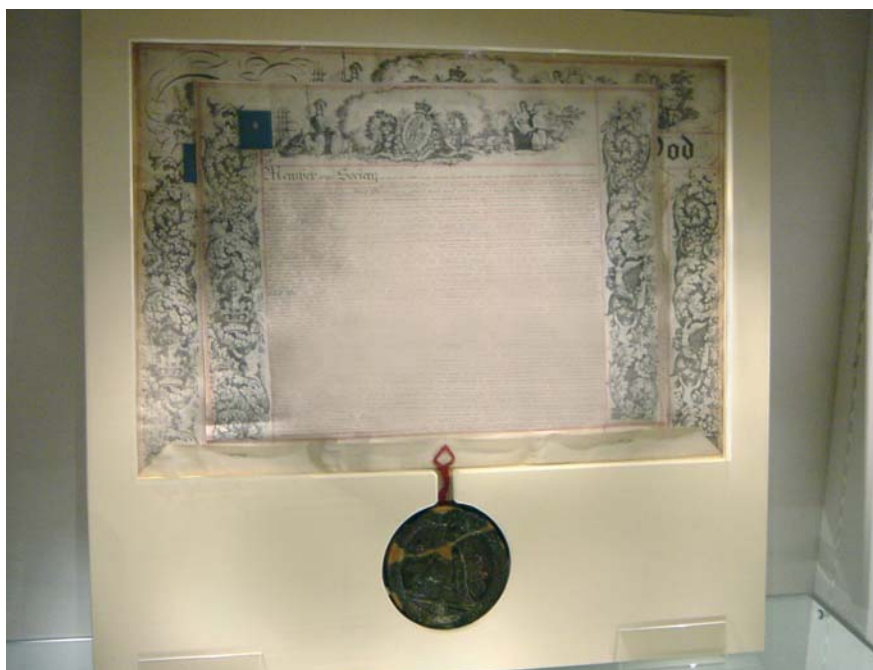


WHICH TAKES PRECEDENCE? THE SOCIETY'S CHARTER OR SECTION 60?

Nicholas Levisaur, The Journal's legal adviser, examines the provisions and constraints of the Royal Pharmaceutical Society's Charter in the context of the Society's modernisation programme



The Society's charter can be viewed on the first floor of the Lambeth headquarters

On 15 April 1841, a resolution was put by the chairman, Richard Pigeon, to a public meeting held at the Crown and Anchor Tavern in the Strand, London. The resolution stated: "That for the purpose of protecting the permanent interests and increasing the respectability of chemists and druggists, an Association be now formed under the Title of the Pharmaceutical Society of Great Britain." It probably marked the beginning of the Pharmaceutical Society. One says probably because an astute lawyer could make a case, if enough turned on it, for 5 April or 1 June 1841 as well.¹ The Society for the protection of the interests of Chemists and Druggists is now the Royal Pharmaceutical Society but the consequences of those early arrangements and the difficulties inherent in the dual aims spoken of in the original resolution continues to this day.

Unincorporated associations, which is what the original Pharmaceutical Society was and most village cricket clubs are, possess many virtues, notably that of adaptable flexibility. However, they suffer at law from being neither a company nor a human being. Owning property is possible but inconvenient; suing, and being sued, is possible but inconvenient; borrowing money and entering into contracts is possible but uncertain. The virtue of incorporation is that it introduces certainty and gives legal persona while protecting the officers from the joys of bankruptcy. Acts of Parliament

and royal charters offered the only route to incorporation in the 1840s. Royal charters were cheaper, quicker and offered enormous respectability, which is no doubt why on 18 February 1843 the Royal Charter was received by the nascent Society with such enthusiasm.

CONSTITUTION AND MANAGEMENT

That Charter governed the constitution and management of the Society. The new or Supplemental Charter of 1953, which replaced it and the Supplemental Charters of 1901 and 1948, likewise governs the Society. It is to it and to the general law of the land that one must turn to answer any questions about what the Society and its Council and members can or cannot do. In considering the position in relation to the Charters of 1843 and 1901, Mr Justice Peterson said this in 1921: "In my opinion the authorities justify me in holding that if the Society in the present case intends to do acts which are not authorised by its Charter, a member is entitled to ask for an injunction restraining the commission of acts which are outside the scope of the Charter and which may result in the forfeiture of the Charter and the destruction of the Society. It is also to be observed that section 1 of the Pharmacy Act 1852 confirmed the Charter, and that section 2, which authorised the Council to make bye-laws for the purposes contemplated by the Charter or the Act, recognised

that the only purposes of the Society were those which were contemplated either by the Charter or by the Act; and I am of opinion that this amounts to a statutory limitation of the acts of the Society."²

The Charter governs the Society and provides an external structure for it. The bye-laws, of which one hears so much, are, or should be, concerned with matters of detail, the principle of which has been established by the Charter. The bye-laws, deriving their authority from the framework of the Charter, ought not and are not meant to alter the structure of the Charter itself. Generally therefore bye-laws that are not authorised by the Charter or whose purpose is to alter Charter provisions are void as being *ultra vires*, or beyond the powers of those who propose to make them.

The Charter has much to say about bye-laws. Clause 1 defines them as meaning "the bye-laws made by the Council and confirmed and approved by the Lords of Our Privy Council in accordance with the provisions of this our Charter". Clause 18 provides that no bye-law whether made under the provisions of the Charter or any statutory enactment shall have any force or effect unless not less than 60 days' notice of intention to make alter or revoke it has been given to the members and it has been confirmed and approved by the Privy Council. Crucially, and in accordance with general legal principles, clause 18 also provides that no bye-law shall have any force or effect

if it is repugnant to the provisions of this Charter or the laws of realm. The Charter provides that bye-laws may be made for a number of specific purposes, *viz*, honorary membership, general meetings, the election and regulation of the Council (but not its composition, which is a reserved Charter matter), its officers and its duties, the regulation of the Scottish Department and the auditors and Secretary of the Society. However, clause 17 gives the Council wide powers to make any other bye-law as may "from time to time seem to the Council requisite for the management and regulation of the affairs and property of the Society and the better execution of this Our Charter and the furtherance of the objects of the Society".

THE SOCIETY'S OBJECTS

What then are these objects? The answer is to be found in clause 4 of the Charter, and nothing much has changed since 1841. The Society is:

- 1 To advance chemistry and pharmacy
- 1 To promote pharmaceutical education and the application of pharmaceutical knowledge
- 1 To maintain the honour and safeguard and promote the interests of the members in their exercise of the profession of pharmacy
- 1 To relieve poverty

The cumulative effect of clauses 17 and 4 in the light of these objects and the modern desire for administrative efficiency is to give the Council wide powers indeed, despite the apparently restrictive tone of clause 18.

Those wide powers are given even greater scope by the provisions of clause 20 of the Charter. That allows the Council, subject to the approval of Her Majesty in Privy Council, to alter amend or add to the Charter in any way it thinks fit. The existence of such a power would, if untrammelled, fly in the face of everything which has been said about the subordinate nature of bye-laws and the over-arching control afforded by the Charter. The power is, however, strictly circumscribed. The aim is to allow change to be made and for that change to flow from the profession but to make it difficult to do so unless it is truly shown to be the will of the overwhelming majority.

The Council may resolve to change the Charter but it must secure the votes of three-quarters of the members present and voting (being an absolute majority of Council) and must then secure the votes of three-quarters of the members present and voting at a special general meeting convened for the purpose.

This admirable model of professional self-regulation is, however, not the end of the matter. The pharmaceutical world has, since the days of Jacob Bell MP and the Pharmacy Act of 1852, been subject to constant control by the legislature whose acts of Parliament take precedence over the Society's Charter.³ The Pharmacy Act 1954 provided that the Privy Council may appoint three persons to the Council (who do not have to be members of the Society) in addition to those elected under the Charter (who must be pharmacists). It also made provision for the regulation of the profession not least by the establishment of the Statutory Committee.

HEALTH ACT 1999

The Health Act 1999 flung wide open the door of statutory regulation by the enactment of section 60 which provided that Her Majesty may by order in council make provision modifying the regulation of the profession of pharmacy so far as appears to her to be necessary or expedient for the purposes of securing or improving the regulation of the profession or the services which the profession provides or to which it contributes. Statutory instruments made pursuant to section 60 and laid by the Secretary of State on the table in both Houses of Parliament and thereafter approved by resolution would override any provision of the Charter or bye-laws made thereunder.

The question as to whether or in what circumstances section 60 regulations could override the provisions of the Charter and the Pharmacy Act 1954 is a difficult one. Any regulation could only be made insofar as it appears to Her Majesty (which for these purposes means, of course, the Secretary of State) it was necessary or expedient for the purpose of securing or improving the regulation of the profession or the services which the profession provides. Some matters would clearly tend to have that effect; others equally clearly would not. Whether, to take a topical example, recasting the composition

of the Council to allow for up to 40 per cent of non-pharmacists could be brought within the scope of section 60 must be a matter of some doubt. The decision to make section 60 orders is, importantly, not a matter for the Society; it is the responsibility of the Secretary of State. The Council has a duty to uphold the Charter and to ensure that the objects of the Society are achieved. Although it may make recommendations it is difficult to see that it ought to do so if that would undermine its own Charter. Were the Council to reach a view that the Charter provisions were out of step with modern thinking and practice, it ought, pursuant to its general duties and powers under the Charter, to seek to amend it. That, under the terms of the Charter, would require the qualified majority of both the Council and the members in special general meeting.

WHO OWNS THE SOCIETY?

All of this will have been of interest to constitutional lawyers and members of the Society's Council. For those who read *The Journal* it is perhaps only fair to say something about matters of more absorbing general interest, namely, whose money is it anyway?

The short answer to this question is that the Society's assets, in whatever form, belong to the Society. The members do not own them, nor can they call for the distribution of them to the members for the time being. This flows from the fact of incorporation in February 1843 when the Pharmaceutical Society became a creature in its own right. In October 1975 the supplemental Charter was altered to permit the Society to acquire, hold, sell and generally deal with any personal or real property in whatever amount or value. The only constraint placed on the power was to prevent the sale of its premises at Lambeth and York Place and Birdsgrove House save with the approbation and concurrence of a special general meeting of the members. Were the Royal Pharmaceutical Society to cease to exist the position might be different, but for that to happen Her Majesty would have to revoke the Charter and various acts of Parliament would have to be repealed. In those circumstances it is difficult to conceive of individual pharmacists being any the richer: the profession itself would, however, be immeasurably impoverished.

NOTES

1. Respectively, the dates on which a resolution was passed by representatives of the leading wholesale houses and the leading retail chemists of the metropolis that the permanent interests of chemists and druggists require that they shall immediately form themselves into a society and the date on which the society's fundamental laws were adopted by a general meeting at the Crown and Anchor Tavern. See generally S.W.F. Holloway's 'Royal Pharmaceutical Society of Great Britain 1841-1991'.
2. *Jenkin v Pharmaceutical Society of Great Britain* [1921] 1 Ch 392 at 400.
3. *Primary legislation*: an act of Parliament.

Secondary legislation: regulations, made by statutory instrument, under powers granted to a minister or other competent body pursuant to the provisions of an act of Parliament.

The Charter: that documentary manifestation of the Royal prerogative which incorporates and provides the framework for the regulation of the Royal Pharmaceutical Society.

Bye-laws: those rules made under the framework powers contained with the Charter. Although competing and mutually supportive levels of authority may exist simultaneously, bye-laws give way to Charter provision, which in turn give way to secondary legislation. Acts of Parliament take precedence over all.