



TRUSTEES &
GOVERNANCE

Collaborative working and mergers

An introduction

CHARITY
COMMISSION



The Charity Commission

The Charity Commission is the independent regulator of charities in England and Wales. Its aim is to provide the best possible regulation of charities in England and Wales in order to increase charities' effectiveness and public confidence and trust. Most charities must register with the Commission, although some special types of charity do not have to register. There are some 190,000 registered charities in England and Wales. In Scotland the framework is different, and the Commission does not regulate Scottish charities.

The Commission provides a wide range of advice and guidance to charities and their trustees, and can often help with problems. Registered charities with a gross annual income or expenditure over £10,000 must provide annual information and accounts to the Commission. The Commission has wide powers to intervene in the affairs of a charity where things have gone wrong.

More information about the Commission together with a range of guidance for charities can be found on our website www.charitycommission.gov.uk, or by contacting Charity Commission Direct:

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Contents

A.	Introduction	2
B.	Collaborative working	6
C.	Mergers	20
D.	Due diligence	42
E.	Further information and advice	46

Guidance from the Charity Commission for all charities who may be considering working in partnership or merging with other organisations.

A. Introduction

A1. What is this guidance about?

We are often asked to advise charities on issues they should take account of when seeking to work collaboratively or to merge. Based on our experience, this guidance sets out the issues and factors that need to be taken into account before taking any decision to go further. We have also identified the key stages and practical steps that are involved in the different options.

A2. 'Must' and 'should': what we mean

In this guidance, where we use '**must**', we mean it is a specific legal or regulatory requirement affecting trustees or a charity. Trustees must comply with these requirements. To help you easily identify those sections which contain a legal or regulatory requirement we have used the **L** symbol next to the short answer in that section.

We use '**should**' for items we regard as minimum good practice, but for which there is no specific legal requirement. Trustees should follow the good practice guidance unless there is a good reason not to.

We also offer less formal advice and recommendations that trustees may find helpful in the management of their charity.

A3. Scope of this guidance

This guidance highlights some key issues for charity trustees and, where applicable, their staff on the subject of collaborative working and mergers. It describes ways of working in partnership as well as the different types of structures and processes involved. It is intended to help charity trustees decide whether they want to proceed and, if they do, what the different stages and issues are. This guidance concentrates on the role of the Charity Commission in both partnership working and mergers and outlines the support we are able to offer.

The guidance includes some case study examples of collaborative working and mergers.

Section B illustrates different forms of collaboration and partnership and describes both the formal and informal structures that a number of charities might use in working together.

Section C describes what a merger means in practice for a charity and also covers key considerations for trustees: costs, the role of the Chief Executive and the legal issues that might arise.

Section D is concerned with the issue of 'due diligence' – a technical term used to describe how a charity should assure itself that merging with a new organisation is in the best interests of the charity and is a good 'fit'.

A4. What does the Commission mean by the terms 'collaborative working' and 'merger'?

In this guidance 'collaborative working' describes joint working, by two or more charities, on a project or venture in order to fulfil their purposes, whilst remaining as separate organisations. The project or venture may relate to any aspect of the charities' operational activity, including administration, resource sharing and streamlining of costs, service delivery and fundraising activity, or advertising and profile enhancement.

Sometimes a decision to work together can lead to the formal merger of two or more charities. We use the word 'merger' to describe the transfer or combination of the assets (and liabilities) of two or more separately registered charities. This will result in some or all of the parties restructuring or dissolving. In such cases, either a new charity is formed or one charity assumes control of another.

A5. Some technical terms used

Although we have tried to write this guidance in everyday language, there are some technical terms we have to use in places. This list explains some of them:

Charitable company means a company (usually limited by guarantee):

- formed and registered under the Companies Act 1985; or
- to which the provisions of the 1985 Act apply;

and

- which is established for exclusively charitable purposes;
- which may or may not be registered as a charity (some may be too small to be registered and some may be exempt from registration on other grounds).

Chief executive is used to refer to the most senior member of paid staff within the charity. They may be known by a range of titles, including chief executive, chief executive officer, director, or director general.

Duty of care – all trustees have a duty of care towards their charity. For the trustees of unincorporated charities, the Trustee Act 2000 defines the level of care and the particular circumstances in which it must be used. This standard means that a trustee is expected to use his or her knowledge and experience reasonably and in the interests of the charity. If they do so, they are unlikely to breach charity law. Where a trustee has professional or business expertise then

he or she is expected to make use of this in running the charity. Although, strictly, this duty of care only applies in certain situations defined in the Act, legal precedent and good practice mean that the duty of care should be considered as applying to all aspects of trustees' work.

Although the Act does not apply to charitable companies, the general principles of charity law mean that similar duties and principles apply to trustees who are directors as well.

Duty of prudence – trustees must:

- ensure that the charity is and will remain solvent;
- use charitable funds and assets wisely, and only in furtherance of the charity's objects;
- avoid undertaking activities that might place the charity's funds, endowments or other assets, or reputation, at undue risk; and
- take special care when investing the funds of the charity, or borrowing funds for the charity to use.

Governing document means any document which sets out the charity's purposes and, usually, how it is to be administered. It may be a trust deed, constitution, memorandum and articles of association, conveyance, will, Royal Charter, Scheme of the Commission or other formal document.

Legal authority is a general term for the method by which the Charity Commission authorises an alteration in the way that a charity operates. It can mean a scheme, an order or, in the case of charitable companies, consent to a change under section 64 of the Charities Act 1993.

- An **Order** is a legal document made by us which can, for example, confer new powers on a trustee body or appoint or remove trustees.
- A **Scheme** is a legal document made by us that can change any aspect of a charity's purposes or administrative provisions.

Permanent endowment means the property of a charity (including land, buildings, cash or investments) which the trustees cannot spend as if it were income. It must be held permanently, sometimes to be used in furthering the charity's purposes, sometimes to produce an income for the charity. The trustees cannot normally spend permanent endowment without our authority.

The **Register of Charities** is maintained by the Charity Commission. It contains the details of registered charities in England and Wales. Most charities are required by law to register their details with the Charity Commission (a few have registered voluntarily).

SORP is shorthand for the Statement of Recommended Practice for Accounting and Reporting by Charities. It was most recently revised in 2005.

Special trusts or restricted funds

mean funds or property held and administered as separate trusts by or on behalf of a charity. The purposes of a special trust must be narrower in range than those of the main charity.

Trustees means **charity trustees**.

Charity trustees are the people who serve on the governing body of a charity. They may be known as trustees, directors, board members, governors, or committee members or some other title. They are responsible for the general control and management of the administration of the charity.

Some charities also have **custodian** or **holding trustees**. A custodian trustee is a corporation appointed to have the custody, as distinct from the management, of trust property. Holding trustees are individuals appointed to hold the property of the charity. They can only act on the lawful instructions of the charity trustees and in accordance with any provision contained in the governing document.

TUPE stands for the Transfer of Undertakings (Protection of Employment) Regulations 1981 and 2006. These regulations, and amendments, implement the European Community Acquired Rights Directive 1977. TUPE is intended to protect the rights of employees when a transfer from one employer to another is made. Although TUPE will apply in a wide range of situations, there may be some circumstances when it does not: TUPE is likely to apply to mergers between charities.

B. Collaborative working

This section describes different formal and informal types of collaborative and partnership working. It also makes good practice recommendations for trustees.

B1. What does the term collaborative working cover?

The short answer

Collaborative working describes joint working by two or more charities in order to fulfil their purposes, whilst remaining as separate organisations. This may relate to any aspect of the charities' operational activity, including administration, fundraising, profile enhancement, resource sharing and streamlining of costs and service delivery.

In more detail

Collaborative working can cover a wide range of activities. At the informal end of the spectrum it can include networking, sharing of information and membership of associations, groups or federations. While these examples of informal collaboration have an important role to play, this guidance focuses principally on more formal partnership projects and other collaborative ventures. Examples include:

- outsourcing functions such as finance, information systems support and payroll services;
- sharing resources such as training or transport;
- co-locating and sharing accommodation and premises;
- working arrangements which increase access and participation and enable charities to develop diversity in their services;
- formal partnerships between organisations in which resources are pooled to secure staff or services that none could afford on their own; and
- joint projects or programmes for aspects of service delivery or campaigning.

Case Study

The Community Council for Devon & Kenn Parish Hall

The Community Council for Devon (CCD), with an income of around £900,000, is based in Exeter and serves Devon. It exists for general charitable purposes and concentrates on supporting rural communities. Its activities include village hall support, community planning, housing and rural learning, social inclusion and rural regeneration. Kenn Parish Hall is a smaller charity based near Exeter which provides the inhabitants of the parish with a hall for social, educational and recreational purposes. It has an annual income of around £11,000.

The two charities are planning a novel example of collaborative working. This is a joint venture to provide a new purpose-built complex which will provide up-to-date premises for CCD (currently based in a prefabricated building), and brand new community hall facilities for Kenn Parish Hall.

Having taken professional advice, the charities have drawn up a joint venture agreement which details the ratio of investment and the usage arrangements for each charity. The scheme has also been awarded full planning permission and the charities are currently working on funding arrangements.

Both charities exist to benefit the public and further their charitable purposes by way of community development activities. This meant that there was no need for any specific power in their governing documents, or any other authority needed, before they could enter into the joint venture agreement. Their purposes already permitted this type of collaboration.

This joint venture serves as a really good illustration of what could be possible when charities work together for their own mutual benefit.

B2. What general points should be considered when thinking of working collaboratively?



The short answer

Trustees must act prudently in the interests of their charity. In practice this means that the benefits of collaborative working should be clearly established at the outset.

Usually, collaborative working does not require the Commission to be involved as the arrangements are likely to fall within the trustees' existing powers. However, depending on the nature of the collaboration, trustees may need to consider whether to take specialist professional advice.

In more detail

Before entering into a collaborative arrangement with another organisation, as good practice trustees are recommended to:

- Satisfy themselves that there will be adequate benefits to their users and beneficiaries, which could include:
 - cost benefits;
 - improvements to the quality of service; or
 - the ability to reach a more diverse group of beneficiaries, thus ensuring improved access to the services the charity provides;
- Identify the key success factors for the collaboration, which could include:

- arrangements which value each party's independence;
- compatible activities and organisational structures;
- a clear definition of, and accounting for, what each of the relevant charities is responsible and liable for;
- agreements which are proportionate to the relative risks and complexity of the collaboration; and
- a termination clause in any formal contract.

Whatever the size and complexity of the proposed arrangement, trustees should assess the risks involved to ensure that these have been sufficiently addressed.

Case Study

Community Alliance

The Community Alliance (CA) is a partnership of four national community based networks – bassac, Community Matters, Development Trusts Association and The Scarman Trust. The partnership was set up in 2004 to provide a nationwide resource of services and support to community organisations across England.

CA's aim is to help community organisations have long term impact by developing a more interactive relationship between community groups and the public.

The principle behind CA's partnership is to work in close collaboration where possible, while ensuring the distinctive features of each organisation are kept. They identify areas of shared interest, such as product development or publications, to help the members of all four bodies, alongside specific initiatives for individual organisations.

Its success depends on creating a structure with good governance, flexibility and a balance of input from all four members. First steps have included setting up cross-partner working groups of staff from each organisation, bringing trustees of all four together for regular meetings and forming a strong chief executive working group – all coordinated by a dedicated programme director responsible for both programme delivery and developing the partnership.

B3. What sort of legal issues might arise?



The short answer

There are unlikely to be any legal barriers for charities working collaboratively, providing they are furthering their charitable purposes. However, depending upon the nature of the collaboration, charities may need to draw up legal agreements or contracts. In all circumstances, trustees must comply with the provisions of their charity's governing document.

In more detail

Usually, there are no legal barriers to charities working collaboratively in furtherance of their purposes. This is because charities either have:

- an express power which allows them to establish and support any charitable association or body (for example enabling a charity to create a body to provide back office services for the charity and other partners); or
- an implied power to work towards the furtherance of its purposes by collaborating with one or more organisations.

We are only likely to become involved at the Charity Commission in cases where there are legal barriers or constitutional issues to be addressed, such as incompatible purposes between collaborating charities. In order to use a charity's power to work

with other organisations (either explicit or implied), trustees must be satisfied that the proposed arrangements fall within the charity's purposes. We can advise if there is doubt about the compatibility of the proposed activities with the charity's purposes.

Trustees must properly exercise their duty of care. This means that they should thoroughly consider the possible risks involved in collaborative working. In particular, when considering using charity property or assets in a collaboration, trustees should properly assess the likely risks as well as the potential benefits. Where there is a question about the proposed use of, and likely risks to, any type of charity property (for example, giving a loan to a joint venture) we can provide tailored advice.

In all collaborations charities should consider what would happen if one of the parties was suddenly unable to meet its obligations. It is important to consider whether the remaining party or parties would be able to continue in the working arrangement. Should anything go wrong, issues of liability can have wider implications for the charities involved, with repercussions for their assets and reputation. For these reasons it is important to have a clear formal agreement proportionate to the potential risks.

B4. When does the Commission need to be involved?

The answer

There are a number of different ways in which the Commission can help to facilitate collaborative working between charities.

Where unincorporated charities do not have the power to collaborate in a particular way, we can make a **Scheme** (a legal document) that can change any aspect of the charity's purposes or administrative provisions. Generally, these Schemes are used to enable charities to more flexibly use their assets to deliver their charitable purposes. Schemes might be agreed when:

- property required for a particular purpose is no longer fully used; or
- church hall charities wish to use the hall for non-religious purposes. (See Section E for how to obtain further information on this area.)

We can also make an Order (a legal document) to clarify or add to the trustees' powers. Before making any Order, we will need to be sure that what is proposed is in the interests of the charity.

B5. What types of structures are available for charities working collaboratively in a formal way?

The short answer

Charities and other organisations can operate together in a variety of formal or informal structures for the purpose of providing the best possible services for their beneficiaries.

Three common structures are:

- the 'group structure', a formal association of separate organisations;
- the 'affiliated or federal structure' where a parent body offers support, strategic and central services to its members or affiliated bodies;
- the 'coalition structure' where a group of charities works together for a common purpose.

Some of the reasons for choosing one of these structures might include;

- the provision of a wider and better range of services for beneficiaries;
- the creation of a well-known and trusted group 'brand';
- financial savings;
- increased purchasing power; or
- the advantage of working with similar organisations while retaining individual cultures and identities.

In more detail

Group structures

Group structures are a distinct form of working together, enabling charities to fulfil common purposes over a wide area, or deliver a complex range of related services to their beneficiaries. A group

structure is a formal association of separate organisations. This could involve for example, a parent charity setting up other charities and non-charitable subsidiaries.

Groups can take many forms and a range of terminology is used to describe the parties involved. However a group structure is likely to have some or all of the following features:

- the group members act as a collective to deliver a range of services to beneficiaries;
- the arrangement is formalised for example by a contract, service level agreement or memorandum of understanding;
- the group will often include a parent organisation with one or more other charities and non-charitable subsidiaries;
- the group may consist of organisations which are both charitable and non-charitable;
- the group might consist of only incorporated organisations and, as such, be subject to the Companies Act;
- all organisations within the group will have their own name and distinct objects (although it is likely that these will be similar in some way);

- the group will produce consolidated accounts.

Where a parent body or charity sets up other charities and/or non-charitable subsidiaries, it is likely that the activities carried out by, or hived off to, the other charities or non-charitable subsidiaries will either be specialist, non-charitable or involve some form of risk. Some charities will wish to undertake activities that fall outside of their core business and hiving them off to other charities or to non-charitable subsidiaries can enable the parent charity to support and promote those activities while treating them as separate businesses, so not putting the parent charity's funds and assets at risk.

This situation can also be achieved by a charity becoming the parent body of other already existing charities.

Case Study

Portsmouth Housing Association Group (PHA)

The PHA group consists of four organisations which are involved in social housing and community regeneration. The four organisations are:

- Portsmouth Housing Association (PHA)
- The Portsmouth Foyer
- The E C Roberts Centre
- The Bill Sargent Trust

PHA is the parent company in the Group. Its mission is 'Building homes and communities to be proud of'. Through working in partnership with group members and with other local organisations it delivers a wide range of services across the communities of South Hampshire.

PHA was founded in 1973 and is a Registered Social Landlord with charitable status. It owns or manages over 5,000 homes and is developing a further 200 each year. It also supports the development of a range of community initiatives including: social enterprises, community banking, and community development training.

Portsmouth Foyer provides a mixed community for young people aged 16-25 including both supported accommodation as well as learning and development programmes. It also provides employment access advice, women's projects, a supported move-on scheme and support for asylum seekers.

The Roberts Centre is dedicated to supporting families who are vulnerable due to homelessness or relationship difficulties. It provides a nursery with places for very young children as well as a contact centre and a range of tenancy support services.

Both the Foyer and the Roberts Centre are regarded as centres of excellence within their fields of operation. They are both registered charities and companies limited by guarantee. So they have the support and management focus of their own board of trustees whilst also benefiting from PHA's support, particularly with professional services such as finance and HR.

The Bill Sargent Trust is a charitable trust which promotes action research into homelessness and related issues of social exclusion. It is currently evaluating the impact of local community banking initiatives and is planning to research the housing needs of the local Bangladeshi community.

Affiliated or federal structures

In an affiliated or federal structure there is usually a national charity which exercises some degree of control over local independent charities

which are its members (or affiliates). Each local charity will have its own trustees who have responsibility for the general control and management of the local charity.

An example of how an affiliated or federal structure works

A national charity is set up to support and assist disabled people. Its members, who are also independent charities, have compatible purposes. In this example, the purposes of the members are limited to a defined and local area, such as the provision of day care facilities or the relief of need amongst the beneficial class in a certain local geographical area.

The members of this affiliated structure are bound together by a common name, brand and purposes. As a condition of membership the members of the group will usually be asked to use a standard governing document provided by the national body. Examples of constitutional control that a national body might wish to have over its members include the right to:

- approve any member's change of name;
- approve any member's change of purposes or area of benefit;
- suspend membership for a proper reason;
- approve the disposal of assets upon dissolution.

The national body typically has an advisory and supportive function but is also able to place conditions on how the member charities operate, in return for using the brand or name.

If the national charity is responsible for the general control and management of the local charities, that may mean the local bodies are not independent charities but merely branches of the main charity. **In such a case there is only one charity and it is not an affiliated or federal structure.** In this

situation, whilst these local branches or committees have no discretion over policies to be adopted (except within limits agreed with the national trustee body) they do have the benefits of working under the umbrella of the national charity.

Coalition structures

For the purposes of this guidance only, we are using the term 'coalition structure' to describe a structure that exists where a number of separate charities agree to work together for a common purpose, sometimes

described as 'a partnership of equals'. The agreement may be only a temporary collaboration with a certain aim in mind, or it could be established on a more formal basis with a new association being set up (as in the case study on the next page).

Case Study

The Disasters Emergency Committee (DEC)

The DEC is a registered charity and is a national forum of leading UK independent humanitarian agencies. It was established to support its members, currently thirteen agencies, in their task of alleviating acute human suffering amongst those least able to withstand the effects of a major overseas disaster by:

- creating an efficient appeal mechanism through the media for national fundraising and public response;
- ensuring that funds raised are used in an effective, timely and fully accountable way;
- facilitating agency co-operation, co-ordination and communication;
- raising standards in the implementation of humanitarian responses;

Its purpose is to provide a national forum for joint fundraising and to assist and promote a swift exchange of reliable information in response to an overseas disaster. DEC appeals are managed by a small Secretariat that enjoys unique and generous support from a range of external organisations who provide their services at little or no cost during the launch and aftermath of an appeal. This powerful and widespread support, known as the 'Rapid Response Network' enables appeals to be launched quickly and cost effectively. It also guarantees widespread public awareness of the extent and needs of each disaster by delivering clear consistent messages about the crisis, and offers the UK public convenient ways to give.

The essential character of the DEC is the commitment by its member agencies, firstly to work together in the launch of national appeals, and secondly to be held jointly and individually accountable for the expenditure of funds raised.

B6. What types of formal collaborative arrangements are there?



The short answer

Formal collaborative arrangements can vary in type. Examples are:

- contracts;
- service level agreements;
- memoranda of understanding.

Trustees must ensure that they properly exercise their duty of prudence when drawing up collaborative agreements. Agreements should be sufficiently robust to protect each party's interests and take account of the risks, but not so burdensome as to hold back innovation or incur unreasonable administration costs.

In more detail

Informal collaboration will usually be more appropriate where the collaboration involves low risk activities such as sharing knowledge, experience or best practice information. However, even for such informal collaborations the arrangements and procedures should be clearly set out in writing to avoid any confusion.

Formal arrangements enable charity trustees to better identify and manage risks. Formal contracts may mitigate some risks, mainly legal, and if they are drawn up carefully they may also protect charities from risks to their assets and reputation. Depending upon

their trustee and staff skills and experience, charity trustees may need to seek specialist professional advice when entering into a formal collaborative working arrangement.

Collaboration may take the form of a joint venture which is operated through the vehicle of a separate company, set up to separate the collaborative working element from the continuing activities of each charity in the arrangement.

Where a formal arrangement is proposed, trustees should ensure that their charity can meet the terms of any contract they enter into throughout the period of its existence.

A key overall message is that it is important to set the ground rules but not to over-complicate the arrangements. It is also important that an agreement for terminating the arrangements is drawn up from the beginning in case circumstances change and the arrangement is no longer viable.

C. Mergers

This section describes what a charity merger is and covers key legal and practical issues. When thinking about a merger, trustees must:

- check to see that they have the necessary legal authority to proceed, either from their governing document or from us; and
- ensure that there is enough similarity of purpose and structure between the charities that are merging.

C1. What is meant by a merger of charities?

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The short answer

The merger of charities means two or more separate charities coming together to form one organisation. In such cases, either a new charity is formed to carry on the work or take on the assets of the original charities, or one charity assumes control of another. Trustees must act in accordance with the powers in their charity's governing document or those given to them by law to make sure that any merger is legally sound. If these powers are insufficient, the trustees may wish to come to us for additional powers.

In more detail

The term merger is more commonly associated with the commercial sector where two or more companies merge together in order to save costs, increase profits and improve services. In the context of charities, the primary purpose for a merger should be to better meet the needs of the beneficiaries or users of all the

charities involved, and make best use of their charitable funds and property.

The actual process of a merger between charities will depend on the legal structures involved and the powers contained in each of the charities' governing documents. The merger will usually take one of the following forms:

- (a) Two or more charities combine their assets and resources by transferring them all to a new charity established with purposes similar to those of the original charities. What can or can't be done will depend on either:
- what the governing documents of the charities concerned allow in terms of bringing the charities to an end, what must be done with their property and how the decision is to be made ('the dissolution clause');
- or
- where there is no 'dissolution clause' or similar, an analysis of what the purposes of the charities are and how their property may be used. Broadly speaking, the objects must be similar enough to ensure that those who currently benefit from the charities will continue to do so after the merger. It will also be important to check for any restrictions on how the property of the charity can be used as this will have an effect on how the merger is brought into play. (See sections C2 and C5.)
- (b) One or more charities dissolve and transfer their assets to an existing recipient charity.
- (c) Two or more charities are grouped together, with one charity (or its trustees) becoming the trustee body of the other charity or charities involved. This is not strictly speaking a merger as there continue to be two or more separate charities (for example covering different parts of the country). In these cases trustees must be clear when they make decisions for a specific charity in the 'group' that they are acting in the interests of that charity rather than any other charity of which they also happen to be the trustees.

Where charity trustees are considering the possibility of a merger and looking at the feasibility of the various options, they may identify legal issues which require the Commission's input, advice or guidance. Where a legal authority is necessary to enable the arrangement, we are pleased to advise the trustees on the most effective option.

Case Study

Volunteering England

The trustee bodies of the following three high-profile charities took a collective decision to merge, and launched the charity Volunteering England in 2004:

- The Consortium on Opportunities for Volunteering – a charity with an annual income of around £2.1million and 5 staff operating nationally;
- The National Centre for Volunteering – a charity with an annual income of £2.7million and 32 staff operating nationally; and
- Volunteer Development England – a charity with an annual income of £0.5million and 15 staff operating nationally and overseas.

Prior to the merger, the three charities had already worked successfully in partnership together and a merger seemed a natural and sensible progression.

The trustees realised that it made sense to have one national organisation because the core functions of all three charities overlapped. The existing charities created a new charitable company, Volunteering England, in order to ensure equal status for all three partners and to better reflect the underlying key principle that the three organisations were coming together to create something new. The memorandum and articles of Volunteering England provide for a brand new trustee board to be formed, some elected from the membership of the company and some appointed by other bodies in the volunteering sector.

The following benefits of the merger were identified:

- more effective use of resources, expertise, knowledge and information;
- the ability to speak with a single voice and have more powerful communication;
- the creation of a joined-up national, regional and local volunteer development function;
- improved strategic thinking on policy, research and grant making; and
- avoidance of duplication of effort, achievement of economies of scale and improved access to funding.

The merger has resulted in:

- the creation of a new organisation called Volunteering England;
- new and enhanced programmes of activity, which better use the skills, knowledge and expertise of the new charity's staff, board and advisory committees;
- increased levels of government funding, compared with that received by the three charities combined;
- enhanced status with a stronger 'volunteering' brand both nationally and locally;
- good morale amongst staff; and
- increased credibility with key stakeholders.

The new Board believe that the merger worked because of a collective understanding among the trustees of all three former charities that it was the right thing to do for volunteering. There was a clear reason to merge, the environment was right and it made strategic sense.

C2. What sort of information needs to be gathered to begin with?

The short answer

Information is required about the purposes, powers and property of the charities involved in a proposal to merge. This is to identify any potential problems or legal barriers to merger before any decision has been made.

In more detail

These are some examples of the type of information that is needed:

- What is the structure of each charity that is involved – is it an unincorporated association, a trust or a charitable company?
- What are the purposes of each charity involved?
- What powers are available to each charity to achieve a merger?
- Does any charity transferring assets have the powers it needs, for example a power of dissolution?
- Does any charity receiving assets have the powers it needs, for example can it act as a trustee?
- What property is to be transferred?
- Is any of the charity's property held as permanent endowment or on other special trusts that might prevent it from being mixed together with the assets of any recipient charity? (see section C5).

C3. Is the Commission's consent needed for a merger?

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The short answer

Not always. The majority of charity mergers do not need our consent. But we must be involved if a charity has insufficient powers and wishes to proceed with a merger proposal, or its governing document specifically requires our consent when it is dissolving or merging.

In more detail

A charity's governing document will, more often than not, contain the power needed to allow a charity to merge with another. Examples of the typical powers that trustees might have are:

- (a) the power to dissolve their charity and pass the assets to another charity with the same or similar purposes. Generally, trustees may use this power without needing to first obtain our consent unless their governing document specifically says otherwise.

- (b) an express power to merge – the power contained in our model governing documents also enables charities to merge without first getting our consent.

If charities' existing powers (both constitutional and implied) are a barrier to merging with another charity, we are pleased to offer tailored advice and guidance to help secure the best way forward.

C4. Do the purposes of merging charities need to be the same?



The short answer

Not necessarily, but the purposes of the merging charities must be compatible.

In more detail

The primary duty of the trustees of a charity transferring its assets to another charity (a transferring charity) is to consider the needs and interests of those who benefit from its work. The purposes of the merging charities need to be compatible. Transferring charities must ensure that the recipient charity has purposes which are

suitable, given the terms of the dissolution clause or other power being used by the transferring charity.

We are happy to advise on the adequacy of the charitable purposes of the recipient charity if there is any doubt.

C5. If a transferring charity has special trusts, restricted funds or permanent endowment, will this prevent the merger from going ahead?



The short answer

No, but it is important to identify these classes of funds since they must be dealt with in accordance with the rules governing their use and cannot be simply mixed in with the general assets belonging to the recipient charity.

In more detail

Typically it will be necessary to ensure that the special trusts, restricted funds and permanent endowments which are being transferred to the new charity, continue to have a separate and ring-fenced existence where this is legally required. However, the terms of special trusts or restricted funds sometimes enable the funds to be wound up and transferred over to the general assets of the recipient charity.

If the terms do not allow this, it will usually be possible for the trustees of the existing charity to appoint replacement trustees for the special trusts (likely to be the trustees of the recipient charity), to take over once the merger has happened. Trustees may need to take legal advice on this issue. We are happy to assist if there are inadequate powers of appointment available.

Case Study

CLIC Sargent

Cancer Leukaemia in Childhood (CLIC), with an annual income of £6.4million and operating nationally, and Sargent Cancer Care for Children, with an annual income of £7million and also operating nationally, were two charities that existed to provide clinical, psychosocial and emotional support for children and young people with cancer, and their families.

In deciding to merge, they opted to wind up both existing organisations and transfer their assets to a newly formed charitable company with identical purposes.

The main aims of the merger of CLIC and Sargent Cancer Care for Children were:

- an enhanced service delivery to the users of the charities' services;
- pooling of resources and a projected annual income of £17million for the new charity;

and

- enhanced governance arrangements.

The Charity Commission met with representatives from both charities and their professional advisers and discussed the way forward. We identified the stages of the merger process that would require the input of the Commission. These stages included:

- advice on the new charity's governing document;
- registering the new charity;

and

- making an Order transferring the ownership of 42 properties from the former charities to the new charity.

As well as the overall decision to merge, some of the main considerations for trustees in the process were;

- ensuring that services to beneficiaries were maintained throughout;
- agreeing the name, brand and identity of the new charity;

- ensuring there was an efficient assimilation, restructuring and recruitment process that would cause minimum disruption to staff and the charities' activities.

CLIC and Sargent Cancer Care for Children merged in January 2005. Indications are that the merger has been a success and the new charity, CLIC Sargent, is providing enhanced service delivery for beneficiaries and is on target to achieve its projected income.

CLIC Sargent is keen to share their merger experiences with other charities who may be considering undertaking the process: please feel free to contact the charity on 020 8752 2800.

C6. What are the powers that trustees might expect to see in their governing document that would allow their charity to merge with another charity?

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The short answer

The charity's governing document, typically a trust deed, a constitution or a memorandum and articles of association, might contain powers that could be used to achieve a merger. These will vary from charity to charity and other routes to a merger may be available. The most common power is one which allows trustees to dissolve or wind up the charity and to pass the charity's assets over to another charity or charities with similar purposes. Some charities may have an express power to merge with another charity.

In more detail

These are some of the implications of the differing governing documents:

A trust: A trust governed by a trust deed does not usually have members and all decisions will be made by the trustees according to the procedures set out in the deed. The deed may contain an express power to merge, or a power to dissolve and pass the charity's assets to another, or in some cases both.

An unincorporated association: This form of charity has members who play a key role in the administration of the charity. The governing document, usually a constitution, might contain an express power to merge and commonly has a power to dissolve the charity and transfer its assets to

another. Although the trustees are responsible for the general administration of the charity, decisions such as the dissolution of the charity will require a vote by the members. This means that the members can vote against a motion to dissolve (see section C7).

A charitable company: The governing document of a charitable company, a memorandum and articles of association, will usually include a range of powers that will enable it to merge with one or more charities. Any changes to the purposes of the charity or anything that restricts or directs the way that its property is used will require our consent under section 64 of the Charities Act 1993. Charitable

companies must also inform Companies House of a change to their memorandum and articles of association or of their dissolution.

Mergers between charitable companies tend to be more administratively straightforward because of the expendable nature of their property. Charitable companies cannot hold permanent endowment corporately because, by its nature, permanent endowment is held on trust for investment or for retention, and must only be used to further the charitable purposes for which it was given. All of a charitable company's assets must be able to be used for its own general purposes which may be wider than the purposes for which the funds were given (this includes paying creditors in case of liquidation). A permanent endowment can be held by a charitable company in a trust (where it is a corporate trustee) but not as corporate property.

C7. How involved in the process should our members be?

The short answer

Generally it is unincorporated associations and charitable companies that have a membership structure and the governing document will set out the role these members have in the administration of the charity.

In more detail

If a charity has members, trustees should consider the role and involvement of those members in the merger process at an early stage. This is particularly important if the proposals, or exercise of any power to merge, requires the consent or other input of those members. For example:

- the governing document of a charity may require its trustees to ask its members to vote on any merger proposals before a decision can be taken; and
- in some governing documents, members are required to vote on proposals to dissolve the charity and transfer its assets.

C8. Are there different procedures for small charities?

The answer

Smaller charities may be able to take advantage of sections 74 or 75 of the Charities Act 1993 which make special provisions for certain small charities to transfer property, modify their trusts or use their capital with the Commission's agreement.

C9. What do the trustees need to think about when estimating the cost of a merger?

The short answer

Do not under-estimate the cost of a merger. Set aside adequate levels of funding for the merger, and keep the actual and anticipated costs under review.

In more detail

Some costs can be calculated in advance, such as:

- modification or development of services;
- introducing common technology and information systems;
- professional fees;
- advertising;
- rebranding;
- staff time;
- relocation expenses; and
- governance costs, such as special general meetings, or amendments to membership or beneficiary records.

Unforeseen costs might include:

- losing out on new initiatives, opportunities or income sources because of time spent on the merger;
- possible disruption, for example through office relocation, or through redundancy processes;

- changes in legislation which might, for example, affect terms and conditions for new, as opposed to existing, staff and the speed at which the new charity can move to common terms and conditions of employment;
- disruption to delivery of aims and objectives; and
- loss of existing funding (for example where a funder is currently donating to both charities but their policy states that they can only give to one organisation).

In the short term there may be more costs than benefits and if trustees are considering a merger, they need to be confident that the longer-term anticipated benefits justify those costs.

Some funding bodies provide grants for charities to explore and undertake a merger (see section E – Further Information and Advice). Although sometimes administratively straightforward, mergers can often be

complex in terms of organisational and cultural change, which might mean that charities considering merger could benefit from specialist independent advice. As with any significant contract, trustees should consider tendering for these professional services to help them merge.

C10. Can charitable funds be used to meet the cost of a merger?

The answer

Yes. The costs of a merger are proper calls on the funds of a charity.

C11. What other issues are there to consider when thinking about a merger?



The short answer

Charity trustees are legally responsible for taking any decision to assess a merger proposal. This work is often delegated to senior staff within the charity. However, trustees themselves need to fully consider all the relevant issues before making any decision.

In more detail

The main issues to consider when exploring a merger proposal include:

- whether the merger will be in the best interests of the charity's beneficiaries;
- ensuring all legal issues have been addressed and that the process complies with the charity's governing document;
- how to maintain confidentiality;
- proper assessment of employment issues, such as any TUPE requirements, pension liabilities (in particular, final salary schemes) and compliance with employment law;
- sensitive handling of staffing issues, such as managing any staff reductions (including in some cases the chief executive and other senior staff) and addressing staff morale in the period of change;
- an assessment of the risks attached to the proposed merger, including any operational and reputational risks;
- other factors that can impact on a merger, including:
 - the need for good communications, both internal and external;
 - future location;
 - filling key roles eg chair, chief executive, and board members;
 - the importance of deciding on an appropriate name, brand and identity for any new charity;
 - engaging with and managing expectations of people and organisations that have an interest in the merger;
 - the need to negotiate with existing funders at an early stage;
 - any impact on the ability to fundraise, for example the likelihood of an attrition of donors;
 - organisational culture; and
 - internal politics.

C12. What should the planning process involve?

The short answer

Mergers are major projects. Whilst the cultural aspects of a merger should not be underestimated, a structured project-management process will help to ensure clarity about planning, timescales and costings throughout the merger process.

In more detail

The following stages are normally involved in the planning process for a merger:

- joint exploration (ie between all parties to the proposed merger) of the key issues, including:
 - reasons for the merger;
 - potential benefits; and
 - potential obstacles.
- an initial feasibility study, cost-benefit analysis and risk assessment;
- the appointment of a merger project manager or dedicated resource to manage the process;
- legal and accountancy analysis by advisers;
- advice from or discussion with the Charity Commission if there are problems with powers or other legal issues are identified;
- a formal due diligence exercise (this can be carried out in-house or by the charities' respective auditors or other professional advisers). More information on due diligence can be found in section D; and
- a formal decision by each trustee body to proceed with merger.

This list is not exhaustive and will vary depending upon the size and nature of the charities merging.

C13. What part should a chief executive play in the process of merger?



The answer

The role a chief executive will play in a merger will vary. In many cases, the chief executive's contribution is vital to the process (and they may have identified or instigated the merger proposal). In these instances, they are likely to play a key role in the process. Nevertheless charity trustees must remain in control of the overall process. The chief executive and other individuals (including consultants) or committees, to whom certain tasks or responsibilities have been delegated, should report back to trustees on a regular basis.

Sometimes, a charity's trustees may pursue a merger which will result in an outcome in which there is no future role for the chief executive. In these instances, the trustees will need to proactively drive the merger and also be particularly aware of managing communication with the chief executive, staff and other key stakeholders.

C14. Will any other public bodies need to be involved, in addition to the Charity Commission?

The short answer

Possibly. Each charity involved in the merger process should have identified as part of a due diligence process (see section D) whether any other public body will need to be consulted or involved as part of the merger process.

In more detail

The following agencies are examples of those that may need to be approached:

- HM Revenue and Customs if the new merger will affect the charity's tax or trading arrangements.
- The Registrar of Companies if a new company is being created, an existing one dissolved or changes to a memorandum and articles are being made.
- The Land Registry if land or property is being transferred from one organisation to another.
- The Criminal Records Bureau if a charity is taking over responsibility for overseeing volunteers or staff who will be working with vulnerable beneficiaries, and require checks.
- Local authorities, for a variety of reasons, including change of details for obtaining charitable relief from council tax payments, or for public collection licences.
- The Commission for Social Care Inspection, if a charity's activities are inspected by the organisation.

This is not an exhaustive list, and will vary according to the charity's purposes and activities.

C15. What is the function of the Register of Mergers?

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The short answer

The Register of Mergers can be seen on the Commission's website and shows the recipient charity of the property of a charity or charities that has ceased to exist. However, it can only contain details of mergers that have been notified to us by the receiving charity.

In more detail

New sections 75C, D, E and F of the Charities Act 1993 were introduced by the Charities Act 2006 and provide for the establishment of a Register of Mergers. Full details of how the Register operates can be found in our operational guidance *Register of Charity Mergers* (OG60) on the 'Publications and Guidance' page of our website.

The provisions are designed to address two issues:

- uncertainty over whether a legacy to a charity which has transferred all of its property to another and ceased to exist can pass to the transferee charity;
- simplifying the legal formalities regarding transfer of property between the charities involved in a merger.

Relevant mergers (those that are eligible to appear on the Register) are defined in section 75C(4). Broadly speaking, a relevant merger covers:

- a charity dissolving and passing its assets to another;

- incorporation cases (where an unincorporated charity winds up and passes its assets to a newly formed charitable company); or
- cases where two or more charities dissolve and pass their assets to a new charity.

We are only required to register those mergers that are notified to us by the trustees of the transferee charity once the transfer of all property has been completed and the transferor has ceased to exist. The merger that is notified to us can have taken place before sections 75C, D, E and F came into force. However, the trustees of the transferee charity **must** notify us of any merger where a vesting declaration has been used to transfer the title to the transferors property to the transferee.

Trustees of a transferee charity can use the application form CSD-1162 (available on our website under the 'Apply for it' page) to notify us of a relevant merger.

D. Due diligence

D1. What is 'due diligence'?



The short answer

Due diligence is a phrase with origins in the corporate sector. It is used to describe the steps organisations take to assure themselves that a merger is in their best interests. In charities, "due diligence" describes the investigation of another charity or charities in advance of completion of a merger. The result of a due diligence exercise is that a charity has full knowledge of the organisation they seek to merge with (ie there are no surprises).

Where there is a collaboration involving significant financial or reputational risks the same process may also be used, although it may not be described as such.

The costs of commissioning due diligence work is a proper use of charitable funds, but should be forecast at the outset and regularly reviewed to ensure they remain proportionate to the risks involved.

In more detail

Collaborative working and mergers have the potential to expose charities to a variety of risks, including additional liabilities. Trustees of all charities must comply with their legal duty to act prudently. When planning a proposed merger or a contractual collaborative arrangement, they should ensure that they have identified any potential risks to their charity before entering into any agreement.

The nature of the checks used should be proportionate to:

- the size and nature of the proposal;
- the amount of income and expenditure involved; and
- the nature of the existing and planned activities.

For example, a more rigorous exercise may be necessary where charities have one or more of the following:

- complex service delivery arrangements;
- high profile or sensitive work undertaken;
- links with affiliated charities;
- operations in a number of geographical locations;
- one or more trading subsidiaries;
- extensive property holdings and assets; or
- restricted funds or permanent endowment.

Depending upon their initial assessment, trustees may require professional advice to ensure that there is an appropriate level of due diligence undertaken.

D2. What general areas are looked at in a due diligence exercise?

The short answer

The main elements of due diligence tend to include commercial, financial and legal matters. Other issues such as fundraising strategy, evaluation of future income sources, property, pensions and the provision and maintenance of information technology systems will often also need to be covered.

In more detail

These are some pointers to the types of issues that could be included as part of carrying out due diligence on a charity or another organisation:

Commercial due diligence:

- initial procedures (including agreeing extent of work, establishing main contact and liaising with other due diligence advisors);
- SWOT (strengths, weaknesses, opportunities, threats) analysis;
- impact on future income;
- competitive position;
- management resources;
- risk analysis.

Financial due diligence:

- initial procedures (as above);
- financial review:
 - history;
 - statutory information;
 - management and employees;

- management information and accounting systems;
- accounting policies;
- financial results;
- net assets;
- cash flow statements and forecasts;
- taxation;
- general matters (eg accounting for pensions FRS17, insurance).

Legal issues:

- initial procedures (as above);
- available/required powers;
- compliance with relevant legislation, eg TUPE;
- property issues, eg assignment of leases, transfer of title;
- contractual issues;
- rules for appointing trustees to the newly merged body;
- nature of assets, eg permanent endowment.

D3. How should a due diligence exercise be carried out?

The answer

There is no pre-set or prescribed way for carrying out due diligence exercises.

Whilst trustee bodies of all charities considering a merger should conduct a due diligence exercise, it can be undertaken either with or without external professional advice. If trustees have adequate experience, the due diligence exercise can be wholly performed by them. The advantage of external advice is that professionals with specialist expertise can act independently and objectively. They can also be used to ask the awkward questions and request documentary evidence to support the answers.

Due diligence provides all sets of trustees involved with detailed knowledge which may help build trust during the merger negotiations, and in the future after the merger has been completed. The exercise will also identify any problems in advance of the merger progressing formally. This enhances the likelihood of trustees being able to properly address those problems at an early stage, and enhances the potential for a successful merger.

E. Further information and advice

The Commission produces a wide range of publications and website guidance giving information and advice to charity trustees and the general public on a number of issues relating to charity law and regulation. The full list of publications is on our website www.charitycommission.gov.uk The list below is a selection based on some of the issues identified in this guidance.

To obtain copies of these or any other of our publications you can either:

- view and print from our website www.charitycommission.gov.uk
- e-mail us at enquiries@charitycommission.gsi.gov.uk
- telephone Charity Commission Direct on 0845 300 0218 (08:00 – 20:00 Monday – Friday and 09:00 – 13:00 Saturdays) or 0845 300 0219 for Tynetalk users
- write to Charity Commission Direct, PO Box 1227, Liverpool, L69 3UG

We have also listed a selection of other organisations and publications which can be used as sources of information.

E1. Charity Commission publications

Collaborative Working and Mergers (Research Report RS4)

Milestones: managing key events in the life of a charity (Research Report RS6)

The Essential Trustee: What you need to know (CC3)

Internal Financial Controls for Charities (CC8)

Use of Church Halls for Village Hall and Other Charitable Purposes (CC18)

Charities and Fundraising (CC20)

Charities and Public Service Delivery - An Introduction and Overview (CC37)

Charity Reporting and Accounting: The essentials April 2008 (CC15a)

Charity Commission website publications:

- Policy statement on mergers, collaborative working and due diligence
- Charities and Risk Management

E2. Other organisations

Commission for Social Care Inspection (CSCI)

The Inspectorate will, amongst other related tasks, carry out local inspections of all social care organisations – public, private and voluntary – against national standards, publish reports and register services that meet national minimum standards.

33 Greycoat Street
London SW1P 2QF
Helpline: 0845 015 0120
Email: enquiries@csci.gsi.gov.uk
Website: www.csci.org.uk

Community Interest Companies (CIC) Regulator

The Companies (Audit, Investigations and Community Enterprise) Act 2004 established the CIC Regulator. The aim is a 'light touch' regulator who will encourage the development of the Community Interest Company (CIC) brand and provide guidance and assistance on matters relating to CICs.

The CIC Regulator
CIC Team
Room 3.68, Companies House
Crown Way, Maindy
Cardiff CF14 3UZ
Tel: 029 20346228
Email: cicregulator@companieshouse.gov.uk
Website: www.cicregulator.gov.uk

Companies House

The main functions of Companies House are to:

- incorporate and dissolve limited companies
- examine and store company information delivered under the Companies Act and related legislation; and
- make this information available to the public.

Crown Way
Maindy
Cardiff CF14 3UZ
Contact Centre: 0870 33 33 636
Email: enquiries@companieshouse.gov.uk
Website: www.companieshouse.gov.uk

Criminal Records Bureau (CRB)

The CRB is set up to provide access to criminal record information. The CRB helps employers in the public, private and voluntary sectors identify candidates who may be unsuitable for certain work, especially that involving contact with children or other vulnerable members of society.

Customer Services
CRB
PO Box 110
Liverpool L69 3EF
Information line: 0870 90 90 811
Website: www.crb.gov.uk

Healthcare Commission

The Healthcare Commission promotes improvement in the quality of the NHS and independent healthcare.

Tel helpline: 0845 601 3012

Email:

feedback@healthcarecommission.org.uk

Website:

www.healthcarecommission.org.uk

HM Revenue and Customs (HMRC)

HMRC is the new department responsible for the business of the former Inland Revenue and HM Customs and Excise. The website will direct you to the correct contact point for your enquiry.

Website: www.hmrc.gov.uk

Land Registry

The Land Register provides access to details of more than 20 million registered properties in England and Wales. The title register includes ownership details and, for most properties which have changed hands since April 2000, the property price information.

Website:

www.landregisteronline.gov.uk

National Council for Voluntary Organisations (NCVO) – Collaborative Working Unit

NCVO produces a wide range of information and support services for those working in the voluntary sector. The Collaborative Working Unit provides good-practice information and advice on all aspects of collaborative working for voluntary and community associations.

Regent's Wharf

8 All Saints Street

London N1 9RL

Tel: 020 7713 6161

Email: helpdesk@askncvo.org.uk

Website: www.ncvo-vol.org.uk/collaborate

Office of Fair Trading (OFT)

A Government Department that advises on information relating to businesses and markets (including mergers).

Fleetbank House

2-6 Salisbury Square

London EC4Y 8JX

Tel: 0845 4040 506

Email: enquiries@oft.gov.uk

Website: www.oft.gov.uk

Other publications

‘Financial Due Diligence’

By Arthur Davey BA FCA and published by CCH. This publication presents a practical approach focussing on the key issues of merger and acquisition. It is suitable both for the new and the more experienced practitioner.

Website: www.cch.co.uk

Customer helpline: 0870 777 2906

‘Legal Issues in Charity Mergers’

A Report published in January 2001 on a year-long research project to identify the legal issues arising in charity mergers and the different responses to them. It also considers the most appropriate solutions to commonly experienced problems.

Charity Law Unit, University of Liverpool.

Website: www.liv.ac.uk

‘Mergers: A Legal Good Practice Guide’

Published in January 2001 to accompany the Report described above, This is intended to help charities anticipate and deal with problems that can arise when a merger takes place.

Charity Law Unit, University of Liverpool.

Website: www.liv.ac.uk

‘Key Findings on Voluntary Sector Mergers’

By Ben Cairns, Margaret Harris and Romaine Hutchison. The Key Findings are based on research in voluntary organisations considering or implementing merger (including Terrence Higgins Trust, Crisis and Homeless Link). These Key Findings describe and discuss a number of issues connected with a merger between two or more voluntary organisations.

University of Aston

Website: www.abs.aston.ac.uk

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This publication can also be accessed at the Charity Commission's website: www.charitycommission.gov.uk

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