IN THE MATTER OF THE VETERINARY SURGEONS ACT 1966

AND

IN THE MATTER OF THE ROYAL COLLEGE OF VETERINARY SURGEONS

JURISDICTIONAL MATTERS

OPINION

Introduction

1. I am asked to advise the Royal College of Veterinary Surgeons ("The College") in relation to a number of jurisdictional issues which have arisen against the background which I set out below.

2. The range of matters upon which I have been asked to advise is wide and I therefore provide below a short summary.

Summary of Advice

3. 3.1 The College is able through publication of Guidance to the profession to introduce standards' monitoring and to take other measures such as the introduction of CPD and PDP using the prospect of disciplinary proceedings under Sections 15 and 16 of the Veterinary Surgeons Act 1966 Act for those who fail to comply with standards set out in Guidance if their conduct is considered to be disgraceful in a professional respect.

   3.2 The College is in my opinion able to require English Language proficiency post registration and to introduce language proficiency tests for Non-UK entrants, provided it does so proportionately and on a case by case basis.

3.3 I answer the specific individual questions asked under topic heads in the body of this Opinion

Background

4. The College has acquired its jurisdiction for regulation and discipline of registrants pursuant to the Veterinary Surgeons Act 1966 ("the Act"). The College is constituted under a Royal Charter of 1844 which was amended and ultimately supplemented by a new Charter in 1967 ("the Charter").

5. Under sections 15 and 16 of the Act the College has jurisdiction to discipline surgeons in respect of three matters:

   (1) Matters regarding fraudulent entries on the College register;

   (2) Criminal convictions rendering registrants unfit to remain on the register; and

   (3) Disgraceful conduct in a professional respect.

6. The College Council's ("the Council") primary powers in relation to the keeping of the register are contained with sections 2 to 14 of the Act. Pursuant to these sections the Council is required to maintain the register (section 2), to register holders of university degrees on the register (section 3), to carry out supervisory functions in respect of universities whose degrees will be given recognition for registration purposes (section 5), to register a person with community rights for registration (section 5B), to register registrants who come from the Commonwealth or are "foreign practitioners" (section 6), to keep the register (section 9), to provide a procedure for registration (section 10), and to make regulations in respect of the register (section 11).

7. So far as disciplinary and similar proceedings are concerned the statutory framework is as follows:

(1) The College has a Preliminary Investigation Committee which is charged with the "*duty of conducting a preliminary investigation into <u>every</u> disciplinary case (that is to say, a case in which it is alleged that a person is liable to have his name removed from the register or to have his registration suspended …) and of deciding whether the case should be referred to the Disciplinary Committee.*"

(2) A Disciplinary Committee is maintained by the Council of the College which has the duty of considering and determining disciplinary cases.

(3) The power to remove names of persons from the register is provided for under section 16 and occurs if:

(a) A person is convicted of a criminal offence which renders him unfit to practise veterinary surgery; or

(b) A person is judged to be guilty of disgraceful conduct in any professional respect; or

(c) The Disciplinary Committee is satisfied the name of any person has been fraudulently entered on the register.[1]

(4) The disciplinary powers available to the Committee are limited and comprise only (i) removal from the register or (ii) suspension or (iii) reprimand.

[1] Under section 16(1)(b) provisions are made in respect of European state practitioners which are not relevant for current purposes.

8. Provision is made in the Act (section 17) for appeal.

The Regulatory System

9. The College's policy regarding discipline has hitherto been one where the College will not normally commence an investigation or consider taking action in a matter until such time as it receives a formal, written complaint from a person outside the College. The College will sometimes raise complaints on its own behalf via the Chairman of the PIC but will not do so normally unless a general concern has been raised by a member of the public where such a person does not have direct knowledge of an incident or a matter. The background therefore is of a regulatory and disciplinary system which is confined by the terms of the statute (see section 16), and has been complaint-driven. Further, it is clear from the legislative scheme as a whole that the scheme of regulation and discipline is one which applies to individual veterinary surgeons and not to the entities or partnerships in which they practise.

10. The College wishes to move from a reactive approach to regulation and discipline (i.e. an essentially complaint-driven approach) to one which is more proactive, albeit proportionate. The College wishes to reform its regulatory functions, in the interest of the profession and in the public interest, so that it can maintain high standards within the profession, monitor the maintenance of such standards and, I infer, ensure that few veterinary surgeons are brought before the Disciplinary Committee because there has been compliance with good standards and maintenance of the reputation of the profession in the public interest.

11. The College does not at present have a professional competence or "standards committee" (a name which I personally prefer for a committee which seeks to set and maintain standards within the profession). The College does not investigate or proceed with complaints against registrants based on poor performance, save where that performance falls so far below the standards expected of the profession as to constitute "*disgraceful conduct in a professional respect*".

12. When complaints are brought to the College the PIC gives careful consideration as to whether a case is suitable for prosecution before the Disciplinary Committee by examining, amongst other things, whether or not a registrant whose standards have fallen below what is considered reasonable has taken steps to correct his/her behaviour or procedures and will accept advice from the College, for example, by undergoing additional training or continuing professional development (CPD).

13. The College has already taken advice from counsel, Nicholas Peacock, and I have been provided with a copy of his Opinion of 9 December 2009. I agree with his Opinion. "*Professional misconduct*" and conduct which is "*disgraceful in a professional respect*" are almost synonymous. Definitions by a court or the Privy Council of the meaning of "*disgraceful conduct*" can be found by reference to a judgment of the Court of Appeal *In Re a Solicitor 1972 2 All ER 811* where Lord Denning MR stated in the context of a charge of conduct "*unbefitting a solicitor*" where the books of account of the solicitor had not been written up by the accountant, that negligence may amount to conduct unbefitting if it was:

> *"sufficiently reprehensible or inexcusable and such as to be regarded as deplorable by his fellows in the profession"*

14. Conduct which is disgraceful in a professional respect will be conduct which judged objectively is such as would be considered disgraceful by one's peers in the profession and/or by an objective bystander such as the Profession's Disciplinary Committee, a Court or a Tribunal. Certainly it includes conduct which would be considered "*deplorable*" and other such words used by the Court in the case of *In Re a Solicitor*. The following encapsulation in the 19th Ed'n of Cordery provides some assistance:

> *"Professional misconduct is simply conduct which the [Solicitors Disciplinary Tribunal] and the Judges from time to time regard it to be. "Conduct which would be regarded as improper according [to] the*

consensus of professional, including judicial opinion could be fairly stigmatised as such whether it violated the letter of a professional code or not." Conduct does not have to be "regarded as disgraceful or dishonourable by his professional brethren of good repute and competency" to amount to professional misconduct as even negligence may be misconduct if it is sufficiently reprehensible or "inexcusable and such as to be regarded as deplorable by his fellows in the profession".

It will be noted that these quotations preserve the assessment of professional conduct, as to whether or not it amounts to professional misconduct, to the profession itself and to the judges"[2]

In the context of the statutory test for conduct to be disgraceful in a professional respect the conduct must be regarded as such by the profession, as embodied by the Disciplinary Committee, or the Court. The Privy Council in *McCleod v the Royal College of Veterinary Surgeons 2006 UKPC 39* said this at paragraph 21 of the test:

> *"at its hearing the Disciplinary Committee was advised by its legal assessor that disgraceful conduct in a professional respect is conduct which falls far short of that which is expected of the profession. Their Lordships consider that that was an appropriate definition and that the Committee was correctly advised"*[3]

If the College as the Profession's Governing Body sets out in its Guide to Professional Conduct what conduct it considers may amount to "disgraceful conduct in a professional respect", then a failure to achieve the standard required, or embarking upon the conduct so identified, may well be regarded as satisfying the statutory test. Of course the judgment is one which must be made by the Disciplinary Committee judged by the facts of each case. But clearly

[2] See Harris QC and Carnes, Regulatory and Disciplinary Proceedings 5th Ed'n at para 4.13 and see Aaron v The Law Society 2003 EWHC 2271(Admin), Ridehalgh v Horsefield 1994 Ch 205 CA, and Re A Solicitor 1972 2 All ER 811.

[3] See also the further discussion as to whether on the facts the facts of the particular case the conduct was disgraceful and whether the Privy Council could interfere at paragraphs 22 et seq.

transgressing published standards or requirements gives both the Profession and the Committee a benchmark by which to judge the conduct in question. Support for this approach can be found in the passages cited above and also in Harris and Carnes 5th Ed'n at 4.19 et seq[4].

15. Before the Preliminary Investigation Committee decides that a case will be brought before the Disciplinary Committee it applies a twofold test. First, it asks whether there is sufficient evidence to give a reasonable prospect of a finding of disgraceful conduct in a professional respect (or other statutory basis for a finding of liability – see para 7(3)) Second, it asks whether it is in the public interest to bring a prosecution before the Disciplinary Committee. This approach is adopted by other regulators and also by public authorities such as the Crown Prosecution Service and the Director of Public Prosecutions. The same test is applied by the Solicitors Regulation Authority. I return to the ways that the College might develop its regulatory functions and its approach to matters which might be considered "*disgraceful conduct*" against the background of section 16 and the two-stranded test for prosecution later.

16. Against this background I deal with the questions raised for advice in turn below.

[4] Note the requirement for clarity of drafting and sufficiency of guidance in order for the College to be confident that there will be compliance with ECHR Art 7 as applied by the HRA 1998.

Questions for Advice

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[5] or a professional competence

[5] The Bar Standards Board for example has a Standards Committee and has been developing through it a monitoring function

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.

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

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 allege 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 the bringing of a case of misconduct 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:

(1) That the misconduct is described in sufficient detail for the registrant to be in no doubt about what has gone wrong and why;

(2) That the undertaking is required in the public interest and for the protection of the public and/or the health of animals;

(3) That the College is minded not to proceed to a prosecution if an undertaking is given and complied with but that if no undertaking is given

(4) 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.

(5) 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:

(1) Where there has been fraud in relation to the register;

(2) Where there has been a criminal conviction;

(3) 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.

The College's Investigative Function

35. The question upon which I am asked to advise is whether the College can proceed to investigate the conduct of registrants without receiving a formal complaint. Within this question the following issue arises. Does the College have jurisdiction to undertake monitoring visits?

36. The College has established a practice standards scheme (PSS) which it asks registrants to subscribe to. The College asked me to advise on whether the PSS can be used as a means by which it can marshal its investigative resources.

37 The College has no statutory powers of entry on premises. It is not registered under the Regulation of Investigatory Powers Act 2000 (RIPA). It is not open to the College to carry out invasive surveillance or to enter premises without consent. On the other hand the College has for many years been able to obtain documents and responses to inquiries as part of the procedures which it operates. Indeed, a failure to cooperate with a proper inquiry could lead to a complaint that there has been disgraceful conduct in a professional respect

38 It follows from the foregoing that the College must approach that part of its functions relating to entry on premises on a consensual basis. The College therefore will need to provide in its Guidance notification that its inspectors may visit practices and may ask the practice to provide practice records to inspectors. Notification should be given in the Guide that inspectors will expect access to be given to premises so that inspections can occur in the public interest.

39 Because the approach to this question of entry on premises will be consensual, the College's sanction for a failure either to permit access to documents or to premises will be to record the fact of that refusal and, in circumstances where there is published guidance from the College requiring such access to consider on

40 On the whole, where there is sufficient clarity in published guidance most practices who are the subject of visits will agree to permit entry into their premises by inspectors and will also continue to provide inspectors with sight of their practice materials.

41 The short answer therefore to these questions is that the jurisdiction to enter premises is dependent upon consent. Refusal to provide consent when reasonably sought is a material factor in determining whether or not a registrant is guilty of disgraceful conduct in a professional respect.

42 It is permissible for the College to use such system as it considers most appropriate to organise a monitoring scheme. It can build upon the current voluntary PSS in the way it thinks most appropriate to achieve its legislative and charter objectives. It may wish to maintain a separation of the function of <u>setting</u> standards from the work of inspection on the ground. If it does develop the system in this way it will want to make sure those who set standards can learn from any lessons drawn from the work of inspections, and that before setting standards any questions about the practicability of enforcement of such standards are considered in consultation with those in charge of monitoring and enforcement work.

43 There are certain legal principles to which the College must both have regard and with which the College must comply:

(1) The Data Protection Act 1998. The College must ensure that in carrying out inspections it complies with the provisions of the Data Protection Act.

(2) Article 8 of the European Convention on Human Rights. The College does not have a right, absent consent, to enter premises or to inspect

_____ that such an individual inspection is to inspect premises and documents which relate to the practice of the profession and not to the private life of the individual in question. In consultation I reminded the College of the case of *Niemetz v. West Germany 1992 13710/88 ECJ 16.12.92.* In that case the ECJ found that taking personal materials in an otherwise authorised search of a lawyer's office (also his home) breached Article 8 of the ECHR.

(3) All registrants are entitled to protection under Article 1 Protocol 1 of the ECHR of their right to private property. A right to private property includes a right to carry out the practice of a profession pursuant to the entry of the registrant on the register: see *Holder v. The Law Society 2003 1 WLR 1059*. Any interference with the right must be in accordance with the law and proportionate.

44 As with Article 8, so with Article 1 Protocol 1. Where the individual has consented to the inspection of documents and/or to inspection of premises there will be no breach of the Article 1 Protocol 1 right provided that the inspection that is carried is carried out in accordance with the consent that is given and is proportionate – i.e. it does not invade the non-professional life of the individual in question.

45 A difficult question can sometimes arise for a regulator who suspects that a registrant, for example, is suffering from a medical condition, such as alcoholism, which may be preventing the proper performance of his professional duties. In circumstances where an inspector observes a

46 At the other end of the scale is the case where an inspector may suspect that there is some medical condition but there is no evidence of it either on inspection of the practice or from the practice records. In those circumstances, whilst it might be justifiable to inquire into the medical or mental health of a particular registrant, it may be a step too far to require such a registrant to provide medical evidence to the College itself. Each case will of course depend on its own facts. The principle is that the College is only entitled to interfere with the private life (as opposed to the professional life) of an individual registrant in circumstances which are (a) justified by law and (b) proportionate in the public interest.

Conciliation and Mediation

47 I have been asked whether a complainant may be told that a complaint cannot be dealt with because it raises, for example, an issue of negligence that could not amount to either serious professional misconduct or "*disgraceful conduct in a professional respect*", but that a mediation or conciliation procedure may be followed.

48 The example which is given is that of a case where a member of the public finds that an animal has been carelessly treated but the fact would not justify a finding of "*disgraceful conduct in a professional respect*".

49 The College is limited in the way it can allocate its funds by reference to the statutory schemes, and its Charter.

50 I am instructed that the only source of income available to the College is that which is achieved through fees paid on annual registration by registrants. In these circumstances it will be necessary for the College, if it were to establish a conciliation or mediation scheme, to do so in accordance with the statutory purposes pursuant to which the registration fees are obtained.

51 On balance I consider that a conciliation scheme can only be established in the following way under the current legislative scheme.

52 Under section 15(1) of the Act the Preliminary Investigation Committee of the Council is under a duty to conduct a preliminary investigation into "*every disciplinary case*", and a disciplinary case is defined as a "*case in which it is alleged that the person is liable to have his name removed from the register or to have his registration suspended*" under section 16.

53 It is likely that most of the cases which might arise for possible conciliation or mediation will be cases where a complaint has been made to the Preliminary Investigation Committee by a member of the public. The Committee's duty is to investigate such complaints. It is not the duty of the Preliminary Investigation Committee to resolve every complaint to the satisfaction of complainants. The PIC's duty is one of investigation. The professions have a long history not only of well founded complaints, but of ill-founded complaints being made by those who are aggrieved when they perceive something has gone wrong when on proper investigation it is found that nothing has. The duty of the PIC is to investigate and where it is satisfied on both the evidential and public interest tests to which it operates that a case should be brought before the Disciplinary Committee that this does occur. However, it may well be the case that in carrying out such investigation it reaches the conclusion that there is neither an evidential basis nor a public interest basis for a prosecution to be brought before the Conduct Committee.

54 In circumstances where there is a duty to investigate a complaint, as well as a duty to discharge the public interest function, namely of protecting the public against risk and of maintaining the reputation of the profession, it is appropriate for the College to allocate resources to a function which enables it satisfactorily to resolve complaints. In this context it is appropriate for the College to establish a conciliation or mediation mechanism. In order for such a mechanism to comply with the statutory purposes under which the College operates the mediation/conciliation must occur where there has been a complaint where the College considers that it is not one which it is in the public interest to be pursued before the Disciplinary Committee (applying the twofold test set out above) but considers that satisfactory resolution can occur through conciliation. I stress the importance that conciliation is not going to be appropriate in

Continuing Professional Development (CPD)

55 I have been asked about two areas of continuing professional development. The first is whether or not the College can make it compulsory through its own Guidance to the profession that it requires registrants to undertake a specified annual number of hours of CPD. Further, the College would wish to require registrants to complete and lodge with the College a CPD record card.

56 It is perfectly proper for the College to publish in its Guidance a requirement that registrants should complete the specified number of CPD hours each year and that registrants should lodge CPD record cards with the College.

57 In circumstances where a registrant has failed either to complete the specified hours or to lodge a record card, it will be proper for the College to consider a prosecution before the Disciplinary Committee for the offence of "*disgraceful conduct in a professional respect*". I stress that each case will turn on its individual facts. Where the College has published a requirement widely to the profession that the profession must undertake a specified number of hours of CPD and that the records of such CPD should be lodged with the College and has warned that the College may treat failure on either ground as disgraceful conduct, then in serious cases of breach it is possible that a conviction for "*disgraceful conduct in a professional respect*" can be established. In cases of trivial or minor breach I would not expect a conviction to occur. The more serious the breach, or the more often the breach is repeated, the more likely it is that a conviction for an offence of "*disgraceful conduct in a professional respect*" will arise.

58 The requirement that a record card should be lodged is appropriate for the same reasons. Again, a single failure to provide a record card or a failure to provide a record card or a delay in the provision of a record card, is unlikely to lead to the finding of "*disgraceful conduct in a professional respect*". However, repeat failures after deadlines have been offered may well result in such a conviction.

PDP

59 In the first year of practice a registrant is required to undertake a professional development programme which is more demanding than that which would apply for those in subsequent years of practice.

60 I have been asked whether a failure on the part of a new registrant (i.e. a person in year 1) would entitle the College to refuse to register the applicant for year 2.

61 In the absence of a finding by the Disciplinary Committee of disgraceful conduct, I do not consider that it would be permissible for the College to refuse to register a person for the simple failure to undertake PDP or to return a PDP record card. This is because the scheme of registration did not contemplate continuing professional development as a prerequisite of registration under sections 1 to 14 of the Act.

62 Nevertheless, a failure by a person to lodge a record card or to complete the required hours of PDP can properly lead in cases where the facts justify, to a charge being made before the Disciplinary Committee of disgraceful conduct. The essential prerequisite is that there has been published to the profession a requirement to complete PDP and to lodge the record card.

Assessed Appraisals

63 The College has asked whether it could embark upon a revalidation or assessed appraisals process as part of its CPD requirements. Again, for the reasons which I have already alluded to in the earlier sections of this Opinion, it is open to the College to set out in its Guidance that it may require a person for a good reason to undergo an assessed CPD or appraisal. As things currently stand I do not consider that it is open to the College to refuse to register a veterinary surgeon immediately upon his satisfying a degree qualification by requiring him or her to undergo a further appraisal. Subject to effluxion of time cases (see below), the concerns which the College has, can be dealt with by Guidance and the use its disciplinary process in order to maintain standards. This is because I do not consider that the scheme of registration as provided for in sections 2 to 14 permits the imposition of an appraisal or reappraisal process as a condition of registration immediately after passing a qualifying degree. If the College were to attempt to impose such a system as part of its registration process it would be susceptible to challenge on judicial review. The College must therefore use its disciplinary process in order to police standards.

64 Section 3(1) of the 1966 Act gives a UK applicant the entitlement to be registered and to become a member of the College where the Privy Council has made the relevant recognition order. Unlike the position under section 5A (EU registrants), section 3 is not an implementation of any European Directive and so the meaning to be given to the statute is whatever Parliament's intention can be established to have been. I think it is clear that the intention would have been for the registration to take place as a matter of entitlement.

65 However, to prevent a perception of unfair treatment as compared with EU applicants in a similar position, the Guide should make provision where there has been an effluxion of time post degree without practice for (a) any necessary CPD to bring the applicant up-to-date and (b) testing to take place. It should be made clear to the applicant (and on the register) that they are not entitled to practise until this is complete. This creates a broad equivalence with the way the EU applicants are treated under the *"compensation measures"* provisions, while respecting the actual words used and their differing contexts in the legislative provisions. See further below.

Fees

66 I have been asked to advise on what steps the College can take in order to ensure that members of the public are not unfairly overcharged by veterinary surgeons.

67 The relevant background is as follows:

(1) There is no requirement as to the level of fee setting contained within the current Guide to Professional Conduct;

(2) In the case of *RCVS v. Bailey*, the Disciplinary Committee did not convict a registrant of disgraceful conduct in relation to his fees although they were critical of the lack of transparency in respect of his fee arrangements;

(3) Under the Provision of Services Regulations 2009 SI 2009/2999 which implement the services directives a provider must (a) make the price available and/or (b) the method of calculation of fees available for the public before work is undertaken.

68 Against this background it will be perfectly proper for the College to publish in the Guide to Professional Conduct what it considers to be the proper approach to fee charging by registrants. In consultation I understood that the College does not want to set fee rates or bracketed rates

(1) Make their prices available before consultations occur;

(2) Make the methodology of price charging available before consultations occur; and

(3) To publish prices. The College may if it wishes include a requirement that any mark-up on prescription-only medicines (POMs) should be included although this is (and indeed all of these steps) are a matter for its judgment.

69 Again, the Guide should make clear that failure to comply with these requirements may be considered to be "*disgraceful conduct in a professional respect*".

Business Entities

70 The statutory scheme pursuant to which the College regulates the profession is a scheme of individual regulation and discipline and not of entity regulation and discipline.

71 Against this background the only way by which the College can ensure that practices conform with proper professional standards is to ensure that all members of the College who work within such practice comply with proper professional practice methodologies and practices in their work.

72 It will be proper for the College to publish in its Guidance requirements along the following lines:

(1) That there must be oversight of and maintenance of standards within the practice;

(2) Where members provide their services through corporations, or limited liability partnerships, they should ensure that a chief veterinary officer is employed by the practice and is responsible for the maintenance of standards within the practice.

(3) In conventional sole practitioner and partnership arrangements the College may want to impose a similar such standard for example by requiring that in sole practitioner firms and/or in conventional partnerships there should be a member who is responsible for maintenance of standards.

73 There should be included within the Guide a requirement that individual registrants are responsible for arranging their practice affairs and business

Standard of Proof

74 Most modern regulators have moved to use of the civil standard of proof in disciplinary proceedings. There are some exceptions, for example the Bar Standards Board still uses the criminal standard of proof as does the Solicitors Disciplinary Tribunal in cases where it is not hearing appeals under section 44(d) of the Legal Services Act 2007.

75 Under the Veterinary Surgeons Proceedings Rules 2004 the standard of proof is established under rule 23.6 as follows:

"*The highest civil standard of proof, so that it is sure.*"

76 This definition is tautologous. The civil standard of proof is proof on the balance of probabilities. The criminal standard of proof is proof so that the tribunal is sure or (and it is synonymous) sure beyond reasonable doubt.

77 There is a muddle in the definition contained within rule 23.6. In the House of Lords' decision of *In Re H (Minors)(Sexual Abuse Standard of Proof) 1996 AC 563 at 586d-h* Lord Nicholls finally resolved the notion that there was a floating or moving civil standard of proof. There is not. In civil proceedings, which is what proceedings are under the 2004 Rules, see rule 14.1 specifically, the civil standard is a standard of proof on the balance of probabilities. There is no such thing as a shifting civil standard of proof.

78 The reality is that the 2004 Rules as currently set out are in fact providing for a criminal standard of proof using language which refers to a civil standard of proof. The only way that the College can move to a conventional civil standard of proof is by obtaining a legislative change to rule 23.6.

79 It may allay concerns if I point out that the Disciplinary Committee will be required to recognise (if there is a shift to the conventional civil standard of proof) that the more serious the charge that is brought the greater the cogency of evidence which will be required to prove the charge assuming that the civil standard applies. As Lord Nicholls points out *In Re H* (supra) if a person is charged with conduct which it is most unlikely for that person to have committed, then a court or tribunal will require much more cogent evidence to prove that charge. The cogency of the evidence which is

80 The College may wish to address what is a muddle in the current drafting of rule 23.6. If the College is to move towards a modern regulatory system, by adopting the civil standard of proof it will have to seek a legislative change in order to do so. There is no reason in principle why it should not do so if it should wish as the civil standard is the standard to which most regulatory bodies now work, and the College also accepts that its proceedings are civil as rule 14.1 requires.

Criminal Convictions

81 I am asked whether the College can require registrants to declare criminal convictions when making application to the College. This question is also related to whether or not the College can refuse to register applicants if they have criminal convictions which render their character unsuitable for veterinary practice.

82 The College is exempt from the Rehabilitation of Offenders Act 1979. Further, it is plainly a matter which would lead to removal from the register if an individual acquires a criminal conviction during practice which renders him unsuitable for the profession.

83 It is therefore relevant for the College to ask whether or not a person has criminal convictions. The question is the nature and extent of the inquiry?

84 In circumstances where the College is not bound by the Rehabilitation of Offenders Act 1979, it can ask an applicant to divulge criminal convictions which are spent.

85 Further, the College can require disclosure of convictions which may render the individual unsuitable for membership of the College.

86 Against this background the correct questions to ask on an application form are along the following lines:

(1) Do you have any criminal convictions? [You must declare any criminal conviction even if they are spent.]

(2) Do you have any cautions? [You need not declare spent cautions.]

(3) [You must declare all criminal convictions except driving offences which have not led to disqualification.]

87 In discussion in consultation it seems to me that questions along these lines will satisfy both the public interest and be workable from an administrative point of view. There are variants on the way in which these questions can be asked. However, the clearer the question and the greater the requirement for forthright disclosure, the greater will be the protection of the public interest. The more confused the recipient of the form is going to be, the more problematic will be the administration process, and the more likely that the public interest will not be served because some individuals slip between the grills.

88 I confirm that as a responsible regulator the College is entitled to ask on annual declarations prior to re-registration whether or not a person has been convicted of a criminal offence. It is a legitimate inquiry because if a person has committed a criminal offence then registration need not occur and/or disciplinary proceedings may follow. The failure to answer that question on re-registration could, in circumstances where the reason for the

Is there a discretion to refuse registration in circumstances where a criminal conviction has been declared?

89 It is necessary for me to set out the statutory scheme. The scheme provides, where relevant, as follows:

(1) Under section 3(1) of the Act where the Privy Council has made a Recognition Order in respect of a particular degree those who have attended those courses (and passed them) "*at that university … shall be entitled to be registered in the register and shall on being so registered become a member of the College*".

(2) If a person is a vet within a community country (i.e. a European state) then under section 5(A)(1)(c) the registrar "*where the documentation produced under paragraph (b) shows that the person has been convicted of any criminal offence or offences (whether in the United Kingdom or elsewhere) is of the opinion that the person's having been convicted of the offence or offences does not render the person unfit to practise veterinary surgery ... shall register such person*".

(3) Under section 6 of the Act a Commonwealth or foreign practitioner (i.e. non-European) if he shows to the satisfaction of the registrar –

"*(a) That he is of good character*

… shall be entitled to be entered in the register and on being so registered shall become a member of the College".

90 Under section 10 of the Act:

"*(2) A person applying to be registered in either of the said registers shall produce or send to the registrar the documents conferring or evidencing his qualification for registration, together with a statement of his name and address and such other particulars, if any, as may be required for registration*".

91 Under section 11 of the Act the Council is empowered to make regulations with respect to the register.

92 Section 11 empowers the Council:

"*to make regulations with respect to the form and keeping of the register, the making of entries therein and the removal of entries therefrom, and, in particular –*

(a) Prescribing a fee to be charged on the entry of a name in the register …

(b) Prescribing a fee to be charged in respect of the retention in the register of the name of a person in any year subsequent to the year in which he was first registered …

(c) Authorising the registrar, notwithstanding anything in this Act, to refuse to make in, or restore to, the register any entry until the fee prescribed by regulations under this section has been paid …

(5) The Council may give directions authorising any additional qualifications specified in the directions to be entered in the register on the application of registered veterinary surgeons by whom they are held."

93 It will be seen from the foregoing summary that there is express requirement for European practitioners as well as for foreign or non-European practitioners to be required to declare convictions or matters relating to their characters which may entitle the registrar not to register them if they are unsuitable for registration as a result of such conviction.

94 There is however no reference in either section 3, or sections 10 or 11 to an express power on the part of the College or the registrar to take into account character when it comes to the registration of a United Kingdom applicant for registration.

95 In my view, the gap that is otherwise apparently contained in section 3 is illogical. It would be discriminatory against European veterinary surgeons (for example) for them to be of good character as a pre-requisite to registration if English registrants were not similarly so required.

96 I regard the absurdity that is produced by the absence of such an express requirement contained within section 3 of the Act to be capable of resolution by reading in to section 3 the following words after the words "*and shall*", "*if he is of good character*". However if a person manages to obtain an entry onto the register without declaring criminal convictions which then subsequently come to light I advise that (i) the person should be asked to consent to the removal of his name and (ii) in the absence of consent the matter must be referred immediately to the Disciplinary Committee.

97 This language I refer to above seems to be a necessary implication into section 3. It is the same language that is to be found in section 6(1)(a) and is also consistent with the requirements which would apply to European lawyers. In any event a United Kingdom registrant is also a European veterinary surgeon in the sense that the United Kingdom is a member of the European Community. For all of these reasons, I regard it as likely that a Court will fill the apparent gap in the statutory scheme in the way I have outlined.

98 This area is by no means risk free. However, I regard the risk of the College being subject to judicial review challenge by a registrant who has refused to answer questions about character or previous convictions, or has not been registered because he is considered to be of bad character and/or a person with relevant previous convictions, to be worth taking. It goes

English Language Skills

May the College say to vets who are entitled to be registered in other EU states without (a) English language proficiency and (b) CPD requirements, that they must, to be registered with The College to practise as vets in England, (a) sit an English language test and (b) complete CPD requirements? If the answer is no the College may not do that, does this discriminate against English registrants who do have to do CPD?

99 Sufficient English language proficiency is obviously necessary one might think before any registrant, English or otherwise, can practise in the UK as such, since this is fundamental to public protection and animal health. Understandably, the College considers that this requirement ought to apply across the board to all vets registered with the College. The powers available to the College to address this issue are set out in the 1966 Act as amended and in the 2007 Regulations insofar as they are to be found anywhere. There are five lists which form the register maintained by the College. They are set out in section 2(2):

(i) the General List: this records UK university graduates (sections 3 and 4) and *"Community entitled persons."* The latter are of two types (i) Eligible European Veterinary Surgeons (section 5A) and (ii) Non-Eligible European Veterinary Surgeons (section 5B).

(ii) the Commonwealth List: this records vets from the Commonwealth. Section 6 provides for the Council to be *"satisfied that he has the requisite knowledge and skill to fit him for practising veterinary surgery in the*

"(2) Without prejudice to any other steps which the Council may take for the purpose of satisfying themselves that a person has [the requisite knowledge and skill to fit the person for practising veterinary surgery in the United Kingdom], the Council shall for that purpose, except in a case falling within the next following subsection, require him to sit for examinations held for the purposes of this section by or under arrangements made by the College.

(3) If a Commonwealth or foreign qualification held by a person is of a kind accepted for the time being by the Council as constituting, in itself, satisfactory proof of that person's possessing the requisite knowledge and skill to fit him for practising veterinary surgery in the United Kingdom, that person shall be taken to have satisfied the Council that he has the said knowledge and skill."

(iii) the Foreign List: this records registrants from non-EU, non Commonwealth states and is subject to the same provisions of section 6 just discussed.

(iv) the Temporary List: this records those who have passed exams leading to recognised degrees but have not yet been formally awarded their degree and Commonwealth or Foreign vets who are to practise as vets temporarily or otherwise under restriction. Section 7 gives a broad power to the Council to impose appropriate restrictions: "[it can] *direct that he be registered in the register subject to such restrictions as the Council may specify in the direction with respect to the period for which, the place*

(v) the Visiting European List: this records visiting European vets and provision is made in Schedule 1B for passing an *"aptitude test"* pursuant to the European Communities (Recognition of Professional Qualifications) Regulations 2007 if the vet is required to take such a test under Part 2 of the Regulations. The Regulations require the College to check the professional qualifications of the vet *"prior to the first provision of services"*. Regulation 15 appears to be wide enough to support language proficiency testing where that is necessary and proportionate following the check and in light of the service to be performed:

"(1) Subject to regulation 16, the competent authority for a profession which has public health or safety implications shall, prior to the first provision of services, give the applicant the opportunity to show that he has acquired the knowledge or competence lacking where:

(a) the result of a check under regulation 14 demonstrates that there is a substantial difference between the professional qualifications of the applicant and the training required to access and pursue the regulated profession in the United Kingdom, and

(b) the substantial difference is such as to be harmful to public health or safety. [if the exams for the applicant's qualification were not set and answered in English, this is likely to be satisfied]

(2) In the circumstances specified in paragraph (1), the applicant shall demonstrate that he has acquired the knowledge or competence lacking, in particular, by taking and passing an aptitude test. [this is not clear about whether proof short of taking a test would suffice, but my view is that that ought to be permitted as good common sense and is open on the wording].

100 As the above shows, as to veterinary students graduating from UK universities subject to a recognition order in section 3, there is no express provision that might permit the College to apply any English language proficiency requirement. This is understandable as a recognition order will only be granted by the Privy Council if *"it appears that the courses of study and examinations are such as sufficiently to guarantee that the holders of the degree – will have acquired the knowledge and skill needed for the efficient practice of veterinary surgery."* As the exams set by these universities will invariably be in English, the Privy Council will be satisfied that graduates will possess sufficient English language skills for efficient practice as a vet in the UK (the gloss added here - in the UK – seems the reasonable and preferable interpretation of s3(1)(b)(i) as the section itself is dealing with UK university courses being assessed by a UK constitutional body).

101 As to Eligible European Veterinary Surgeons, since the last paragraph shows how the College is satisfied of the language proficiency of UK university graduates pre-registration and, as above, the other remaining categories each have room for confirming that English language proficiency is sufficient where there are concerns, this category *prima facie* appears to be the one category in which the College does not have the power to ensure the English language level of vets registering via this route.

102 I understand that this topic has been an issue of dispute between other health professional regulators and the Department of Health for some time in that the latter take the view, for instance that *"the GMC must accept an EEA migrant's qualifications if they meet the minimum standard and cannot impose an additional test e.g. for language competency before registration."* (DoH, "Delivering Quality in Primary Care, Language Knowledge"; 4 Feb 2010). They take the view that language proficiency is then a matter for employers to assess on a proportionate case-by-case basis.

103 The wording of section 5A appears to confirm this position, in that the entitlement to registration is stated in absolute terms:

"(1) A person who is a Community rights entitled person is entitled to be registered in the register if—

(a) the person is an eligible European veterinary surgeon (see Schedule 1A);

(b) the person applies to be so registered by producing to the registrar the documentation specified in subsection (3) [none of this relates to language skills, although proof of nationality is required]*; and*

(c) the registrar, where the documentation produced under paragraph (b) shows that the person has been convicted of any criminal offence or offences (whether in the United Kingdom or elsewhere), is of the opinion that the person's having been convicted of the offence or offences does not render the person unfit to practise veterinary surgery.

(2) A person shall become a member of the College on being registered under subsection (1)."

104 Section 5A was inserted in the 1966 Act by the Veterinary Surgeons Qualifications (European Recognition) Regulations 2008 (SI No 1824 of 2008), which in turn gave effect to the Professional Qualifications Directive (Directive 2005/36/EC). This means that in interpreting this section, regard may be had to the Directive. Article 53 specifically states that: *"Persons benefitting from the recognition of professional*

_____ *for public health and safety and consumer protection*...[my emphasis]" However, on reflection I have concluded that for the following reasons passing an English language proficiency test cannot be made a pre-condition to registration by an applicant who falls within Section 5A of the Act. My reasons, after some considerable thought, for reaching this conclusion are:

104.1 The general list maintained by the College is described in Section 2(1) and 2(2) as a list of those "**entitled**[6] to be registered under Sections 3, 4 or 5A of this Act". One cannot avoid the fact that the language of "entitlement" is used in respect of each of the relevant sections, including 5A. The draftsman has therefore proceeded on the basis that an **entitlement** to be entered on the register arises if a candidate for registration satisfies the conditions set out in any one of these sections.

104.2 A person who obtains a qualifying degree in the UK which has been recognised as such by the Privy Council obtains an entitlement to registration under the clear language of Section 3(1)

[6] My emphasis

of the Act (subject to the point I make above about criminal conviction);

104.3 The language in Section 5A "shall be entitled to be registered and on being so registered shall be a Member of the College" mirrors the language of entitlement which is found in section 3(1) for those who obtain a qualifying UK degree.

104.4 Similar language of "entitlement" is to be found in Section 4 in respect of those who have obtained a degree followed by successful completion of a College examination.

104.5 Schedule 1A simply contains a list of qualifying University degrees without there being any English language qualification nor room to assume one, such as occurs where the degree course which the Privy Council has recognised is taught and examined in English.

104.6 Section 5A(2) with its use of the word "shall" leaves no room for an English language test pre-registration and the language elsewhere in S5A does not. In other words the entitlement to registration arises on fulfilment of the express S5A and Schedule 1A conditions.

104.7 The effect of the foregoing is that an entitlement to registration arises on the Registrar being satisfied that the EU registrant fulfils the express statutory criteria for registration.

104.8 The fact that Parliament, when seeking to give the Directive legislative force in the UK could have created a statutory power in Section 5A to enable the College to hold a proficiency test prior to registration, does not mean that having not done so expressly in S5A as drafted the section should be read as if Parliament had by implication. I do not consider that such an implication arises on the well known criteria of necessity or to avoid absurdity because (a) it is possible for there to be a post registration requirement of proficiency (see below) and (b) I doubt that the majority of those

105 The result of this is that the safer course for the College is to require under its Guide that registrants should have sufficient English language skills to be able competently to practice their profession using the English language, and to attend and pass a test if required by the College. The College can set up as part of its information gathering exercise on registration a form which must be supplied in English from which the College can select those who must undertake the test. Failure to undertake the test or to be able to communicate properly in English can be the subject of disciplinary action under Section 16 of the Act.

106 The test must be a suitable one for someone who wishes to practise as a vet, simple enough to operate without being administratively burdensome, and one which objectively tests proficiency without being discriminatory. It ought to be possible for a straightforward test to be operable within the Registration Department albeit by someone suitably qualified to administer it.

107 Support for member states operating either or both a pre-registration and post registration test can be found in the document from the European Commission in which they gave guidance to the Member States on transposing the Directive into national law:

"This means that language tests are not absolutely excluded, but they cannot be used systematically nor be standardized. The individual situation of the migrant must be fully taken into account. Moreover, there should be no restrictions as to the language certificates which may attest of language knowledge or on any other means of proof. In addition, evaluation of language knowledge is not part of the

procedure for the recognition of professional qualifications but is one of the requirements (subject to proportionality) for access to the profession..." [7]

Whilst this supports the proposition that member states may operate a pre-registration test, albeit not standardised or systematic, it does not assist on whether the 1966 Act must be construed so as to conclude that the UK has in this case of necessity created a power to conduct a language test **pre**-registration and to refuse registration to those who fail or do not take the test.

108. The 2007 Regulations allow the competent authorities such as the College to require the applicant, in certain circumstances, to undertake an *"adaptation period"* or *"aptitude test"* at his option, prior to authorising the applicant to practise in the UK. It is expressly provided that the status of the applicant before the period is completed, or the test is passed, is a matter for the College. Whilst this would be consistent with an interpretation of the 1966 Act to the effect that language proficiency is a pre-requisite of registration, it does not on analysis support an implication of language to that effect.

109. I set out below the relevant regulations, regulations 23 to 25:

"Compensation measures - adaptation periods and aptitude tests

23.*—(1) An adaptation period means, in relation to the regulated profession which the applicant seeks to take up or pursue in the United Kingdom, a period of pursuit of a regulated profession under the supervision of a qualified member of that profession, subject to an assessment of the ability of the applicant to pursue that profession in the United Kingdom.*

(2) The competent authority shall clearly set out the detailed rules governing the adaptation period and its assessment, having regard to the circumstances of each individual applicant and, in particular, to the fact that he is a qualified professional in another relevant European State.

[7] Doc on the EU website; this quote is taken from a paper prepared by the General Dental Council on the equivalent problem

(3) The applicant may be required to undergo further training during the adaptation period.

(4) The applicant's performance during the adaptation period shall be assessed by the competent authority.

(5) The professional status of an applicant during the adaptation period shall be a matter for the competent authority.

***24.**—(1) An aptitude test means, in relation to the regulated profession which the applicant seeks to take up or pursue in the United Kingdom, a test of the applicant's professional knowledge conducted by the competent authority with the aim of assessing the ability of the applicant to pursue that profession in the United Kingdom.*

(2) The test shall take into account that he is a qualified professional in another relevant European State.

(3) The competent authority shall determine the matters to be covered by the aptitude test as follows:

(a) the competent authority shall establish the subjects which, on the basis of a comparison between the education and training required for the practice of the profession required in the United Kingdom and that received by the applicant, have not been covered by the diploma or other evidence of formal qualifications possessed by the applicant;

(b) the test shall cover subjects selected from those so established, the knowledge of which is essential for the pursuit of the regulated profession in the United Kingdom; and

(c) the test may include knowledge of the relevant rules of professional conduct.

(4) The detailed application of the aptitude test and the professional status of an applicant preparing for the aptitude test shall be a matter for the competent authority.

25.—*(1) A competent authority may, before authorising the applicant to practise the regulated profession in the United Kingdom, require him in the circumstances specified in paragraph (3) either (but not both)—*

(a) to complete an adaptation period of up to three years with a successful assessment, or

(b) to take and pass an aptitude test.

(2) If a competent authority intends to require the applicant to complete an adaptation period or take an aptitude test it must first examine whether the knowledge acquired by the applicant in the course of his professional experience in a relevant European State or in a third country is such that it fully or partly covers substantially different matters.

(3) A competent authority may require the applicant to complete successfully an adaptation period or pass an aptitude test if:

(a) the duration of education and training of which he provides evidence, under paragraphs (1), (2), (3) or (4) of regulation 22, is at least one year shorter than that required by the regulated profession in the United Kingdom;

(b) the education and training he has received covers substantially different matters than those covered by the evidence of formal qualifications required for the regulated profession in the United Kingdom; or

(c) the regulated profession in the United Kingdom:

(i) comprises one or more regulated professional activities which do not exist in the profession in the applicant's home State, and

(ii) that difference consists in specific training which is required by the regulated profession and which covers substantially different matters from those covered by the applicant's attestation of competence or evidence of formal qualifications.

(4) In this regulation, "substantially different matters" means matters of which knowledge is essential for pursuing the profession and with regard to which the training received by the applicant shows important differences in terms of duration or content from the training required in the United Kingdom."

109. It is clear from the above that an assessment of each applicant is necessary. The definition of *"substantially different matters"* is wide enough to cover English language as constituting *"matters of which knowledge is essential for pursuing the profession";* additionally there would be *"important differences in content"* where the applicant's EU degree was not taught in English.

110. As to CPD, a matter of continuing education and training; if there are no CPD requirements in the applicant's home state and they have been practising for longer than one year then "*the duration of education and training of which he provides evidence, under paragraphs (1), (2), (3) or (4) of regulation 22, is at least one year shorter than that required by the regulated profession in the United Kingdom.*"

111. Accordingly, the College would be empowered under regulation 25(3) to require such an applicant to either sit an aptitude test or undergo an assessed adaptation period, after considering "*whether the knowledge acquired by the applicant in the course of his professional experience in a relevant European State or in a third country is such that it fully or partly covers substantially different matters."*

112. For the reasons summarised above in relation to a language test I consider that imposition of CPD for European registrants as a post registration requirement can be imposed via the Guide. It can be supported where appropriate by the disciplinary procedures in s15 *et seq.* of the Act. That is to say, the applicant would be liable to removal from the register where the CPD failures were so bad as to constitute *"disgraceful conduct in a professional respect"*. It is important that guidance is given on the College's approach to this test,

particularly in the CPD context, both in the Guide and by better publication of the decisions made by the disciplinary committee. One option might be to publish a database of all decisions along the lines of the Health Professions Council as it appears that currently the College website publicises committee decisions by way of a findings publication. It then keeps this for 5 years. I do not consider that the fact that European entrants who apply for registration may not have undertaken PDP or CPD as may their English/UK qualified counterparts could give rise to any legitimate complaint on the part of the English/UK registrant. First, because all registrants would be subject to CPD including those entering via Europe. Second the College will, I assume, try to ensure that those who enter as European registrants will either have done the equivalent of PDP or else will be asked to do so in a similar way to their English/UK Counterparts.

113. In conclusion on this question:

(i) It is not possible to apply a standardised language test or CPD requirements to all EU applicants for registration. Whilst it may be arguable that a case-by-case and proportionate approach can be taken to justify a pre-registration test for Section 5A eligible candidates I do not consider on reflection that the statutory language justifies this approach. A post registration test which is worked up on a case by case and proportionate basis is the better approach.

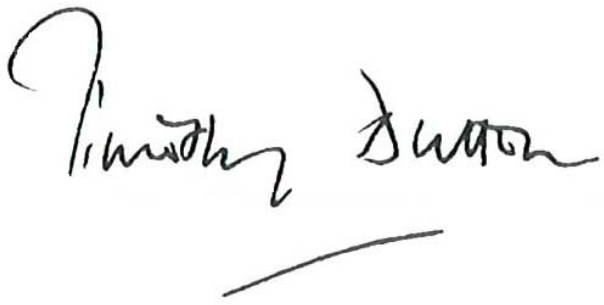
(ii) The College is bound to register the Applicant who fulfils the express criteria in Section 5A and Schedule 1A of the Act. It is arguable that by registering the EU applicant with a requirement or condition that the applicant cannot practise until the relevant assessment is complete the College would still not be complying with Section 5A. But a post registration requirement for those

(iii) The College is not able in my opinion to refuse to register the applicant until the relevant assessment is complete. On reflection the Government view appears from the language of the Act (Sections 5A and Schedule 1A) to be correct, although the contrary is arguable. Accordingly, and in my opinion, to impose a pre-registration language test on eligible European applicants who apply under Section 5A of the Act is a risky approach which may open the College up to potentially costly legal challenge.

(iv) It is worth the College contacting other health professional regulators such as the GMC and the GDC to discuss their thinking on this topic which affects all regulators who are *"competent authorities"* for the Directive's purposes in this area (albeit differently according to the particular statutory regime). There may be some scope for seeking Court clarification on a test basis; this will be better done with as many affected parties as possible being involved.

Conclusions

114. My conclusions to the key questions asked are that the College is able through publication of Guidance to the profession to introduce standards' monitoring and to take other measures such as the introduction of CPD and PDP using the prospect of disciplinary proceedings under Sections 15 and 16 of the Veterinary Surgeons Act 1966 Act for those who fail to comply with standards set out in Guidance if their conduct is considered to be disgraceful in a professional respect. The College can (indeed should) impose the same post registration CPD and PDP requirements for those who become registrants via the European route using the prospect of disciplinary action under S16 of the Act as the means of enforcement. The College is in my opinion able to introduce language proficiency tests for Non-UK entrants provided it does so proportionately and on a case by case basis and in the case of those applying as eligible European applicants who otherwise fulfil the statutory criteria does so after registration.



TIMOTHY DUTTON QC 8th April 2011

Fountain Court Chambers
Fountain Court
Temple
London EC4Y 9DH

IN THE MATTER OF THE VETERINARY SURGEONS ACT 1966

AND

IN THE MATTER OF THE ROYAL COLLEGE OF VETERINARY SURGEONS

JURISDICTIONAL MATTERS

OPINION

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