

GENERAL OPTICAL COUNCIL CONSULTATION ON AMENDMENTS TO ITS FITNESS TO PRACTISE RULES TO INTRODUCE THE CIVIL STANDARD OF PROOF IN FITNESS TO PRACTISE HEARINGS

Introduction

1. The General Optical Council (GOC) is consulting on proposed amendments to its Fitness to Practise Rules 2005. It is proposed that a new rule is introduced, and supporting guidance issued, to reflect the new legal requirement for the Fitness to Practise Committee to apply the civil standard of proof when the Committee has to make decisions on disputed facts in fitness to practise hearings. This legal requirement will apply once the relevant provisions of the Health and Social Care Bill 2008 are enforced.
2. The Fitness to Practise Committee currently applies the criminal standard of proof ('beyond reasonable doubt') when making decisions on disputed facts. This is a matter of custom and practice, and is not a requirement of the Opticians Act 1989 or the Fitness to Practise Rules. GOC reviewed this practice in 2006, and undertook a consultation as to whether it should continue to apply the criminal standard of proof. At that time, GOC decided that the Fitness to Practise Committee should continue to apply the criminal standard of proof.
3. In February 2007 the Government published its White Paper, *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century*. The White Paper directed that the civil standard of proof, rather than the criminal standard, should be the common standard of proof for all health regulatory bodies.
4. The Health and Social Care Bill, which is currently being considered by Parliament, includes provisions which will require the civil standard of proof to be applied by health regulatory bodies, their committees and officers, in any proceedings which relate to the fitness to practise of a health professional. It is anticipated that the Health and Social Care Bill will receive Royal Assent on 28th July 2008, and that the provisions relating to the standard of proof will come into force on 28th August 2008. Thereafter, it will be a legal requirement for the Fitness to Practise Committee to apply the civil standard of proof in all hearings when it is required to make decisions on disputed facts.
5. The proposed rule, on which GOC is consulting, will mirror the requirement on the Fitness to Practise Committee to apply the civil standard of proof arising from the Health and Social Care Bill. It will support compliance with the Fitness to Practise Committee's obligations under the provisions of the Bill when these become law. In addition, GOC will issue guidance to the Fitness to Practise Committee on the application of the civil standard.
6. The purpose of this consultation is to seek the views of GOC's stakeholders on the proposed rule change and guidance intended to support the Fitness to Practise Committee's compliance with the new legal obligation to apply the civil standard of proof in fitness to practise hearings.

The Proposals

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6. It is proposed that Rule 50 of the Fitness to Practise Rules 2005 is amended as follows:

50 (1) The Fitness to Practise Committee shall then determine their findings as to fact and as to whether or not the allegation is proven.

(2) The standard of proof applicable before the Fitness to Practise Committee for findings as to fact is the standard of proof required in civil proceedings.

7. The proposed rule 50(2) makes it clear that the standard of proof is a matter concerning the findings of fact in a fitness to practise hearing. Therefore, the standard of proof will not be relevant for Interim Orders where no findings of fact are made. Neither will it be relevant where there is no dispute as to the facts. The proposed rule 50(2) only applies where there are facts in dispute between the parties.

8. GOC will issue guidance to the Fitness to Practise Committee on the application of the civil standard of proof. Draft guidance is attached. This guidance highlights that the standard of proof is not a matter relating to the Fitness to Practise Committee's judgement as to whether the facts proved amount to misconduct, deficient professional performance, and ultimately impaired fitness to practise. The guidance also highlights the need for the Fitness to Practise Committee to have in mind the seriousness of the allegation and the potential consequences for the defendant if the allegation is found proved when considering the cogency of the evidence required to find the facts proved on the balance of probabilities.

Implementing the changes

9. It is intended that the rule changes will come into force to coincide with the enforcement of the legal obligation arising from the provisions in the Health and Social Care Bill. This means that the Fitness to Practise Committee will apply the civil standard of proof in all substantive hearings occurring on and after the enforcement date.

10. It is **not** intended to link the enforcement date of Rule 50(2) with the date on which allegations are received by GOC or the date on which allegation are referred to the Fitness to Practise Committee by GOC's Investigation Committee. This is because the legal obligation for the Fitness to Practise Committee to apply the civil standard of proof under the provisions in the Health and Social Care Bill will apply irrespective of the date on which an allegation is received by GOC or referred by the Investigation Committee. This will prevent the Fitness to Practise Committee having to apply both the criminal standard of proof and the civil standard of proof for different cases during a transition phase, depending on when the allegation was received or referred.

Consultation Questions

11. Comment is invited on all aspects of the proposals. However, please bear in mind GOC is not canvassing views as to whether the Fitness to Practise Committee should apply the civil standard of proof. This consultation concerns GOC's plans to implement what will become a legal requirement from November 2008.

12. We would particularly welcome your views on the following:

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Question 1: Do you agree that the proposed rule 50(2) will support the Fitness to Practise Committee in complying with its future legal obligation to apply the civil standard of proof in fitness to practise hearings?

Question 2: Do you agree that the attached guidance will support the Fitness to Practise Committee in complying with its future legal obligation to apply the civil standard of proof in fitness to practise hearings?

Question 3: Do you agree that the enforcement date of proposed Rule 50(1) should coincide with the enforcement date of the legal obligation arising from the provisions in the Health and Social Care Bill to apply the civil standard of proof in fitness to practise hearings?

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Guidance on the Application of Rule 50(2): The Civil Standard of Proof

Introduction

1. Rule 50(2) establishes the standard of proof to be applied by the Fitness to Practise Committee when making findings of fact:

‘The standard of proof applicable before the Fitness to Practise Committee for findings of fact is the standard of proof required in civil proceedings.’

2. The standard of proof used in criminal proceedings, and used in Fitness to Practise proceedings by the General Optical Council (GOC) before [1st November 2008], is proof beyond reasonable doubt. In civil proceedings, the standard of proof is proof on the balance of probabilities; a fact will be established if it is more likely than not to have happened. The civil standard of proof is to be used in Fitness to Practise proceedings by GOC from [28th August, 2008] when Rule 50(2) comes into force.

3. Rule 50(1) makes express reference to the standard applicable to the findings of fact. It is only in relation to findings of fact that the standard of proof has any relevance.

4. Therefore, the standard of proof will not be relevant for Interim Orders where no findings of fact are made. Neither will it be relevant where there is no dispute as to the facts. The standard of proof will only be relevant where there are facts in dispute between the parties.

The process

5. In cases where there are facts in dispute, the following process is to be followed. Once the Fitness to Practise Committee has heard the evidence, it must decide:

(1) Whether the facts alleged have been found proved;

(2) Whether, on the basis of the facts found proved, the defendant’s actions amount to misconduct, deficient professional performance, or that he or she has adverse physical or mental health¹;

(3) Whether the misconduct, deficient professional performance, or adverse physical or mental health, amounts to impaired fitness to practise²;

(4) What sanction (if any) is to apply.

¹ Where the defendant is a business registrant, the Committee must judge whether there is misconduct by the business registrant or one of its directors, or whether there were practices or patterns of behaviour occurring of which the registrant knew or ought reasonably to have known of which amount to misconduct or deficient professional performance.

² In the case of business registrants, the judgement to be made is whether the registrant’s fitness to carry on business as an optometrist or dispensing optician is impaired. For student registrants, the judgement is whether the student’s fitness to undertake training is impaired.

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6. The application of the civil standard of proof applies to (1) only. The question of whether or not, in the light of those findings, the defendant has acted in a way which amounts to misconduct, deficient professional performance, or has adverse physical or mental health is a matter of judgement in respect of which the standard of proof is not relevant. The same is true regarding the decisions as to whether the defendant's fitness to practise is impaired and what sanction is to apply.

The application of the standard of proof

7. When reaching a decision on whether the facts have been found proved, the Fitness to Practise Committee must have in mind the seriousness of the allegations and the potential consequences for the defendant if the allegations are found proved. In the Court of Appeal, Lord Justice Richards stated that English law recognises only one single civil standard of proof but that this has a flexible application. The more serious the allegation or the consequences for the defendant, the more cogent and compelling will be the evidence required to find the facts proved on the balance of probabilities:

'Although there is a single standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before the court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.' *R (N) v Mental Health Review Tribunal [2006] QB 468*.

8. Considering the potential consequences for the optician during the fact finding stage does not mean that the Committee makes a decision on sanction at this stage. The potential consequences for the optician are simply a corollary of the seriousness of the allegations presented to the Committee. Any final decision in relation to sanction can only be taken by the Committee at the final stage of the process once both parties have had an opportunity to make further submissions on the appropriate outcome.