

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 commenced.

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. GOC understands that the intention is to commence the provisions which will require the civil standard of proof to apply to all Fitness to Practise proceedings no earlier than November 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, its implementation and the 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

7. It is proposed that a new Rule 50A of the Fitness to Practise Rules 2005 is inserted, which will read as follows:

50A. The standard of proof applicable in any proceedings before the Fitness to Practise Committee where the Presenting Officer has addressed the Fitness to Practise Committee in relation to each allegation in accordance with Rule 45 (Presentation of the Presenting Officer's case) on or after **[insert date of commencement]** is the standard of proof applicable to civil proceedings.

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 only pertinent to disputed issues of fact between the parties. It does not relate to the Fitness to Practise Committee's judgement as to whether the facts proved amount to misconduct or 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 implementation of the relevant provisions of the Health and Social Care Bill. In all cases where at a substantive hearing the Presenting Officer addresses the Committee in relation to the allegations on or after the date of implementation, the civil standard of proof will apply to decisions on disputed questions of fact. In any case where the presenting officer has already addressed the committee before the commencement date (eg. adjourned cases), the committee will continue to apply the criminal standard of proof

10. It is **not** intended to link the commencement of Rule 50A 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. That obligation will apply to all hearings where the presenting officer opens the case on or after the commencement date. To link the commencement to the date of receipt of a complaint, or the date of referral by the Investigation Committee, would result in the Fitness to Practise Committee applying different standards of proof to different cases for a considerable period of time.

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 regarding how to implement what will become a legal requirement from the date of commencement of the relevant provisions of the Health and Social Care Bill.

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

Question 1: Do you agree that the proposed rule 50A 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 the manner in which GOC intends to commence the Rule change?

How to respond

Please either email your response to mclaridge@optical.org or post to: Maria Claridge, Project Support Officer, General Optical Council, 41 Harley Street, London W1G 8DJ. Comments must arrive no later than **Friday, 5 September 2008**.

This document is also available from the GOC's website, at www.optical.org

Guidance on the Application of Rule 50A: The Civil Standard of Proof

Introduction

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

“50A. The standard of proof applicable in any proceedings before the Fitness to Practise Committee where the Presenting Officer has addressed the Fitness to Practise Committee in relation to each allegation in accordance with Rule 45 (Presentation of the Presenting Officer’s case) on or after **[insert date of commencement]** is the standard of proof applicable to 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 [insert date] 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 [insert date] when Rule 50A comes into force.

3. It is only in relation to findings of fact that the standard of proof has any relevance.

4. The standard of proof is not relevant for Interim Orders where no findings of fact are made. Nor is it relevant where there is no dispute as to the facts. The standard of proof is only 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 health (where the allegation

relates to a criminal conviction, stages 1 and 2 are in effect merged as a conviction is itself a ground for impairment)¹;

(3) Whether the misconduct, conviction, deficient professional performance, or adverse physical or mental health, leads to a finding of impaired fitness to practise²;

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

6. The application of the civil standard of proof applies to (1) only. Questions as to 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 decision 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

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.

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.

2008 No. 000

HEALTH CARE AND ASSOCIATED PROFESSIONS

OPTICIANS

The General Optical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008

Made - - - - 2008

Coming into force - - 2008

At the Council Chamber, Whitehall, the day of 2008

by the Lords of Her Majesty's Most Honourable Privy Council

The General Optical Council have made the General Optical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules 2008, which are set out in the Schedule to this Order in exercise of the powers conferred by sections 23C and 31A of the Opticians Act 1989⁽³⁾.

Before making the Rules, in accordance with section 23C(10) of that Act, the General Optical Council consulted such organisations representing the interests of registrants as it appears appropriate to the Council to consult.

In accordance with section 34(1) of that Act, such Rules shall not come into force until approved by Order of the Privy Council:

Their Lordships, having taken these Rules into consideration, are pleased to, and do approve them.

This Order may be cited as the General Optical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008, and come into force on **[to be inserted 2008]**.

Name
Clerk of the Privy Council

⁽³⁾ 1989 c.44. Section 23C is inserted by articles 2 and 17(2) and section 31A inserted by article 2 and 22 of S.I. 2005/848.

SCHEDULE

The General Optical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules 2008

The General Optical Council, in exercise of its powers under sections 23C and 31A of the Opticians Act 1989⁽⁴⁾ hereby make the following Rules.

Before making the Rules, in accordance with section 23C(10) of that Act, the General Optical Council consulted such organisations representing the interests of registrants as it appears appropriate to the Council to consult.

Citation and commencement

1. These Rules may be cited as the General Optical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules 2008 and come into force on **[to be inserted 2008]**.

Insertion of new Rule

2. In the General Optical Council (Fitness to Practise) Rules 2005⁽⁵⁾, after rule 50 (findings), insert—

“Standard of proof

50A. The standard of proof applicable in any proceedings before the Fitness to Practise Committee where the Presenting Officer has addressed the Fitness to Practice Committee in relation to each allegation in accordance with rule 45 (Presentation of the Presenting Officer’s case) on or after **[insert date of commencement]** is the standard of proof applicable to civil proceedings.”.

Given under the official seal of the General Optical Council on the day of 2008.

Attested by:

Name
Member of Council

Name
Member of Council

Name
Registrar

⁽⁴⁾ 1989 c.44; section 23C were inserted by S.I. 2005/848, articles 2, 17(2) and 22.

⁽⁵⁾ Scheduled to S.I. 2005/1475.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order approves an amendment made by the General Optical Council to the General Optical Council (Fitness to Practise) Rules 2005. The effect of the amendment is to apply the standard of proof which is applicable to civil proceedings to all proceedings before the Fitness to Practice Committee which commence on or after **[date to be inserted]**.

CONSULTEES

ABDO College
Action Against Medical Accidents
Age Concern Cymru
Age Concern England
Age Concern Northern Ireland
Age Concern Scotland
Anglia Ruskin University
Association of British Dispensing Opticians
Association of contact Lens Manufacturers
Association of Optometrists
Aston University
Bradford College
British Contact Lens Association
Cardiff University
Chief Medical Officer
Chief Medical Officer Wales
Chief Nursing Officer
City & Islington College
City University
College of Optometrists
Commission for Public & Patient Involvement in Health
Consumers' Association
Council for Healthcare Regulatory Excellence
Diabetes UK Central Office
Diabetes UK Cymru
Diabetes UK Northern Ireland
Diabetes UK Scotland
Eastern Health and Social Services Board
European Council for Optometry & Optics
Eyecare Trust
Federation of Manufacturing Opticians
Federation of Ophthalmic and Dispensing Opticians

Fight for Sight
General Chiropractic Council
General Dental Council
General Medical Council
General Osteopathic Council
General Social Care Council
Glasgow Caledonian University
Guide Dogs for the Blind Association
Healthcare Commission
Health Professions Council
Help the Aged Belfast
Help the Aged Cardiff
Help the Aged London
Help the Aged Edinburgh
International Glaucoma Association
Kings Fund
National Association of Citizen's Advice Bureaux
National Consumer Council
National Patient Safety Agency
NHS Scotland
Northern Health & Social Services Board
Northern Ireland Social Care Council
Nursing and Midwifery Council
Optical Consumer Complaints Service
Optometry Northern Ireland
Optometry Scotland
Optometry Wales
Patients' Association
Patients Forum
Pharmaceutical Society of Northern Ireland
Royal College of Ophthalmologists
Royal National Institute of Blind People
Royal Pharmaceutical Society of Great Britain

Scottish Consumer Council

Southern Health & Social Services Board

University of Bradford

University of Manchester

University of Ulster

Welsh Consumer Council

Western Health & Social Services Board

Worshipful Company of Spectacle Makers