

EXPLANATORY MEMORANDUM TO

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

2008 No. 1256

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This Order approves an amendment to the rules in the General Medical Council (GMC) (Fitness to Practise) Rules Order of Council 2004. The Rules amended by the GMC and approved by the Order of the Privy Council. The effect of the amendment is to require the civil standard of proof to all proceedings before a Fitness to Practise Panel or Investigation Committee which commence on or after 31st May 2008.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Background

4.1 The current General Medical Council (Fitness to Practise) Rules 2004 (the GMC rules) make no provision for the standard of proof to be used in proceedings which relate to a person's fitness to practise.

4.2 Currently eight out of eleven health and social care professional regulators use the civil standard of proof in hearings. The GMC, the General Optical Council and the Nursing and Midwifery Council use the criminal standard.

4.3 One of the key recommendations of the Shipman Inquiry published in December 2004 was that the health and social care regulatory bodies should use the civil standard of proof in hearings to determine whether a disputed fact is considered to be proved or not proved. It was also one of the key recommendations made by the Chief Medical Officer in *Good doctors, safer patients* published in July 2006. The Government set out its intention to take forward this recommendation in its White Paper *Trust, Assurance and Safety- The Regulation of Health Professionals in the 21st Century*.

4.4 In advance of the change in the Health and Social Care Bill, the General Medical Council (GMC) is proposing to introduce the civil standard of proof at Fitness to Practise Panel hearings when panelists are making decisions on disputed facts from hearings starting on or after 31 May 2008. The GMC is planning to introduce the change by way of a new draft Rule 34(12) of the General Medical Council (Fitness to Practise) Rules 2004.

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom.

6. European Convention on Human Rights

6.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Currently, eight out of eleven health and social care profession regulators covered by the Bill already use the civil standard. The GMC, the General Optical Council and the Nursing and Midwifery Council are the only regulators who still use the criminal standard.

7.2 As set out in paragraph 4.3 and 4.4, the Government is committed to change the current standard of proof from the criminal standard of proof to the civil standard of proof. The change in the GMC rules are consistent with the Government's policy. Clauses 107 and 119 of the Bill, reflects the intention to apply the civil standard to all proceedings which relate to a person's fitness to practise by all health profession and social care worker regulatory bodies.

7.3 A number of references to the GMC's intention to change its rules have been made whilst the Health and Social Care Bill has been going through Parliament. These have been as follows: reference was made at the Second Reading of the Health and Social Care Bill on 26 November 2007; oral evidence given to the Committee on 8 January 2008; during Committee on 22 January 2008; and, most recently during the Second Reading of the Bill in the Lords on 25 March 2008.

7.4 The criminal standard of proof requires that panels assessing facts about health care professionals must be wholly convinced that the facts are fully proven, beyond any reasonable doubt (the decision maker must be sure that facts are true and the events occurred as presented to the panel).

7.5 The civil standard on the other hand requires the decision maker to be satisfied on the balance of probabilities that the facts are true or the events occurred (i.e. more likely than not that the facts are true or the events occurred).

7.6 The Government believes that the use of the civil standard of proof in fitness to practise procedures will ensure a balance between fairness to the accused doctor with the protection of the public and the maintenance of public confidence in healthcare regulation.

7.7 The civil standard of proof is a flexibly applied standard. In cases of alleged serious misconduct it is necessary to have strong and cogent evidence justifying a finding that the factual allegations are proven. Case law supports this analysis of the application of the civil standard.

7.8 The amendment to the GMC Rules cannot come into force until the Privy Council approves the Rules by an Order of Council.

7.9 Following the publication of *Good doctors, safer patients* in July 2006, the Department of Health launched a consultation on the report's recommendations, including Recommendation 1:

“In adjudicating upon concerns about a doctor’s performance, health or conduct, the standard of proof should be the civil standard rather than the criminal standard.”

7.10 The GMC’s response to the consultation *The GMC’s Proposals on Healthcare Professional Regulation* was published in November 2006. It supported the introduction of the civil standard of proof. The GMC’s response to *Good doctors, safer patients* was made in the light of a considerable amount of discussion and engagement with stakeholders including the British Medical Association, the Royal Colleges and the medical defence organisations.

7.11 The GMC launched its consultation on its proposed changes to its rules in August 2007. The consultation ran from mid August 2007 until the end of October 2007. The consultation sought views on how the move to the civil standard could be best implemented. The GMC have advised the Privy Council that details of the consultation were sent to several hundred key interest groups including the British Medical Association and many of the Royal Colleges and the medical defence organisations.

7.12 The GMC received around 100 written responses to the consultation. However although the consultation related to the proposed draft amendment and guidance, many of the responses commented solely on the fundamental principle of whether the GMC should introduce the civil standard of proof.

7.13 The Medical Defence Union (MDU) are not content with the proposals. The GMC has stated that the MDU declined its invitation to attend one of the consultation workshops. The MDU did however submit a detailed written response. It also raised concerns with the GMC about the consultation at a meeting on 12 September 2007. The MDU expressed two principal concerns:

- a. It queried the GMC’s duty to consult on its policy decision to introduce the civil standard of proof.
- b. It raised concerns regarding clarity, consistency and fairness.

7.14 The GMC wrote to the MDU on 25 September 2007 confirming that it was satisfied that it was complying with the statutory requirements under Schedule 4 to the Medical Act 1983 (Paragraph 1(6) of Schedule 4)

7.15 The GMC has confirmed to the Privy Council that it is satisfied that there have been sufficient opportunities for interested parties to comment on the principle itself of introducing the civil standard of proof.

7.16 The GMC stated that it has taken into account the responses received and in April 2008 has written to a number of interested parties, including the medical defence organisations, the British Medical Association and a number of legal firms representing doctors in fitness to practise proceedings, with the proposed rule changes

and a note of the intended date of implementation. It has also written to individual doctors whose cases have been referred to a panel and where the alleged facts are to be read out on or after 31st May 2008 with details of the new rule change.

7.17 The GMC has also put a note on its website stating

“The GMC has now confirmed that, subject to a formal decision by the Privy Council, the new rule introducing the civil standard of proof will take effect on 31 May 2008 and that the civil standard of proof will apply to all new Fitness to Practise panel hearings commencing on or after that date.”

7.18 Details of the full consultation process can be viewed on the GMC’s website www.gmc-uk.org

8. Impact

8.1 A Regulatory Impact Assessment is not needed as a Regulatory Impact Assessment has already been prepared on this matter as part of the Health and Social Care Bill’s Impact Assessment, which can be viewed at:

www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation

9. Contact

David O’Carroll at the Department of Health (Tel: 0113 254 6260 or e-mail: David.O’Carroll@dh.gsi.gov.uk) can answer any queries regarding the instrument.