

CONSULTATION DOCUMENT ON THE STANDARD OF PROOF TO BE ADOPTED BY THE REGISTRATION APPEALS COMMITTEE AND THE FITNESS TO PRACTISE COMMITTEE OF THE GENERAL OPTICAL COUNCIL

About the General Optical Council

The General Optical Council (GOC) is the statutory body which regulates dispensing opticians and optometrists and those bodies corporate carrying on business as optometrists or dispensing opticians in the UK.

The Council's general function is to promote high standards of professional education, conduct and performance among opticians. Public protection has always been central to the GOC's purpose. The Government is currently consulting on legislation which would amend the Opticians Act to make the Council's main objective 'to protect, promote and maintain the health and safety of the public'.

Background to the consultation

In June 2005, amendments to the Opticians Act 1989 created two new committees – the Registration Appeals Committee (pursuant to section 5A) and the Fitness to Practise Committee (pursuant to section 5C).

Neither the Opticians Act nor the relevant rules governing the procedures of these committees contain any provision specifying the standard of proof which the committee should use when determining assertions of fact.

This consultation document has therefore been prepared to seek your views on the proper standard of proof which these committees should apply.

Functions of new committees

The functions of these committees are as follows:

Registration Appeals Committee

- to hear and determine appeals against decisions made by, or on behalf of the Council, to refuse registration
- to hear and determine applications for restoration to a register (where the applicant has previously been erased from the register by the Fitness to Practise Committee)

Fitness to Practise Committee

- to hear and determine allegations that a registrant's fitness to practise, undertake training or carry on business is impaired including by reason of
 - Misconduct (e.g. breach of data protection act)
 - Deficient professional performance (e.g. failure to detect ocular disease)
 - Criminal conviction or caution (e.g. for fraud or the viewing of child pornography)
 - Adverse health conditions which affect the ability to practise
 - Decisions of other regulatory bodies

The following legislation, which deals with how the work of these committees is to be carried out may be viewed in full in the legislation section of the GOC website (www.optical.org):

Part 1, Opticians Act 1989 (The General Optical Council)

Part 2A, Opticians Act 1989 (Fitness to practise)

Part 3A, Opticians Act 1989 (Proceedings and appeals)

Schedule 1A, Opticians Act 1989 (Registration appeals)

Registration Appeals Rules 2005

Fitness to Practise Rules 2005

Proof of assertions of fact

Either committee, during the course of a hearing, may be called upon to decide whether assertions of fact made in support of the appeal, application or allegation by the party bringing the matter before the committee are true.

It is important, therefore, that the committee understand, and ensure that all parties understand, the basis upon which facts asserted will be found proven.

This is often referred to as the "standard of proof" – that is, what level of certainty will the committee look for before accepting evidence as true.

Presentation of evidence to committees

Both committees allow evidence to be presented to them if the presentation is fair and relevant and would be capable of being presented in a criminal court case. Even if it could not be presented in a criminal court case, the committee has the power to direct that the evidence may be presented to them if that is desirable in order to conduct the inquiry diligently (see rule 22 of the Registration Appeals Rules and rule 38 of the Fitness to Practise Rules).

Potential standards of proof

The standard of proof applied varies between regulatory bodies and even between those bodies responsible for regulating different healthcare professions. The healthcare regulatory bodies tend to adopt one of the following standards of proof.

“beyond reasonable doubt”

This is the standard generally applied to matters to be proven by the prosecution in a criminal court case. A committee may be directed to find assertions of fact proven on this basis only if they are ‘satisfied so that they are sure’ that the asserted fact is true.

“on the balance of probabilities” (taking into account the cogency of evidence)

This is the standard generally applied to matters to be proven by either party in a civil court case (or where matters must be proved by a defendant rather than the prosecution in a criminal court case). A committee may be directed to find assertions of fact proven on this basis if they find it more likely than not that the asserted fact is true.

When applying this standard, a committee may also be directed, when considering the probability of an event occurring, that the more serious that event is, the less likely it is to have occurred, and therefore the greater is the cogency of the evidence required to find the assertion proven. Thus, in more serious matters, the degree of cogency of evidence required to find an assertion of fact proven, even ‘on the balance of probabilities’, may mean that the standard of proof actually applied approaches that of the criminal standard.

Historical position of Council committees

Some functions of these committees are entirely new (such as the concept of a registration appeal): others resemble functions historically undertaken by other committees of the Council (such as the Fitness to Practise Committee which encompasses some of the work of the former Disciplinary Committee) but with updated language and procedures.

Committees of the Council (such as the Disciplinary Committee) have, in the past, made determinations of fact in relation to restoration applications (brought by practitioners and businesses) and allegations of misconduct (brought by the Council).

Although the Council has never had the benefit of an explicit rule indicating which standard of proof is to be applied, the Disciplinary Committee have, as a matter of practice, in recent years applied the ‘on the balance of probabilities’ test to assertions of fact made by practitioners when hearing applications for restoration and the ‘beyond reasonable doubt’ test to assertions of fact made by the Council when hearing misconduct cases.

Burden of proof

Although the “burden of proof” – that is, who is responsible for proving a matter – is not mentioned explicitly in the Opticians Act or respective rules, where a practitioner or business bases a registration appeal or restoration application before the Registration Appeals Committee upon assertions of fact, it falls upon the practitioner or business to prove those assertions (see sections 8, 8A and 9 regarding registration and section 13K(7) regarding restoration applications made following erasure by the Fitness to Practise Committee).

Neither the Opticians Act nor the Fitness to Practise Rules indicate explicitly which party bears the burden of proof in cases where the Council bases an allegation before the Fitness to Practise Committee of impaired fitness upon assertions of fact. As a matter of general principle and natural justice, however, an assertion of fact should be proven by the party making the assertion. As all relevant facts supporting such an allegation in such cases are made by the Council, the onus will invariably fall upon the Council to prove them; and the burden of proof thus lies with the Council in these cases.

Consultation questions

A. Registration Appeals Committee

- A1. What standard of proof should the Registration Appeals Committee apply to assertions of fact by a practitioner or business appealing against a decision to refuse registration or seeking restoration to a register before the Registration Appeal Committee?
- A2. Does the way in which the committee controls what evidence may be presented at the hearing affect your view? If so, how?
- A3. Does the fact that the onus of proving assertions of fact falls upon the practitioner or business affect your view? If so, how?

B. Fitness to practise Committee

- B1. What standard of proof should the Fitness to Practise Committee apply to assertions of fact by the Council when presenting an allegation of impaired fitness?
- B2. Should the standard vary depending upon the type (e.g. misconduct or deficient professional performance) or seriousness of an allegation which is being made?
- B3. Does the way in which the committee controls what evidence may be presented at the hearing affect your view? If so, how?
- B4. Does the fact that the onus of proving assertions of fact falls upon the Council affect your view? If so, how?
- B5. How does your answer to question B1 give adequate protection to practitioners who are the subject of allegations before a Fitness to Practise Committee?

C. General questions

- C1. How do your answers to questions A1 and B1 ensure the maintenance of public confidence in the work of these committees?
- C2. How do your answers to questions A1 and B1 ensure that the public are adequately protected?
- C3. Is it important for the GOC committees to use the same standard of proof as other regulatory bodies which regulate healthcare professionals? Is your view affected by the way in which optometrists and dispensing opticians provide their services?

Please send all responses to rclarkson@optical.org