

<b>Meeting</b>	Advisory Committee
<b>Date</b>	27 September 2011
<b>Title</b>	RCVS performance jurisdiction
<b>Classification</b>	Confidential until consideration by RCVS Council or until public consultation on this issue has begun
<b>Summary</b>	This paper sets out proposals for an RCVS performance or competence protocol based on the rationale and legal advice for the RCVS Health Protocol implemented in November 2010 and further legal advice from Leading Counsel (a QC)
<b>Decisions required</b>	To agree in principle to the inclusion of relevant provisions in the new RCVS Code of Professional Conduct to support a revised approach by the RCVS and the Preliminary Investigation Committee
<b>Attachments</b>	Annex A: Draft Performance Protocol for discussion
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## RCVS performance jurisdiction

### Background

1. At its meeting in April 2011, the Advisory Committee considered a paper on a draft performance protocol (agenda item 9) proposed by the Preliminary Investigation Committee ('PIC') following the receipt of written advice from Leading Counsel. This paper is closely based on the previous paper and also brings the Committee up to date in relation to recent events.

### Statutory jurisdiction

2. The Veterinary Surgeons Act 1966 ('the Act') gives the RCVS jurisdiction to deal with (a) criminal convictions that may render veterinary surgeons unfit to practise and (b) disgraceful conduct in a professional respect that may affect registration. However, there is no express statutory provision to manage the impairment of fitness to practise due to deficient professional performance.
3. The RCVS has a statutory duty to regulate the veterinary profession to the full extent of its jurisdiction, express and implied. However, it has not been clear whether the RCVS has jurisdiction to deal with ongoing concerns about a veterinary surgeon's professional performance, particularly those which may adversely affect their fitness to practise or where they may be a risk to the public or animals.

### Expanding RCVS jurisdiction

4. In the [Government's response to the Environment, Food and Rural Affairs Committee's Sixth Report of Session 2007–08](#), recommendation 4 includes the statement that:

*"It is not satisfactory for customers who have a genuine case for complaint about the professional standards of a vet to only have recourse to the civil law, without any appeal to a regulatory body."*

Recommendation 6 includes the statement that:

*"Meanwhile, the RCVS should continue to improve its current procedures through administrative reforms which can be achieved within the current legislative framework."*

5. In November 2008, RCVS Council considered a motion that sought a review of the RCVS complaints and disciplinary procedures. Since these were being revised at that time, the motion was held over until March 2009, at which time it was withdrawn on the basis of the revised complaints procedures that had been introduced and other changes, including guidance and indicative sanctions guidance for the RCVS Disciplinary Committee ('DC'), introduced in December 2008. It was also agreed that the new procedures would be reviewed in two years.
6. In June 2009, the Lay Observers who sit with the PIC reported to Council that:

*"Under the existing provisions [for] complaints about poor performance (and in particular the health of a Veterinary Surgeon when it affects their ability to practice) cannot be addressed effectively."*

The PIC responded:

*"With regard to a new Veterinary Surgeons Act, the Committee notes that at this time, the political will for a new Act appears to be lacking; and supports RCVS efforts to find other ways of taking forward, as a matter of priority, changes to key areas of the complaints and disciplinary system."*

7. In early 2010, Penningtons Solicitors provided a report on the RCVS complaints and disciplinary procedures; two years after the changes were introduced.
8. The recent external review of the RCVS complaints and disciplinary procedures has endorsed the RCVS review of its jurisdiction. The external review was decided as part of Council's discussions in March 2008 to ensure the robustness of the RCVS complaints and disciplinary procedures and was carried out in 2009 and approved by Council at the meeting in June 2010.
9. The report noted the ongoing work to consider the current RCVS jurisdiction in the current legislative framework and stated:

*"6.6 Following receipt of Counsel's advice regarding the setting up of a system to deal with "health cases" the College has posed the question whether there are other areas of professional practice which, although not currently within the ambit of its disciplinary processes, could or should in the public interest properly do so.*

*6.7 We agree that, just as it was thought appropriate for the College in the absence of express statutory powers to seek Counsel's advice on what could be done in "health cases" to ensure that it was meeting the public's expectations of it as a regulator, it could usefully seek Counsel's advice with regard to other areas.*

*6.8 We understand that the two areas to be considered initially are (a) competence and (b) CPD. There are already requirements in the Guide relating to both areas. So far as competence is concerned, it requires veterinary surgeons to work within their areas of competence. So far as CPD is concerned, it requires veterinary surgeons to complete a record and provide the record to the College.*

*6.9 We agree that public expectations of a modern regulator are such that it does behove the College to look into how its disciplinary processes might be looked at in much the same way as they were looked at with regard to "health cases". This review, however, should not be confined to these two areas but should look at the College's jurisdiction in its totality. Counsel should be asked as part of the review to consider what could and should be done in these areas in terms of moving more closely to risk-focused/principle-based regulation. Consideration should also be given to whether (and, if so, how) the College's disciplinary processes could move from its current reactive approach towards more proactive regulation."*

10. In June 2010, the Lay Observers reported to Council that:

*“There are a number of important recommendations arising from the Penningtons’ report which if accepted will result in a shift in the way the College regulates the Profession. We agree that there are strong public interest arguments for the College to be more pro-active in the way it regulates (without the need for legislation) in line with other regulatory bodies. A regime which is underpinned by identifying and dealing with risk and which focuses more on prevention rather than reaction, as the report identifies, is the right way forward.”*

The PIC responded:

*“The PIC and the RCVS are seeking further legal advice on the full extent of the RCVS jurisdiction, following the advice on the Health Protocol. This advice indicated that regulation of professions has moved on sufficiently in the last ten or so years that what might not have been within the RCVS statutory jurisdiction ten years ago is now within its jurisdiction. The PIC is assured that the legal advice will seek guidance on the extent that the RCVS can be proactive in the identification of complaints and the extent to which the RCVS has jurisdiction on fee complaints and the poor clinical performance of veterinary surgeons.”*

11. In November 2010, after legal advice had been sought and a consultation exercise carried out, RCVS Council agreed changes to the RCVS Guide to Professional Conduct and a Health Protocol (as an annex to the Guide) which effectively gives the RCVS jurisdiction on health issues through the current legislative framework of the Veterinary Surgeons Act 1966.
12. The legal advice went further than anticipated and confirmed that not only was a health protocol a reasonable proposal, but also that the RCVS has full jurisdiction on health matters within the current statutory framework (through the PIC and DC). This could be clarified and made unambiguous with formal advice from the RCVS (most appropriately this is through the current RCVS Guide to Professional Conduct or proposed RCVS Code of Professional Conduct) that a failure to take steps to avoid unnecessary risks for animals and the public could amount to disgraceful conduct in a professional respect so that veterinary surgeons are aware of what is expected.
13. This advice received in relation to dealing with health concerns therefore led to consideration of what else might properly be included within the RCVS jurisdiction, with appropriate supporting guidance from the RCVS about what amounted to ‘disgraceful conduct in a professional respect’.
14. In the latter part of 2010, legal advice was sought from Tim Dutton QC on a number of aspects of RCVS jurisdiction, including performance or competence, to consider whether something similar to the health protocol could be achieved with performance or competence.
15. The advice on the performance or competence issue broadly provides that arguably, most professionals accept, and the public expects, that the performance or competence of professionals will be of an acceptable standard. The legal advice dated 8 April 2011 states:

***“Performance issues***

17. *The first question of principle is whether or not the College can bring disciplinary proceedings against a registrant for poor performance before the Disciplinary Committee.*

*If so, it follows as a matter of logic that the College is entitled to have a function which monitors performance so as to ensure that it is able both to maintain standards and also effectively to bring matters of poor performance before the PIC and the Disciplinary Committee.*

18. *Performance which is poor to such an extent that it becomes “disgraceful conduct in a professional respect” is a matter which can properly lead to an adverse finding or direction by the Disciplinary Committee under section 16 of the Act, i.e a finding that conduct has been disgraceful in a professional respect. Further, although it is considered in some quarters that poor performance can never constitute “disgraceful conduct in a professional respect” such a belief is wrong: see the authorities cited in paragraphs 13 to 15 above, and see McCleod in the College context in particular.*
19. *It follows that if poor performance can be the subject of disciplinary action it must also be capable of being the subject of monitoring and where appropriate investigation.*
20. *There is no reason therefore why the College should not create a function or build upon its existing functions so as to have as part of its work a committee which is responsible for the monitoring of standards. In other regulators this has been achieved by the creation of a standards committee<sup>1</sup> or a professional competence committee which can monitor performance within the profession and where necessary bring complaints to the PIC for investigation and if the test for a case to be brought is satisfied the PIC can refer the matter to the Disciplinary Committee. To use resources in this respect is an entirely proper use of the College’s funds and falls within the general legislative purposes of the statutory scheme. The manner in which the College organises a monitoring function is a matter for the College itself provided of course that it stays within its statutory and Charter Powers. The College could, for example, build upon existing standards or monitoring function. What matters for the purposes of this legal advice is:
  - i. *that the terms of reference of the monitoring function or of any standards committee are established;*
  - ii. *that the reporting responsibility of the function is clear;*
  - iii. *that there is a careful record keeping and report keeping structure so that evidence from monitoring visits inspections is kept securely and is available if required by the PIC.**
21. *The next question is to what extent a registrant may be guilty of “disgraceful conduct in a professional respect” if he or she has been required to amend his ways of working but has failed or refuses to do so.*
22. *Provided that the College has published clear criteria by which it will judge matters of performance and decide whether or not it will bring a complaint before the PIC and the Disciplinary Committee it is open to the College to set out the criteria which it will consider for the purposes of such a complaint.*

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<sup>1</sup> *The Bar Standards Board for example has a Standards Committee and has been developing through it a monitoring function*

23. *The first step therefore is for the College to set out in clear terms in the form of a performance protocol what criteria it will apply to professional performance issues.*
24. *The fact that an individual registrant may not have satisfied the criteria will not inevitably lead to a finding that his or her conduct has been “disgraceful in a professional respect”. For the Disciplinary Committee’s purposes the fact of non-compliance with criteria published by a professional body will certainly be a relevant factor for the Committee to take into account in considering whether the conduct is disgraceful. Ultimately, of course, the decision as to whether the conduct is in fact disgraceful in any particular case will be a matter for the judgment of the Disciplinary Committee. If the College has published criteria and if a registrant has failed to comply with the criteria either repeatedly, or if in an individual case the failure to comply has been serious, then the likelihood is that a Disciplinary Committee would conclude that the conduct has been “disgraceful in a professional respect”. Tribunals which have received complaints relating to poor performance have been prepared to judge performance by reference to guidance or standards set by the relevant professional body. The Solicitors Disciplinary Tribunal has had regard to published guidance from the Law Society (and now the SRA) for many years without criticism by the Courts.*

**Acceptance of undertaking?**

25. *I am asked whether the College can accept an undertaking. For example, if a registrant has performed poorly can an undertaking be required of him that he will undertake CPD or training or will undertake not to perform certain kinds of operation?*
26. *The first question is whether it is proper in a case which might otherwise be the subject of a prosecution for the College to accept one as a basis not to press ahead with a prosecution. The question assumes that the evidential test for prosecution is likely to be satisfied: for otherwise the public interest test does not come into play. In cases where the second limb of the test – the public interest element – is satisfied by the taking of an undertaking, then it is proper for the College to accept such an undertaking. Both the undertaking and the terms upon which it is accepted must be clear. If the Undertaking is accepted the College must make it clear that it will hold the undertaking on file (defining the limit of time) and that if there is a repeat of the conduct in question or other misconduct arises the College reserves the right to refer to both the undertaking and the facts which gave rise to it before the Disciplinary Committee*
27. *There may be circumstances in which a registrant refuses to give an undertaking. In these circumstances, if the evidential test has been satisfied, and the public interest otherwise justifies a prosecution, then it will be perfectly proper to continue to prosecute misconduct before the Disciplinary Committee. However, there may be circumstances where an undertaking is thought appropriate but the case is borderline and neither the evidence, nor the public interest, justifies continuation of the case with a prosecution before the Disciplinary Committee. In those cases the College could for example record the misconduct in question (with the papers relating to it), the fact that an undertaking was sought but refused, and can follow this up in due course with an inspection in order to*

*check on the conduct of the particular registrant. If the conduct is repeated against a background of the refusal to give an undertaking, then a prosecution may well be justified.*

28. *It is critically important that the College should, in drafting any undertakings which it seeks, ensure that the letter which contains the draft undertaking to the registrant also provides for the following:*
- i. That the misconduct is described in sufficient detail for the registrant to be in no doubt about what has gone wrong and why;*
  - ii. That the undertaking is required in the public interest and for the protection of the public and/or the health of animals;*
  - iii. That the College is minded not to proceed to a prosecution if an undertaking is given but that if no undertaking is given or is given and breached the College will be minded to proceed to a prosecution.*
  - iv. That in any event the College will keep the facts of the case on file, and may refer to the facts and to the giving of the undertaking if the undertaking is breached or there are other disciplinary matters which arise in the future.*
  - v. That on the particular facts known to the College, the giving of an undertaking will be sufficient for a prosecution not to occur but that both the facts relating to the case and the giving of the undertaking will be kept by the College on file. The College may wish to consider the period of time that these matters are kept on file and ought to state what that period will be.”*

***Can a duty be imposed upon a registrant to inform the College about poor performance and that they will be guilty of disgraceful conduct if they fail to do so?***

29. *The professions have been developing duties to report over the last twenty years or so. In the case of solicitors under rule 20(6) of the Solicitors Code of Conduct 2007 an obligation arises to report serious misconduct on the part of a solicitor and to report a solicitor whose integrity is “in question”. Similar duties to report arise for the Bar and in other professions.*
30. *A duty to report takes two forms. First, a duty to report misconduct by other members of the same profession. Second, a duty of self-reporting. Normally, it is sensible for the duty to be imposed at the same threshold level for self reporting as for other members of the same profession.*
31. *It is open to the College to set out in its Guide to Professional Conduct that it requires practitioners to report misconduct, and to state what the threshold for reporting is. The Guide can go on to provide that a failure to report misconduct is considered to be damaging to the reputation of the profession as well as the interests of the public and may therefore be considered to be disgraceful conduct. There is no reason in principle why the College should not take such steps.*



32. *The key question is what is the threshold level at which the reporting obligations should be set? The higher the level at which the threshold is set (i. e. the greater the seriousness of the misconduct) the more likely it will be that the profession will accept the duty and will report. The lower the level at which the threshold is set (i.e. the less serious the misconduct) the less likely it is that the profession will accept the obligation to report and the more likely it is that the College as regulator will have problems with the duty.*
33. *Based on my experience in this field it seems to me that the appropriate threshold level at which a duty to report should arise are:*
- i. Where there has been fraud in relation to the register;*
  - ii. Where there has been a criminal conviction;*
  - iii. Where a registrant has committed misconduct which may be disgraceful or which calls into question his fitness to practise.*
34. *On 21 October 2010 we discussed the relationship between the duties of a registrant (a) to his professional body – the College and (b) to his professional indemnity insurers. There may also be an issue which arises where the professional indemnity insurer happens to employ a registrant. It would be sensible for the College to discuss with those who provide professional indemnity insurance to the profession any issues which may arise if a reporting obligation is developed on the part of registrants, and as to any consequences which may arise with regards to insurers.. This in turn will assist the College and insurers. If, for example, an insurer employing a registrant is in possession of information which indicates that there has been disgraceful misconduct or a criminal offence committed which ought to be reported to the College, then it may be that insurers will want to deal with the issues in their policies. I think it will be useful for the College to have a dialogue with the insurers on these questions.”*

16. In June 2011 the Lay Observers reported to Council that:

- “9. We welcome the College’s recognition that, as the framework of professional regulation has been evolving in more recent years with a move towards “fitness to practise”, it is timely to review current RCVS powers and procedures. Clearly, a balance must be struck between over-regulating the profession, to its detriment, and meeting the legitimate expectations of the public. We feel confident that the College will continue to meet its public duties responsibly and appropriately. We have been kept closely informed of the opinions provided by Timothy Dutton QC in relation to these matters.*
10. *Many complaints received relate to poor performance, but which fall short of that which would amount to “disgraceful conduct in a professional respect”. It is clear to us that poor performance needs to be tackled more effectively through monitoring and investigation against agreed professional standards. This focus on performance would be over and above that expected of practitioners under their contract of employment where this arises. We recognise the challenges this poses in the case of single handed vets. The proposal*

*to develop a "Performance Protocol" with emphasis on the importance of compulsory CPD to rectify deficiencies is essential, in our view. We look forward to further discussion with the College on the outcome of the current review."*

### **Proposed performance protocol**

17. With little prospect of a new Veterinary Surgeons Act to provide an express performance jurisdiction, the PIC and its Lay Observers are keen to clarify and formalise the current jurisdiction and procedures, so that concerns about the professional performance of veterinary surgeons can be managed consistently, under the current Act.
18. At the Advisory Committee meeting in April 2011, the Committee gave initial consideration to a performance jurisdiction. It was agreed that the Advisory Committee Chairman should meet with the Preliminary Investigation Chairman to discuss the feasibility of a performance protocol. The relevant part of the minutes of the April 2010 Advisory Committee meeting record:

*"16. The Chairman introduced the paper and acknowledged the comments of Mrs Alison Bruce in relation to this agenda item. The Committee discussed the content and broad implications of the draft advice of Counsel; the full advice was e-mailed to members prior to the meeting. It was suggested that the Disciplinary Committee provided the correct method of deciding whether the performance of a veterinary surgeon amounted to serious professional misconduct and was the correct method of dealing with such cases. Questions should be asked about whether the proactive approach discussed in Counsel's advice and mandatory continuing professional development was the correct approach for the RCVS. It was clarified that continuing professional development was a separate consideration from a performance jurisdiction.*

*17. The Committee discussed cases where complainants have a genuine grievance but the conduct of a veterinary surgeon does not amount to serious professional misconduct and can currently only result in advice being given. The legal advice on borderline cases was noted. It was acknowledged that incompetence or poor performance in some cases is capable of amounting to serious professional misconduct. It was noted that undertakings are already being given to the Preliminary Investigation Committee in appropriate cases and that to some extent a performance protocol may simply codify the approach already taken in these sorts of cases.*

*18. Concern was expressed by the Committee about the RCVS appointing appropriate experts and the requirement in Counsel's advice to publish clear criteria by which the RCVS will judge matters of performance. It was suggested that this was a potentially huge and correspondingly expensive task. In order to be done properly, the entire veterinary degree would need to be covered and it was suggested that every member of the profession would need to be assessed to establish a baseline. Comparisons were drawn with the re-validation jurisdiction adopted by some healthcare regulators. It was commented that experts are appointed already in appropriate Disciplinary Committee cases and to some extent the current Guide to Professional Conduct included performance criteria.*

19. *Difficulties were identified in differentiating unacceptable performance from poor performance where this could not be based on detailed information on clinical outcomes. It was acknowledged that this information was not available and that there was a role for the RCVS in coordinating data collection by projects such as VEctAR and SAVSNET. Reference was also made to the inclusion of clinical governance in the draft Code of Professional Conduct and that this could be supported by clinical data.*
  20. *It was suggested that dealing with performance may best be achieved on a case by case basis using previous Disciplinary Committee determinations as criteria. It was considered that a case by case approach to performance was also cost-effective.*
  21. *The Committee was referred to the draft performance criteria in the draft Code of Professional Conduct currently the subject of consultation, which matched a similar responsibility relating to adverse health. It was suggested that the provision in the draft Code was appropriate and reasonable.*
  22. *It was suggested that a way forward was for the Chairmen of the Advisory and Preliminary Investigation Committees to consider the feasibility of a performance protocol before the Committee considered the issue again at its next meeting in September.”*
19. The Chairmen of the Advisory and Preliminary Investigation Committees met in June and the outcome of the discussion was that a performance protocol along similar lines as the health protocol was feasible. This was seen as something less draconian than had been proposed and discussed at April AC and therefore resolved issues such as setting standards for every aspect of veterinary practice and performance assessments.
  20. It was agreed that a case by case approach was appropriate and this is essentially the way PIC currently manages performance-type cases. An appropriately amended draft protocol in the same format as the health protocol was used for the purpose of discussion. A copy of the draft discussion performance protocol is attached as Annex A.
  21. The PIC considered the draft protocol at a meeting on 6 July 2011 and commented that care should be taken with the drafting, to ensure that there is no suggestion that the RCVS deals with negligence. The protocol could include a reference to the greater responsibility on those veterinary surgeons who manage veterinary teams and businesses and who are in a better position to be aware of those with performance issues; and the need for practices to take any necessary internal action where appropriate prior to any referral (paragraph 2). It was commented that this would make it easier for practice owners to address matters.
  22. The PIC noted that there was no guidance on what amounted to poor performance. There was discussion on the thresholds document and that this was based on past DC complaints. It was also noted that there was reference to performance concerns, which did not seek to pre-judge the case.

23. In order to reflect current PIC practice there should be reference to the involvement of appropriate veterinary surgeons to advise on the cases as is the case currently with clinical cases that are referred to the DC (paragraph 12). Also, before a case is held open will there be a face to face with the veterinary surgeon to ensure that there is discussion of the concerns and the conditions or undertakings appropriate to address those concerns which mean a referral to DC is not in the public interest. Concern was expressed that there might be the perception that practitioners would be asked to plead guilty to avoid referral to DC which ought to hear the evidence and decide if they are guilty.
24. The PIC also discussed the difficulties in establishing when it was appropriate to refer a case to the RCVS as a competence case. It was commented that consultation with the profession, prior to a final decision on implementation was essential.

### **Current position**

25. The PIC, as the statutory committee with the responsibility to investigate relevant complaints and cases against veterinary surgeons may refer any complaint to the DC where a veterinary surgeon is liable to have his or her name removed from the register. Currently, the PIC manages informally performance-related complaints with monitoring of the veterinary surgeon.
26. Cases of a clinical nature where it is alleged that the subject veterinary surgeon's performance is so poor that it amounts to disgraceful conduct in a professional respect are referred to the DC. The DC has found that poor performance or competence, often described as inadequate professional or veterinary care, does amount to disgraceful conduct in a professional respect. In appropriate circumstances complaints are referred to the Disciplinary Committee ('DC') where they are managed with undertakings by the veterinary surgeon, postponement of Judgment and, if appropriate, suspension or removal from the register. Therefore, to some extent, the proposed performance or competence protocol seeks to clarify existing practice.
27. It has been understood that where there is a realistic prospect of proving charges against a veterinary surgeon (in accordance with the RCVS jurisdiction), the complaint must be referred to the DC; subject always to the public interest.

### **Discussion / issues**

28. Dealing with clinical incompetence is not new for the RCVS and Dr Chesney's fellowship thesis on the RCVS disciplinary system (the fellowship was awarded by the RCVS in March 2011) has detailed increasing numbers of competence-related cases from 1966 onwards. He refers to a number a number of cases, including a case in 2000 where supervision was imposed following a finding that the veterinary surgeon had 'forgotten' to remove the uterus and ovaries of a cat during a routine cat neutering, and to have grossly mishandled the castration of a guinea pig. This supervision followed a DC hearing.
29. Consideration of a veterinary surgeon's performance would need to be based on accepted standards, for example, those published by the RCVS in the RCVS Guide to Professional Conduct

and in due course the RCVS Code of Professional Conduct; the core standards set out in the RCVS Practice Standards Scheme Manual; accepted proper practice. The most contentious of these is likely to be 'accepted proper practice' although the threshold for 'disgraceful conduct in a professional respect' may be sufficiently low that this is less of an issue. In certain cases, there might need to be relevant expert veterinary opinion to assess a veterinary surgeon's practice or the clinical procedure or incident complained about. Generally, the PIC has decided whether expert veterinary opinion should be sought in any case.

30. Similar to the health protocol, any performance or competence protocol and any formal RCVS guidance in the current Guide or new Code, might seek to confirm that serious clinical failings – failings in performance or competence can already amount to disgraceful conduct in a professional respect and, in addition, advise that a failure to address clinical practice which causes harm to animals or the risk of harm, can amount to disgraceful conduct in a professional respect. And, in appropriate cases, that the RCVS might seek undertakings from veterinary surgeons and monitor compliance with those undertakings without referral to the DC, if the public interest can be protected without referral of the complaint to the DC. A performance or competence protocol would need to identify the factors to be taken into consideration in determining whether a complaint was referred to the Disciplinary Committee, particularly the borderline cases where compliance with advice is considered relevant (see paragraph 27 of the legal opinion).
31. The draft Code of Professional Conduct includes the following draft responsibilities in relation to health and performance or competence:

***“Veterinary Surgeons & the Profession***

1. *Veterinary surgeons must take and, at the request of the RCVS, demonstrate that they have taken, reasonable steps to address adverse physical or mental health (i) that could impair fitness to practise; or (ii) that results in harm, or a risk of harm, to animal health or welfare, public health or the public interest.*
2. *Veterinary surgeons must take and, at the request of the RCVS, demonstrate that they have taken, reasonable steps to address performance (i) that could impair fitness to practise; or (ii) that results in harm, or a risk of harm, to animal health or welfare, public health or the public interest. [Subject to legal advice on RCVS jurisdiction]”*

32. The legal advice is clear that an essential part of the RCVS review and re-interpretation of its jurisdiction is advice to the profession so that it is clear to veterinary surgeons and veterinary nurses what is expected of them. This could be done through the Code of Professional Conduct and supporting guidance that might include or be the performance or competence protocol. A performance or competence protocol identifying what may amount to *performance that could impair fitness to practise* and the reasonable steps expected of veterinary surgeons, is likely to relate to the ongoing work on clinical governance, currently under the Guide Working Party.
33. The introduction of a clearly stated performance jurisdiction along side the existing jurisdictions on conduct and health, in effect, provide a fitness to practise regime similar to that used by the regulators of human health care professionals.

## **Financial issues / PR implications**

34. The financial implications may be considerable because first, such cases generally require considerable investigation to determine the factual position; second, where a complaint may be referred to the DC, generally statements are taken from witnesses and a case prepared for referral which usually involves external solicitors; third, such cases usually require veterinary advice and involvement which is likely to come from either members of the PIC or the team of veterinary investigators; fourth, expert reports from appropriate veterinary surgeons will be required to consider the performance or competence of a colleague; and fifth, it is likely that compliance visits will be required to ensure undertakings are kept.
35. There will also be an increased workload for the Professional Conduct Department in managing cases under the performance protocol. However this would be offset to a degree by a reduction in the number of cases that are referred to DC and the costs associated with DC hearings.
36. In the event that the Advisory Committee approves the draft performance protocol for consultation, appropriate publicity will be important to ensure that the correct message is provided to both the public and veterinary profession. The performance protocol would be described as a positive step by the RCVS which recognises that in some cases, the referral of performance-related cases to the DC will not be in the public interest. Any publicity is likely to be approved by the RCVS Officer Team and the Chairmen of Advisory and Preliminary Investigation Committees following consideration of the performance protocol at the November Council meeting.

## **Conclusions**

37. The legislative framework remains as provided in a 1966 Act of Parliament. Interpretation of legislation changes with time and case law and the meaning of professional regulation and the expectations of the public have changed over the last 10 -15 years. The RCVS understanding of regulation has developed over this time and a Performance Protocol would seek to clarify this and provide that a failure to address risks in practice – to animals and the public – can amount to disgraceful conduct in a professional respect. In addition it will give the PIC more scope to deal with serious clinical cases which might be borderline referrals to the DC.
38. Therefore, a performance or competence protocol might include the following: that if a veterinary surgeon makes a serious clinical error but not so serious that it is referred to DC, and then fails to take steps to address appropriate risks, the two aspects of the matter, together, could in an appropriate case be referred to DC. Equally, there may be times when it is not in the public interest to refer a performance or competence case to DC case, if the public interest can be satisfied by undertakings from the subject veterinary surgeon.
39. The intention would be to engage in a public consultation on the performance protocol with a view to the protocol forming part of the supporting guidance for the new Code of Professional Conduct for approval by RCVS Council at the March 2012 meeting.

## **Recommendations**

40. To agree a draft performance protocol so that the statutory work of the PIC can be supported by additions to the RCVS Code of Professional Conduct supporting guidance.