job applicant simply because of a diagnosis of epilepsy or mental illness will be unlawful in all cases. Where the medical diagnosis gives cause for concern as to the capabilities of the disabled person, an individual assessment must be undertaken. In the event of evidence that the disability may impede performance, adjustments must be explored to see whether modifications to the environment or the job may assist the disabled person to do the required tasks. Only if no reasonable adjustments are identified may the employer, university or professional body lawfully reject the disabled individual. A health and safety risk, or the need to comply with legislation, may be a justification for such disability-related discrimination, but it must be backed by evidence. For example, in High Quality Lifestyles v. Watts [1], an employer who dismissed an HIV-positive care worker because of the risk of transmission of the virus through biting and scratching by his clients, children with severe learning disabilities, was held to have breached the DDA because advice from the UK Panel for Healthcare Workers with Blood-borne Viruses was that there was no evidence that this was a significant risk.

The report argues convincingly that it is unnecessary to have additional general legal requirements for good health and physical fitness for professionals and that these should be revoked. It finds that assumptions are frequently made that disabled professionals would pose a risk to the public, when they are not backed by evidence. The case of Beverley Allitt, the nurse who murdered children in her charge, has had a great influence, and not only on the nursing profession. The Clothier Report on the Allitt case revealed that there was nothing in the history of Allitt that would have led anyone to predict that she would commit the crimes that she did. As Sir Cecil Clothier put it: ‘Civilised society has very little defence against the aimless malice of a deranged mind’ [2]. What was needed was proper management and supervision and prompt action when suspicious circumstances arose. A particular outcome of the Clothier Report has been the stigmatization of people who have, or have had, mental health problems. This has led to a reluctance to disclose information about mental health, leading to a lack of support and adjustments to enable professionals with mental health problems to practise safely and effectively. No evidence was presented to the inquiry that a diagnosis of mental ill-health is a sufficient predictor of unsafe or poor practice for nurses, teachers or social workers. The impact of any condition is particular to the individual and their circumstances. The professional bodies and employers should assess competence, not health. Remember also that certain medical conditions, such as substance addiction, paedophilia and kleptomania are not covered by the DDA. As regards training, the inquiry panel found that there was discrimination in the higher education sector against disabled students. The emphasis should be on reasonable adjustments to allow a student to qualify. It should be recognized that different career paths are often available and that it is unnecessary that a student should be trained in every procedure as long as his or her general education is satisfactory. A medical student with a blood-borne virus who intends to become a psychiatrist or
general practitioner should be allowed to qualify as a doctor even though barred from a career in surgery or dentistry.

Despite its condemnation of the imposition of general health standards for professionals, the report recognizes that there are some jobs where it is necessary to require particular standards of health, for example, physical strength for heavy lifting, or absence of a blood-borne virus for health care workers who perform exposure prone procedures. It is generally accepted that the need to protect others exceptionally justifies compulsory testing of eyesight, hearing or blood, invasive questions on a health questionnaire or conduct checks, such as Criminal Records Bureau clearance. However, these invasions of privacy should be confined to work where the risk of injury to others outweighs the right of the individual to preserve medical confidentiality. The report advocates that pre-training, pre-registration and pre-employment questionnaires and health assessments should be linked to the actual tasks to be performed and be subject to reasonable adjustments, for example, the provision of aids to manual handling and the removal of exposure-prone procedures from the job description when they represent a minor part of the activity. As in the USA, medical enquiries and examinations should be prohibited before the offer of a job is made, though the offer can be made subject to satisfactory medical clearance.

The report castigates the practice of using a failure to disclose a disability or long-term health condition as evidence of misconduct leading to disciplinary procedures, unless there are serious concerns about the effect of the disability on the performance of the job, as in the case of a cardiothoracic surgeon who knows or suspects that he is a carrier of a blood-borne virus, but fails to seek or take occupational health advice. The advantage of the DDA is that a person with a disability knows that he or she has the protection of the statute and is more likely to be willing to make disclosure, aware that there will be a duty of reasonable adjustment.

Some witnesses to the inquiry argued that, were the specific statutory provisions to be repealed, the public might be exposed to unacceptable risks. My view is that this would not be the case, because the DDA contains adequate safeguards to permit the exclusion of those who constitute a serious risk. Reference should be made to another publication from the Disability Rights Commission, this time jointly with the Health and Safety Executive. This is Health and Safety for Disabled Workers and those who work with them, available at www.hse.gov.uk. The key is an adequate risk assessment, balancing the aim of encouraging the employment of people with a disability against the need to protect them and others, with the emphasis on doing what is reasonable to enable them to work. An example of justified discrimination against someone with a mental illness was A v. London Borough of Hounslow [3]. A, a laboratory technician in a school, refused to take medication for his paranoid schizophrenia. A had had fantasies about mass murder in the past and the school feared for the safety of pupils and other staff. It was held that his dismissal was justified discrimination for a disability-related reason.

Where a disabled person is allowed to be at work, there may be an increased risk either to him or her or to others. Again, a risk assessment should be able to gauge whether it is reasonable to accept the risk in the interest of allowing the disabled person to work. Where the assessment is properly performed by a competent person, the employer will be able to defend himself against an allegation of negligence. In a number of cases, courts have held that an employer has no duty of care to dismiss or move an employee known to have a particular vulnerability who has knowingly and willingly accepted a risk. In Dugmore v. Swansea NHS Trust [4], a hospital which allowed a nurse with type 1 latex allergy to continue in employment, and did everything which was reasonable to guard her against exposure to latex, was held not liable in negligence when she suffered an anaphylactic shock on picking up an empty box which had contained latex gloves. She knew of the risks and was determined to continue with her work. And in Sutherland v. Hatton [5], the Court of Appeal held that an employer aware that an employee is suffering stress-related illness caused by work is not under a legal duty to remove him or her from the source of the stress if the employee wishes to continue. The only duty on the employer is to do that which is reasonable to reduce the stress. Once that has been done, it is for the employee to make the decision whether he or she wishes to continue.

It is not clear whether the recommendations of the inquiry will be implemented. It is unlikely that this will happen in the near future. Meanwhile, advocates for the disabled, influenced by the inquiry's findings, have been arguing that there must be a general change of practice across the board in assessing fitness for work. A firefighter who is deaf, for example, should not be referred to a consultant for a medical report, but should merely undergo a hearing test, the same test as is administered to all would be firefighters. Although this may sometimes be sufficient, occupational physicians have argued that it is less than adequate if there is a need to identify the particular kind of hearing loss, to know about prognosis and also to have expert advice on the type of hearing aid which might assist. Capability cannot be divorced from medical assessment in some cases. No doubt this debate will continue, and it is likely to reach the employment tribunals in due course.

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References

5. [2002] IRLR 263.