

Regulatory reform – Standard of proof and fitness to practise meeting

Friday 6 November 2020, 10am
Zoom meeting

Attendees

Julian Wells – Chair
Izzie Arthur (part) – Association of Veterinary Students
Maddy Campbell – Ethics and Welfare Advisory Panel
David Catlow (part) – BVA member
Ryan Davis – Society of Practising Veterinary Surgeons
Daniella Dos Santos – BVA Senior Vice President
Amelia Findon – BVA Head of Policy & Governance
Cath Grimsey – Veterinary Management Group
Dr Judith Hulf – non-vet
Malcolm Morley – Policy Committee
Catherine Oxtoby – BVA member
Gudrun Ravetz - BVA LWP representative
Peter Robinson – BVA member

Apologies: Fabian Rivers (recent graduate)

Welcome and ways of working

1. The chair welcomed attendees to the meeting and introductions were made.
2. It was noted that the chairs of all five BVA working groups contributing to the development of the BVA position on the recommendations from the RCVS Legislation Working Party had met 15 October to discuss ways of working. It had been agreed that transparency and open lines of communication with the wider membership would be important throughout the process, particularly given some of the concerns circulating around some of the recommendations. It had been proposed that details of working group activity, including membership, minutes, and emerging themes would be published on the BVA website, and promoted via BVA's weekly roundup and social media channels. There would also be a dedicated email address for members to get in touch with views. The proposed approach was supported and, subject to agreement across all five of the working groups, would be progressed in house.

Scope and objectives

3. The RCVS Legislation Working Party (LWP) had been established in 2017, tasked with examining the Veterinary Surgeons Act 1966 (VSA) and making proposals for reform with a view to enabling RCVS as a modern and efficient regulator. LWP had been asked to establish principles on which any reform would be based, and to ensure that any recommendations were considered in the round to produce a coherent vision.
4. Over the course of three years and eleven meetings the group had explored over 56 reform proposals, from fundamental questions to relatively minor changes, with BVA represented by Gudrun Ravetz. It was noted that LWP had developed five overarching principles for legislative reform. BVA had been able to influence these principles, including by lessening the original over focus on mirroring other healthcare professions. LWP had aimed to develop a set of recommendations which were fit for purpose now and in the future, with a view to modernising the regulation of the profession and demonstrating a commitment to best practice in self-regulation such that any future external challenge could be answered.
5. In discussion working group members made the following points:

- The disciplinary system needed to be fairer, faster, and cheaper for the benefit of all concerned. It was recognised that the motivations of RCVS, whose primary aim was to protect the public, would necessarily be different to BVA as voice of the profession. However, many of the desired outcomes could be the same.
- Most of the LWP proposals were for RCVS to have powers ‘in principle’ with the details to be agreed by RCVS Council. This meant that the profession was being asked to grant extensive powers to the College without the detail on what future changes might look like.
- The working group should be prepared to challenge the proposals but must do so in an evidence-based and coherent way, setting out the case for the regulation of the veterinary profession to differ from that of other regulated professions where appropriate.
- The debate over the appropriateness of a College that regulates was longstanding. Funding was a key factor as RCVS was able to fund a wide range of activities under its Charter functions, which might otherwise only be available at increased cost to the profession and therefore their clients.
- As well as responding directly to the recommendations, the working group should also identify any evidence or arguments that LWP might not have considered.
- The working group should also highlight any areas where more information was needed from the College before a view could be formed.

Standard of Proof

6. The standard of proof related to the degree to which a fact-finding tribunal must be satisfied that alleged events actually happened. In the civil courts, a tribunal must be satisfied that the alleged events were more likely to have happened than not in order to find an allegation proven (also known as on the balance of probabilities); in the criminal courts, the tribunal must be sure in order to find a defendant guilty (also known as beyond all reasonable doubt). The standard of proof currently applied at RCVS disciplinary hearings was equivalent to that used in criminal proceedings. This was set out in the Veterinary Surgeons and Veterinary Practitioners (Disciplinary Committee) (Procedure and Evidence Rules) 2004 and as such could be amended by an Order of the Privy Council. Working group members were reminded that the standard of proof was only applied at Disciplinary Committee (DC) stage and only then at Stage 1 of the hearing. However, it was recognised that it might guide the Preliminary Investigations Committee (PIC) in their decision-making around whether to refer a case to DC.
7. It was agreed that the proposal to change the standard of proof to the civil standard needed to be considered in the context of the other recommendations. Although it could be implemented without legislative change, the context of the package of measures was significant and it would be inappropriate to change the standard of proof in isolation.
8. It was noted that LWP had considered the nine (at the time) healthcare regulators overseen by the Professional Standards Authority, all of which applied the civil standard of proof. LWP had also noted that regulators for barristers, accountants, actuaries, auditors, architects, teachers, private security industries, and chartered surveyors all applied the civil standard in their respective disciplinary proceedings. At the time the only other professional tribunal applying the criminal standard in England had been the Solicitors Disciplinary Tribunal (SDT), although following consultation this changed in 2019. In discussion working group members made the following points:
 - Changes to the standard of proof by other regulators had not been without problems.
 - The GMC change to the civil standard in 2008 had been resisted by some, even against the backdrop of Shipman, and despite being introduced as part of a package of measures.
 - Views on whether the change had been for the better in human healthcare were mixed. The package had given flexibility to deal with current impairment, and the option of consensual disposal allowed local redress. Progress had been considerable, but also

slow. The fitness to practise approach was seen as particularly effective for those still in training as it allowed mistakes to be addressed at an educational level.

- It was important not to cherry-pick 'highlights' from other regulators.
- It would be useful to better understand the impacts of such a change in human healthcare, what the desired outcomes had been, and whether they had been achieved.

9. It was noted that the standard of proof adopted by veterinary regulators in other countries had also been considered by the LWP. The Veterinary Council of New Zealand, Boards in at least three Australian states, and two in Canada had confirmed they applied the civil standard. The working group agreed that it would be useful to have more information on impacts, and any associated package of measures, from these regulators. It could also be useful to hear from veterinary regulators in Europe, and the Council of the College of the Veterinarians of Ontario which had adopted a framework for regulatory decision-making 'Right Touch Regulation'.

Action: Secretariat to follow up with veterinary regulators and GMC.

10. In discussion the following points were made:

Impacts and desired outcomes

- It was unclear what issue or perceived issue the College was trying to solve, and for whose benefit.
- The primary driver for RCVS appeared to be alignment with other regulators, which should be challenged. It was noted that LWP had simply identified it as a risk.
- It was unclear whether there were reputational issues for the profession under the current standard of proof.
- The profession could face external challenge if it did not move to the civil standard of proof. Any decision not to align with other regulated professions must be based on sound reasoning as there was a potential reputation risk.
- The Law Commission statement on the regulation of healthcare professionals stated that the primary purpose of professional regulation was to ensure public safety. Vets did not usually represent a risk to public safety.
- The likely impact on disciplinary hearings should be assessed as this was where the standard of proof was applied. It appeared that LWP had only looked at the likely impact on PIC decision-making. The Vet Record article by Gillian Nevin, professional negligence and disciplinary lawyer, had suggested that the application of the lesser standard of proof in a number of recent cases would likely have found additional charges proved and may well have resulted in more severe sanctions being imposed.
- It was unclear how the proposal would protect animal welfare, if indeed that was the driver. The current disciplinary system did not deal with clinical matters, which were those more likely to directly impact on animal welfare, and it was unclear how animal welfare fitted into the RCVS regulatory function.
- It was unclear how animal welfare might have been protected had the hearings referenced in the Vet Record article applied the civil standard.

Whole systems thinking

- The principles of blame culture and whole systems thinking needed to feature in the debate. The environment within which a professional was working inevitably influenced behaviour, and systemic factors were more variable in veterinary work where there was no central employer.
- The current system was punitive rather than curative and should modernise.

- There was likely to be an expectation from the public that standards and animal welfare should be continually improved.
- An effective disciplinary system should address poor practice. A system focused on punishment represented little scope for addressing poor practice as the individuals were few and the punishment terminal.
- Veterinary professionals often found themselves caught between the needs of the client and the patient, where those needs might differ or be in direct conflict.
- The criminal standard was appropriate for the current system because a punishment-based approach should be based on certainty.

Package of measures

- In order to progress a change to the standard of proof all the other issues with the current disciplinary system must be addressed first. This would give confidence to the profession and allow the change to take place in a culture of trust.
- A culture of fear, perpetuated by an inadequate disciplinary process, was arguably the biggest risk to animal welfare.
- Understanding amongst the profession of what constituted serious professional misconduct was generally poor and needed to be clarified and communicated effectively before any change to the standard of proof. This should start at undergraduate level, which was where fears were fostered.
- Graduates may struggle with the realities of practice alongside concerns about the disciplinary process, which could lead to over diagnosis and over treatment.
- If a curative disciplinary process was in place, the standard of proof could be lowered and might help identify problems earlier.
- The language of disciplinary needed to change.
- Self-regulation could diminish public trust.
- Any fitness to practise process, however fit for purpose, was stressful by definition.
- The recommendations of LWP had highlighted a range of shortfalls in the current system which needed to be addressed.
- A change to the standard of proof alone would not necessarily better protect animal welfare, or any of the other factors considered by LWP (the public, the wider public interest, the respondent, professional standards, or confidence in the regulatory process)

Uniqueness of the veterinary profession

- There was a conflict of duty for vets, who were working for their clients but bound by the RCVS Code to put animal welfare first. The same conflict did not exist in human healthcare, although it was recognised some parallels could be drawn when the patient was a child and the wishes of the parent or guardian were in conflict with what was best for their health and welfare. However, it was also recognised that part of the role of the disciplinary process was to recognise and unpick that conflict. The existence of the conflict was not reason in itself to justify being treated differently to other professions.
- It might be more appropriate to focus on what represented best practice for the veterinary profession, rather than attempting to demonstrate why best practice or perceived best practice for other regulators was not directly transferable.
- Attempting to explain why the veterinary profession was different was an unhelpful distraction. The shortfalls in the system needed to be addressed before a change to the standard of proof could be introduced.

11. It was agreed that a change to the standard of proof should not be taken forward in isolation and should instead be accompanied by a package of measures which fostered a curative rather than punitive disciplinary system, based on whole systems thinking. A transparent and well communicated package would be needed to garner trust, with a change to the civil standard being the final step in the process.

Fitness to practise

12. The working group was reminded that RCVS DC currently only had the power to remove or suspend a veterinary surgeon's registration if they were guilty of serious professional misconduct (SPMC), had been convicted of a criminal offence that rendered them unfit to practise, or had been prohibited from practising in a European state after a finding of disgraceful conduct. The disciplinary process was comprised of four stages:
 - the enquiries stage: triaging to decide whether the statutory process is triggered
 - assessment and investigation: carried out by a Case Examiner Group to determine whether or not there is an arguable case of SPMC.
 - PIC: to decide whether or not there was a realistic prospect of proving the alleged facts and if so, that DC might find those facts amounted to SPMC.
 - DC: to establish the facts and then decide whether the facts amounted to SPMC. In the event of SPMC being proven sanctions would be decided – suspension, removal, reprimand, warning, or postponement with or without undertakings on the part of the vet.
13. It was noted that most of the healthcare regulators overseen by the Professional Standards Authority (PSA) operated a form of fitness to practise. The PSA considered that reform of fitness to practise was long overdue as it has evolved from a system of self-regulation by the professions themselves to a set of outdated and piecemeal legislation. This had led to varied outcomes across the regulators, and confusion for patients and professionals alike.
14. The [PSA's right-touch reform report](#), considered by LWP, had recommended an approach to fitness to practise that achieved public protection by means of meaningful remediation where possible, and degrees of restrictions on practice where not. Appropriate early resolution and remediation were key principles and, significantly, early admission and undertakings on the part of the professional were to be viewed favourably.
15. In discussion the following points were made:
 - The current disciplinary process was slow, and backward looking, with the focus being on whether or not a vet should be punished for a mistake which may have occurred several years previously. The current system did not decide whether a vet was currently impaired.
 - It was important to look at the events leading up to the mistake.
 - Systemic issues needed to be fixed rather than just looking at remedial issues surrounding the individual. However, it was unclear how a regulatory process could truly achieve such an aspiration and how individual behaviour and service delivery could be separated.
 - The effectiveness of the Care Quality Commission (CQC) was debateable but broadly speaking the principle was sound.
 - A system like the CQC for the veterinary profession would be enormously expensive and there were questions over how appropriate it would be for RCVS to take on such extensive additional powers.
 - The analogy of the set of scales from the PSA – the balance of regulatory force needed to achieve the desired effect – was something LWP may have overlooked.
 - The principle of looking at systemic issues linked to the LWP recommendations on assuring practice regulation.

- Links to the principle of reflective practice were also a consideration, where reflective practice also included the wider environment rather than just the individual.
- It could be appropriate for the proper application of reflective practice to be demonstrated as part of undertakings under a fitness to practise model. However, it was recognised that defining and assessing such application would be complex.
- Any fitness to practise model must also be fit for purpose beyond clinical roles. Mandatory practice regulation would not address systemic issues in non-clinical roles and although it was less common for vets in non-clinical positions to be the subject of a disciplinary hearing it was not unheard of.

16. It was noted that LWP considered that any new legislative framework should aim to achieve:

- A 'forward looking' process with the protection of animals and the public at its heart
- An enhanced suite of powers available to enable more effective investigations and case management
- A reduction in the length and cost of investigations/proceedings wherever possible
- The ability to amend/update legislation more easily in the future as systems and thinking developed.

17. The working group reviewed the LWP recommendations in turn making the following points:

Recommendation 4.1: Introducing the concept of 'current impairment'

- The proposal represented a fundamental change which should be welcomed.
- In human healthcare, patients and their families tended to value measures to ensure the same mistake would not occur again over and above punishment of an individual. Introducing the principle of current impairment was a step towards this and would be better for patients, clients, and vets.
- The principle of current impairment dovetailed with the proposal to introduce a wider range of sanctions, as this is where the need for justice on the part of the complainant could be addressed.
- It was agreed that the proposal should be supported in the context of the wider package of measures. It was also agreed that effective application of current impairment required an efficient system that could move quickly.

Recommendation 4.2: Widening the grounds for investigation

Recommendation 4.3: Introducing powers to impose interim orders

- The College already did this via the health protocol, although this currently required the consent of the individual.
- The principle was sound but details on how health issues would be assessed and managed were needed.
- Investigation on health grounds needed to be better defined. Some health problems might not have any bearing on competence.
- Poor performance needed to be better defined.
- It was likely that reports of poor performance or health issues would come from colleagues rather than clients. There needed to be a mechanism to ensure that employers could not abuse the system to address internal HR issues.
- Any package for addressing health issues must be supportive in its focus, particularly where mental health issues or addictions were concerned.
- Approaches to supporting those who were not neuro typical, or who might struggle with interpersonal and communication skills, would also need to be factored in.

- Support packages must extend to the environment within which the professional was working. This would be complex in veterinary work where there was a wide range of business models and approaches to managing time off.
- It was unclear how practical or affordable an effective system would be, and at what point RCVS saw their involvement being triggered.
- Recommendations 4.2 and 4.3 were inextricably linked. The regulator had a role in implementing interim orders to mitigate risk, but the College was not qualified to make health assessments on individual vets or design support packages for the vast range of health issues that could be factors in impairment.
- Loss of income for vets suspended from their work also needed to be considered.
- It was important interim orders were issued in a measured and consistent way based on evidence of risk. Although suspension was logical for some types of behaviour there should not be a blanket approach.
- In human healthcare Professional Support Units provided post-graduate support, helping to address issues or behaviours long before they led to disciplinary action. Although support was available for veterinary undergraduates it was lost post-graduation.
- There was a gap in the current system for support measures, which should be implemented long before disciplinary was triggered. Employers should be providing this support and it should not be made too easy for employers to shift the responsibility to RCVS.
- It was agreed 4.2 and 4.3 should be supported in principle, but more detail on practical application was needed.

Recommendation 4.4: Introduce reviews of suspension orders

- The proposal was pragmatic.
- The current system was punitive, and a move towards review and a forward look was appropriate.
- It was agreed the proposal should be supported, providing it was supportive and curative rather than backward looking.

Recommendation 4.5: Introduce a wider range of sanctions

- The proposal was in line with a less punitive and more curative approach as it would allow corrective measures to be put in place
- Impacts on income for the individual where restricted practice was imposed would be a concern for the profession and should be highlighted. Employers would also need to be on board.
- It was agreed the proposal should be supported as it provided opportunities to provide curative support

Recommendation 4.6: Introduce the power to require disclosure of information

- It would be useful to have more information on where the blockers currently were.
- Timely disclosure of information was critical and without a requirement on timeframes it was unclear whether statutory powers would change much in practice.
- It was agreed the principle should be supported.

Action: Secretariat to research approaches and impacts in the human healthcare sector.

Next steps

18. At the next meeting the working group would be invited to consider the interim proposals not requiring primary legislation, including alternative means for concluding DC cases (the Charter Case Protocol), and structural changes to the concerns process ('mini-PICs'). The group would also consider LWP recommendation 4.7: Formalise role of Case Examiners and allow them to conclude cases consensually.

Action: Members to notify the secretariat of any evidence or additional information to help inform the discussion, that could usefully be collated ahead of the next meeting.

19. In the meantime, the BVA secretariat would:

- Circulate the minutes of the meeting
- Circulate an emerging themes document summarising the advice to date from the working group, including any areas of difficulty for further consideration
- Share the advice to date with Policy Committee and Ethics and Welfare Advisory Panel for input
- Find a date for a third meeting of the working group in early January.

20. It was noted that BVA Council would be invited to review the activity of all five working groups at the meeting on 9 December. A webinar, in partnership with The Webinar Vet, would take place 1 December, providing an opportunity for the wider membership to engage with the discussions.

21. Working group members were thanked for their participation and considered input.

Date of the next meeting

22. The next meeting would be held **Thursday 3 December 10am-1pm (by Zoom)**