

IN THE MATTER OF THE ROYAL SOCIETY FOR THE PREVENTION OF
CRUELTY TO ANIMALS

SUMMARY OF JOINT ADVICE
OF SHAHEED FATIMA QC AND JONATHAN FOWLES
DATED 5 DECEMBER 2018

1. For the reasons summarised below (and set out in full in our Joint Advice dated 5 December 2018), we consider that it is possible and lawful for the Rules of the RSPCA ("**the Society**") to be amended under section 10 of the RSPCA Act 1932 ("**the 1932 Act**") so that the Society's governing body, the Council, is comprised of 12 people and that these are (a) 9 Council members who have been directly elected by the membership; and (b) 3 Council members who have been co-opted and that (c) it is possible and lawful for Branch/Regional representation to be at committee rather than Council level.

A. Background

2. The Society is a corporation established by the 1932 Act. From 1824-1932 it was an unincorporated society.
3. The 1932 Act and its associated Rules, as amended since, govern the affairs of the Society.
4. The Society also has Branches which are separate charitable associations. Those branches are grouped into Regions for various purposes, including the election of some of the members of the Society's Council, i.e. the Society's board of charity trustees within the meaning of section 177 of the Charities Act 2011.
5. The Council is given responsibility for managing the Society by section 9 of the 1932 Act. The Council's control of the affairs of the Society is subject to the 1932 Act and the Rules. These Rules set out in more detail how the Society is

to be governed, including how the Council is to be elected (section 9(3), 1932 Act). The Council has power under Rule IV(5) of the current Rules to make bye-laws to regulate the management of the Society.

6. The Rules are part of the 1932 Act because they were, in their original form, included as the Schedule to the 1932 Act.
7. The Rules can be amended using the procedure in section 10 of the 1932 Act without recourse to a further Act of Parliament or Parliamentary scheme. Section 10 of the 1932 Act allows the Rules to be amended by resolution of the Society membership. This is subject to the following two provisos – that (a) in the case of an amendment which affects the property or funds of the Society, the amendment is approved by the High Court or the Charity Commission and (b) in the case of any amendment, the amendment is not “repugnant” to the 1932 Act or the general law. Over the years, the Rules have been frequently amended.
8. The current Rules provide, by Rule V(1), for the Council to consist of up to 25 elected members, of whom 15 are to be directly elected by the national membership (“**National Representatives**”) and 10 by the Regions (“**Regional Representatives**”). Rule V(2) provides that a maximum of 3 further Council members can be co-opted, i.e. appointed onto the Council by the elected Council members themselves rather than elected.
9. The permitted number and proportion of co-opted members of the Council (as compared to elected members) has fluctuated since the 1932 Act. Although it has been settled practice since before the 1932 Act to have Regional Representatives on the Council, and for the Rules at least implicitly to provide for a 3:2 ratio of National Representatives to Regional Representatives (“**the Ratio**”), the operation and structure of the Society have also changed significantly over that time.

B. When can the Rules be amended by members' resolution under section 10 of the 1932 Act?

10. In accordance with judicial interpretation of the 1932 Act, as set out in *RSPCA v A-G* (Lloyd J, unreported decision, 31 March 1999) , our views regarding the scope of possible and lawful amendment is as follows::

10.1 A change to the Rules (for example in respect of the Council's composition and eligibility for Council elections) is lawful provided that it satisfies the proviso in §7(b) above i.e. the non-repugnancy requirement. A change to the Rules which deals with the composition of, or eligibility for election to, the Council does not require the approval of the High Court or Charity Commission. This follows in our view from the language and nature of the first proviso in section 10 of the 1932 Act: see §7(a) above.

10.2 The non-repugnancy requirement is a general requirement of consistency with the other provisions of the 1932 Act and the general law. This follows from the natural meaning of "repugnant" and from the context of the 1932 Act. That context supports the view that, by the 1932 Act, Parliament did not intend narrowly to restrict the members' freedom to change the Rules as compared with their previous freedom, as members of an unincorporated society, to do so.

11. The overall question, therefore, when considering the lawfulness of a proposed amendment to the Rules is to ask whether the proposed changes are inconsistent with the express or implied provisions of the 1932 Act or with general law.

C. Would it be inconsistent with the 1932 Act or the general law not to have Regional Representatives on the Council in a 3:2 ratio or at all?

12. In our view, for the three principal reasons summarised below, there would be no such inconsistency provided that the Council continues to be elected by

members of the Society and that all members are given the power to vote for National Representatives.

13. Before making those three points, it is helpful to put the 1932 Act in context:

13.1 The idea of regional representation on the Council appears to have originated in around 1905-1907 as part of attempts to improve relations between the Society and branches, which until that point do not appear to have been fully integrated into the Society. It was almost certainly the case that between October 1905 and August 1906 it was possible to be a Branch member without being a Society member. From October 1905, the Branches were divided into 16 groups, each of which was able to nominate one representative to the Council (at that time called the Committee). But it was only in August 1906 that Branch members were given (most of) the rights and privileges of the Society. Even then, only members of the national Society could vote for Council members.

13.2 Branch representation on the Council seems likely to have been connected not only with improving relations but with the Branch members' ineligibility to vote for Council members.

13.3 From at least 1907, Branch members could be national members but only on payment of the necessary subscription. Under rules made in 1907, the groups of Branches themselves were able to elect (and not only to nominate) Regional Representatives on the Council. The Ratio was introduced at this stage: 40 Council members, of whom 3/5 were to be National Representatives and 2/5 Regional Representatives.

13.4 However, in the period leading up to the 1932 Act there is nothing to indicate that the Ratio was regarded as unchangeable. For example, in 1929 the options of having a Council composed exclusively of National Representatives and of having a Council composed exclusively of Regional Representatives were considered but rejected.

- 13.5 The surrounding circumstances of a two-tier membership imply that Branch representation on Council was necessary to ensure that all Branch members (and not just those who were national Society members) continued to have at least an indirect say in the composition of the Council.
14. In light of the above: **first**, we do not consider that it would be repugnant (i.e. inconsistent) with the 1932 Act or the general law to remove all Regional Representatives from the Council or to change the Ratio. Section 9(3) of the 1932 Act requires the Council to be elected by the “members”. In the absence of any definition of “members” in the Act, it is reasonable to infer from the circumstances of the Society in 1932 that the relevant “members” were to be both members of the national Society and members of the Branches. However, regional representation on the Council is not explicitly required by the 1932 Act. The only part of the 1932 Act which requires there to be Branch representatives on the Council is the Rules. But the Rules are, as we have explained, expressly capable of being amended under section 10.
15. **Secondly**, as a matter of law and applying *R (N) v Lewisham Borough Council* [2015] AC 1259, it is doubtful that a settled practice will have any bearing on the interpretation of an Act unless there is ambiguity in the words of the relevant Act and judicial decision in support of the relevant practice. There is no such ambiguity in the 1932 Act or judicial decision to support relying on the practice of the Ratio or regional representation generally.
16. Furthermore, there is nothing to indicate that, as a matter of custom and practice, the Ratio has been treated as immutable since 1932. For example, the Sparrow Report of 1974 contemplated a possible ratio of 4:3 (12 National Representatives to 9 Regional Representatives). Crucially, the structure of membership has also changed. Society and Branch membership administration were overhauled in 1979. Key elements of the process were centralised. Both Society and Branch membership were retained, but by 1985 it is clear that it was **not possible** to be a member of a Branch **without** being a

member of the national Society. Accordingly, by this stage **all** Branch members would have been able to vote in the election of National Representatives. This has been the case ever since.

17. **Thirdly**, it is possible to look to secondary legislation made under a power of amendment in a statute in support of the interpretation of a statute (rather than as controlling its meaning), but this will only be a reliable guide where the secondary legislation is contemporaneous with the statute (*Hanlon v The Law Society* [1981] AC 124 at 193-94 *per* Lord Lowry). On this basis, it might be argued that, when interpreted in light of the original Rules, the 1932 Act does require regional representation and/or the Ratio. But there is no provision for this in the Act, and the Rules are expressly changeable, so in our view there is inadequate material to support this argument.

D. What number or proportion of the Council can be co-opted without inconsistency with the 1932 Act or the general law?

18. It is impossible to read section 9(3) of the 1932 Act as excluding the possibility of co-opting Council members, even though it requires the Council to have been "elected by the members according to the election procedure directed by the Rules" (emphasis added). This is because the original Rules forming part of the Act provide for up to 3 of the Council's members to be co-opted and section 9(3) should be read so as to be consistent with this involvement of co-opted members.
19. However, reading the Act as a whole and in light of the nature and purpose of the Society, we think it is unlikely that Parliament could have intended that there could be, e.g., just one elected Council member who then co-opted the rest of the Council. This would create the risk of abuse of power by one or a small number of elected members of the Council. The purpose of the requirement for the Council to have been "*elected by the members*" is likely, in our view, to have been that the Society should be governed by a Council in the ultimate control of the members of the Society.

20. Therefore, we consider that the number and proportion of the co-optees may be changed and increased, but elected members of the Council must always form at least the proportion of members of the Council which is the greatest majority required by the Rules at any particular time for any particular decision: currently 2/3. As matters stand, therefore, co-opted Council members may make up as much as 1/3 of the Council.

E. Would it be acceptable in principle to have a Council made up of only of National Representatives and co-optees, with the representation of the Branch/Region “voice” being placed at committee level?

21. There are 3 potential reasons why the Council might include Regional Representatives, but these reasons do not now apply. These reasons are as follows.

- 21.1 To improve the relations between the Society and the Branches. However, since 1979 there has been a unitary membership structure. The Society’s membership can no longer be viewed primarily as divided between a national Society on the one hand and local societies i.e. Branches on the other.
- 21.2 To avoid the risk that Branch members will be disenfranchised for lack of a say in the election of National Representatives. However, under the unitary membership structure, Branch members may, as Society members, vote for National Representatives.
- 21.3 To ensure that Branches/Regions had a “voice” on the Council. This is based on a misconception of the role of a charity trustee. A charity trustee is not there to advocate the interests of any particular part of the Society. They are instead obliged to act single-mindedly with a view to achieving the purposes of the Society as a whole. In this respect, regional representation at committee level is less problematic than at Council level.

22. Therefore, and in light of the other Sections of this Summary, in our opinion the proposed Council would be lawful. As a matter of principle, we consider that it is acceptable for the Branch “voice” to be at only committee level under the scheme of the existing Rules - provided that the relevant committee is set up in accordance with the requirements of those Rules.

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4 June 2019
