

AG/JP/501

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Dear Colin

**CONSULTATION ON CHANGE TO THE FITNESS REQUIREMENTS FOR
EMPLOYEES OF SERVICES REGULATED BY THE CARE COMMISSION**

Many thanks for the invitation to comment on the above.

CCPS is the national association of care providers in the voluntary sector. Our membership comprises all the major providers of care and support services in the sector and employs a total of more than 16,000 staff. These proposals are therefore of immediate and considerable relevance to our members and we are pleased to offer our comments as follows.

Our understanding of the proposal is that the definition of a 'fit person' – which already includes references to physical fitness, appropriate qualifications and so forth – is to be expanded to include a further reference to 'integrity and good character'. As expressed in regulation 6(2)(a), this already applies to providers and managers, and it is now proposed to expand this to cover all employees in regulated services.

Further, it is proposed that the way in which the 'integrity and good character' of an employee is to be established is by obtaining an enhanced criminal records check from Disclosure Scotland.

Whilst CCPS would in general support any measure designed, as the current paper says, to improve staff recruitment processes, we see a potentially very significant hazard in the proposals as they stand that has perhaps been overlooked by the Scottish Executive and indeed the Care Commission.

The difficulty, as we see it, lies in the scope for disagreement between the employer and the Care Commission about the bearing of the contents of a criminal records check on the employee's 'integrity and good character'.

As the Scottish Executive will be aware, employers are required by the terms of the Police Act 1997 to observe the Disclosure Scotland code of practice, published by Scottish Ministers, when accessing information about criminal records. That code in turn requires that employers 'must not unfairly discriminate against the subject of Disclosure information on the basis of any conviction or other details revealed', and sets out a series of checks and balances that employers must consider when assessing the suitability of an applicant for a particular position. These checks relate to the relevance of the conviction to the position offered, the seriousness of the offence, the length of time since it took place, and so on. Similar principles apply under the Rehabilitation of Offenders Act 1974.

As the Scottish Executive will also be aware, unfair discrimination is actionable under the employment tribunal system, with serious implications (financial and otherwise) for employers found to be in breach of the code in this respect. It is therefore very important that the decision to offer a post to an individual or to withhold it is the employer's, having made a careful assessment of all the facts as required by the legislation, because it is the employer – and not the regulator – who may have to defend that decision before a tribunal.

Our concern, therefore, is that the proposal as it stands appears to provide the Care Commission with the power to overrule an employer's decision about an employee's 'integrity and good character', based on the contents of a criminal records check. This puts employers in an impossible position: either to risk the consequences (compensation, tribunal) of the overruling of an appointment by the Care Commission, or to breach the relevant codes of practice (which have legislative force) by turning down an applicant on the basis of an anticipated overrule, a course which may also result in tribunal action on the grounds of unfair discrimination.

This problem arises, as we see it, firstly because there is no cross-referencing to other relevant legislation; and secondly because there is no definition of 'integrity and good character' in the Regulation of Care (Scotland) Act 2001 or in the associated regulations – this is a term left open entirely to interpretation and therefore the scope for disagreement about its application to individuals is fairly wide (indeed we raised this matter in an earlier consultation, *Draft regulations and order applying to care services*, February 2002).

Our further concern, therefore, is that regulation 6(2)(b), which states that anyone who has received a sentence of more than three months imprisonment is automatically 'unfit', regardless of the specific circumstances, may be used in practice by the Care Commission to define what 'integrity and good character' means in relation to care staff. This is already the case in relation to providers and managers; extending regulation 6(2)(a) without also applying 6(2)(b) would imply that a lesser standard of 'integrity' is required of care staff than is required for their employers and managers, which in our view is a highly questionable position to take.

The *de facto* application of 6(2)(b) to all employees would result in even more difficulties along the lines we have described, and may additionally result in the loss of significant numbers of care staff from the system altogether. Further, it would run counter to the principles of social justice and rehabilitation of offenders implicit in other legislation currently in force.

We feel sure that these consequences are not intended by the Scottish Executive. We would want to emphasise our support for the general contention that service users must be protected from potential harm from unsuitable people being employed as care staff; however we feel that these proposals require much more scrutiny and 'proofing', particularly in relation to the requirements of other legislation (notably the Police Act 1997 and the Rehabilitation of Offenders Act 1974), before they are taken any further.

Yours sincerely

ANNIE GUNNER

Director