THE FOUNDATION FOR SCIENCE AND TECHNOLOGY

Learned and Professional Societies' Notes for Guidance

Incorporation by Royal Charter

There are four methods of legal incorporation of a learned or professional society to make it a legal person able to hold assets and incur liabilities in its own right (and to provide its members with no liability or limited liability for its debts). One is by Grant of **Royal Charter** (and the others are either by registration as a limited liability company under the Companies Acts – the most usual way - or by creation by Act of Parliament or by registration as a Charitable Incorporated Organisation [CIO] with the Charity Commission).

The importance of incorporation by Royal Charter is that it is a process that follows a rigorous enquiry by the Privy Council through its advisers – particularly the relevant Departments of State – so effectively the Charter is the imprimatur of the State that the Charter corporation is a competent body acting in the public interest. **No other form of incorporation gives such assurance.** The Crown, on the recommendation of the government, grants a Charter of incorporation in recognition of the body's stability, track record, pre-eminence in their field, and their work in the public benefit. Subsequently, the Charter and Byelaws may be granted amendments to extend the body's powers to include a role in regulating their profession and awarding the individual 'Chartered' designation to suitably qualified members.

This guidance note concerns only the petitioning (as the application is called) of His Majesty in Council for incorporation by Royal Charter. **The Petition** is made through the Privy Council and there is much useful information about this process on the **Privy Council** website**.** This guidance note is intended to be supplementary to that information.

The drafting of a Petition and the accompanying Charter and By-laws, and their consideration, are important matters which necessarily take time and effort. The Foundation is always prepared to help its members in this respect.

1 The preliminary steps

1.1 The criteria for satisfying the test as to suitability to petition are that:

- The society is preeminent in its field of operation,
- The society is stable and permanent,
- The society's members must be qualified to at least first degree level where it is a qualifying body
- The society is financially sound
- A grant would not be controversial (as where another society also has an interest in the field)

- Regulation by HM Government through the Privy Council (PC) would be in the public interest - the key requirement. The society's work must involve the furtherance of the public benefit (not solely the interests of its members). As PCO published guidance states, "incorporation by Charter is a form of Government regulation as future amendments to the Charter and by-laws of the body require Privy Council (i.e. Government) approval. There therefore needs to be a convincing case that it would be in the public interest to regulate the body in this way."

1.2 The first step is to make an informal visit to the PCO to explain the interest in seeking a Charter.

1.3 There follows the submission of a letter of intent giving details of the petitioner and explaining how it meets the criteria as set out on the PCO website - but the application should be brief – a few pages will be sufficient. It is necessary to include a list of contacts in government departments with whom the application should have been discussed beforehand.

The result of this application will be encouragement or not. If the former, the following notes apply.

2 The Petition and drafting of documents

2.1 It is sensible to draft the **Charter** based on key provisions in the existing governing documents - for companies the articles of association (or the memorandum and articles for some pre-2006 companies). For a CIO, its CIO constitution. For unincorporated societies, their constitution or trusts as the case may be. The Charter should include objects (that is, purposes for which the society is formed), powers exercisable by its governing body in furtherance of those objects and arrangements for dissolution of the corporation to be formed by the Charter. It should (and if intended to be registered as a charity, must) provide that the society's property is to be applied solely to its objects and is not to be distributed to members. If the draft is based on the existing governing documents, the essence of the society's objects, powers and distribution of assets on dissolution will not change substantially and this may provide comfort to members nervous of petitioning. Likewise, if it is already a charity, there is some reassurance that those provisions have previously helped satisfy the Charity Commission as to the charter corporation's charitable status when it comes to register, although it should be appreciated that law and practice as to charitable status does evolve.

2.2 There must be four additional **clauses** inserted in the Charter: the first is the adoption of the coat of arms of the society where one has been granted by the College of Arms; the second is a clause adopting the assets and liabilities and continuing contracts of the limited liability company which is to become the charter corporation; and the third is a power to amend the Charter and By-laws with the approval of the Privy Council. If it is proposed that the society award individual Chartered status, this should be specified in the Charter. The fourth should be a clause setting out the power to surrender the Charter, the required process, and the distribution of assets.

2.3 Similarly, societies should draft the **By-laws** based on the remaining provisions of their current constitution so that the provisions of governance remain the same.

2.4 Incorporation by Charter is also an opportunity to review and refresh objects, powers, dissolution provisions and governance arrangements, particularly if these have not been changed for some time. Your society should take legal advice in order to ensure key governance rules are included, that they meet the needs of modern best practice and are appropriately divided as between Charter and By-laws. Particular consideration should be given to transitional arrangements, including confirmation of the persons who are to be the governing body of the corporation when the provisions of the Charter take effect (see paragraph 5.5 below).

2.5 You should consult PCO at an early stage before petitioning. A draft Charter and By-laws should be provided for them to consider. This will give PCO time to consult with its advisers in order that any issues with the drafts before a petition is made. Where a society is a charity or seeking to become a charity, this should be flagged to PCO since in the case of charities, the **Charity Commission** is one of PCO's advisers. In the case of charities, the Charity Commission is likely to be particularly interested in charitable objects, powers, non-distribution provisions (including any benefits by way of exception to the governing body or members) and dissolution provisions which ensure property is dedicated to exclusively charitable purposes. If these provisions, and the reasons for any changes in theme from the current society's rules, are properly explained, PCO to liaise appropriately with the Charity Commission. This lays important groundwork since the Charity Commission must be satisfied the new corporation is a charity, if it is to be registered as one.

2.6 Provided PCO is content with the drafts at the informal stage, the next action is to draft the **Petition** and an outline is helpfully given on the PCO website. It is vital that this Petition and its accompanying draft Charter and By-laws are adopted by the members of the society in general meeting because the PC will wish to be assured that the decision to petition really is the wish of the society as a whole and not just of its governing body. At the same time, unless it is proposed the present society should continue in existence and retain any assets and liabilities (see later), the members should resolve that, if the Petition is granted, the assets and liabilities of the present society will be transferred to the new charter body.

2.7 The petitioners should supply a list of bodies in the field (both with and without Charters) who have been consulted to indicate if they would have any objections to the application for a Royal Charter, or to any powers sought to confer individual Chartered status. It is important that the PCO is aware of any objections at the earliest stage so these can be considered as part of the assessment process.

3 Timescale

3.1 It is likely that these exercises will have taken some months. However, the Petition, draft Charter and By-laws, and list of Non-Objectors may now be **submitted** to the PCO.

3.2 The PC will then **consider** the Petition at a first meeting and circulate it to its advisers. It will also contact some of those on the list of Non-Objectors.

3.3 The Petition will then be reconsidered at a second meeting in the light of the comments received. If the PC satisfied, the fact of the Petition will be formally publicised in the London Gazette for 8 weeks so that the wider world can see the society's intention and make their objections, if any. In connection with publicity, be aware that PCO is a public body subject to the Freedom of Information Act. Unless exemptions apply, is obliged to provide information and correspondence supplied by the society at the request of any member of the public.

3.4 The PC will then again reconsider the Petition in the light of any responses and recommend to His Majesty it be **granted** (by an Order of Grant) – or not. If the Charter is granted, the date of incorporation will be the date on which it is sealed, not the date of the grant although the Order of Grant, once made, will not be revoked.

3.5 Once granted, the PCO will arrange for the Charter and By-laws to be printed, involving the applicant in the proofing process. Once printed, the PCO will pass the Charter to the Crown Office at the House of Lords for the application of the Great Seal. **Note**: the terms of the Charter will not come into legal effect until the date the Great Seal is applied. The PCO can provide further advice about the printing process, options (i.e. the use of a scribe to produce an illuminated vellum front page), estimated costs and timings.

3.6 The production of the Charter and sealing can be a lengthy process. It is therefore strongly advised therefore that **no date** for a formal presentation is arranged before the Crown Office confirms that the Charter has been sealed. Once the Charter has been sealed, PCO will write to Companies House, who note the creation of the corporation by creating an entry in the register of companies and assigning a registration number with the prefix "RC".

4 Miscellaneous matters

4.1 **The name** of the society is recorded in the Charter. A society, particularly one which is granted the ability to award individual Chartered status, may choose to include the word 'Chartered' in its title but this is not mandatory. The society once incorporated may (and perhaps should) also include such words as 'Incorporated by Royal Charter 20??' on its headed notepaper. Some societies wish to include 'Royal' in the title but this privilege is rarely granted by the Cabinet Office (see the separate Note for guidance).

4.2 **Amendments should only rarely be sought** to both Charter and By-laws. The procedure for amending any Articles of a Charter and By-Laws should be set out in the Charter. If preparing a draft Charter today, these should typically provide for amendment by a 2/3 or ¾ majority resolution of members and be subject to the consent of His Majesty in Council (for amendments to the Charter) or of the Privy Council (for amendments of the By-laws). Before passing any resolution under such a power, best practice is for the society first to consult PCO with a schedule of amendments and an explanatory memorandum or letter. If the amendments are wholesale and fundamental, the society must petition for a supplemental charter which contains the amendments. Such a Petition follows the process above although minor changes are likely to be dealt with more speedily.

4.3 In law, the charter corporation is a new body to which the **assets and liabilities** of the old society should be formally transferred. You should inform all of **those in any relationship** with the society about the change of incorporation and seek their views on what action, if any, they want the society to take in respect of their relationship. There follows **a list** of many of those with whom discussions should be held or formal processes, agreements, transfers, applications or filings made:

(a) Charity Commission to apply for registration of the charter corporation as a charity and any further steps and filings in relation to both it and the former society
(b) Registrar of Companies in respect of the former society (if a company)
(c) Legal advisers in respect of ownership of property and leases - and any other aspects of the process on which you need advice
(d) Members (including groups and branches)
(e) Bank in respect of all accounts
(f) Insurers in respect of all policies
(g) Local Authority in respect of business rates
(h) Employees in respect of contracts of employment (employees have substantive and procedural protections under the Transfer of Undertakings (Protection of Employment) Regulations "TUPE" with which both the old society and charter society must comply) and there may be pensions considerations on which specialist advice will be needed
(i) Auditors and HM Revenue & Customs in respect of accounting and taxation matters including VAT where appropriate, including the registration of the charter corporation as a charity for tax purposes, if relevant
(j) Suppliers in respect of continuing contracts
(k) Any delivery partners or suppliers of services necessary for the society to operate or run its programmes - consider services the society uses; software, hosting and support, any licensed materials or branding the society uses; accreditation bodies; users of the society's services
(l) Customers. If there is a trading subsidiary, it may be that that the trading company will not change its name or corporate structure and therefore its customers may not be affected but (unless the old society is to be retained for the purpose) the shareholding must be transferred from the old society to the charter society.
(m) Regulators - the Information Commissioner's Office and the Pensions Regulator for example.

Note also that care must be taken to ensure that any publications and formal documents to be used by the charter society are updated taking account of any new name, new charity registration number if applicable and where the former society was a company, removing references to company registration details.

5 What to do with the former society

5.1 The question remains as to **what to do with the old society**. Some lawyers recommend maintaining it as a company or CIO to protect the name and to avoid any possible future dispute over donations or bequests made to the society in its former name. This course of action can be complicated in practice and has a cost in respect of filing fees, inconvenience of administration

and the risk of filing related offences in respect of the former society. In the case of a charity, there may be concerns that if it no longer operates, then it no longer operates for the public benefit.

5.2 The former limited liability company could be maintained as a service company with the new charter corporation as its one member. The advantage is that no transfers of title need to be made as they remain with the former company which serves the new corporation.

5.3 It could just be wound up but officers would need to be vigilant that the former name was not being used to mislead. Companies House maintains a voluntary list of charter corporations for the purpose of ensuring that names are not duplicated. There is a risk, particularly if the society is not a charity, that gifts to the former society may be lost. In the case where the former and charter societies are charities, provided the former society ceases to exist and transfers all property to the charter society, then the merger can be registered with the Charity Commission. In this case, gifts to the former society take effect as gifts to the charter society.

5.4 The extent to which company law applies to charter corporations can depend on the circumstances of the corporation. Charter corporations formed for the purpose of carrying on a business with the object of gain (not just financial gain) for itself or its members are typically exposed to a greater degree of regulation by Companies House.. You may wish to consider taking legal advice on the application of the company law regulatory framework to the particular circumstances of your corporation

6 Creation of Rules or Regulations

Detailed administrative procedures should be confined to **Rules (or Regulations or Standing Orders)** which are not part of the petitioning process. The By-laws should provide for the creation of such Rules and for their making and amending by council or by the members in general meeting. It is important to include in the Rules all matters, other than those of principle, for which regular or occasional change may be necessary. This is not only convenient to charter corporations but also it saves unnecessary work for PCO.

7 Legal issues

7.1 Memoranda or articles of association of limited companies contain a clause **limiting the liability** of each of the company's members to a small sum of money, and they do so under the authority of the Companies Act 2006. Charters are not made under the Companies Act and do not contain such an exclusion. Members of charter societies sometimes question whether they now have unlimited liability. The charter society is a corporation which is a legal person distinct from its members and capable of incurring liabilities on its own account. Apart from the usual rules of insolvency law like wrongful or fraudulent trading, or where individuals are themselves party to the liability, it is difficult to see by what principle the corporation's liabilities could be transferred to its members or council. There are, however, no modern cases and very little commentary on the question to confirm the position.

7.2 In a very few cases a **Department of State will sponsor a Petition**. The Petition is replaced by a letter from the Secretary of State concerned to the Lord President of the Council giving reasons for wanting incorporation by Royal Charter. It is also accompanied by a draft Charter and By-laws but a list of non-objectors and an annual report and accounts are not required. The Privy Council will make what enquiries it wishes including submitting the draft Charter and By-laws to the Legal Secretariat at the Attorney General's Office. On their return, the Privy Council will formally recommend that incorporation be granted and the Charter will be printed on vellum ready for sealing.

7.3 It should be rare that a charter **corporation ceases to exist** but it will happen on occasions. The Charter must contain a provision for dissolution and disposal of its assets. Thereafter, the actual charter document must be returned to the PCO and so too must the body's official seal.

7.4 There is a belief that charter corporations (at least those established by charter exclusively under prerogative powers, and not under the authority of Act of Parliament) can behave like natural persons (ie that they can do anything which is not forbidden by law). Modern charters, however, have express objects. The powers too, are usually expressly set out. The court would almost certainly hold a charter society's council (and likely its members) to acting exclusively in furtherance of the charter society's objects, within its powers and according to the procedures in the Charter and By-laws, granting appropriate remedies where this has not been or is threatened not to be the case. Since generally, charter corporations are mature bodies that do not have many disputes as to their constitutions, the law is largely untested. Where charitable, the Charity Commission as charity regulator will also hold the council to account in terms of pursuing the objects in accordance with the powers in the Charter. It is also likely that a corporation acting outside of the conditions under which the Charter was granted would, in the last resort, be liable to the forfeiture of its Charter.

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Tel: 020 7321 2220
Email: office@foundation.org.uk