



THE UNIVERSITY  
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*Charity Law Unit*

***Mergers:  
A Legal Good Practice  
Guide***

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## THE CHARITY LAW UNIT

The Charity Law Unit was established in October 1994 to provide a focus for the already well established reputation of the Faculty of Law, University of Liverpool for research and teaching in Charity Law. The Charity Law Unit has grown from strength to strength since its establishment and it is the only such unit in England and Wales.

The Charity Law Unit's mission is to be recognised as the centre of excellence for legal research of the charity sector. It aims to do this both by responding fully to the demands for legal research raised by the charity sector and by being pro-active in highlighting and pursuing legal research in areas where the law and its application requires clarification, guidance or possible reform.

Mergers: A Legal Good Practice Guide was written by Jean Warburton, Professor of Law in the Charity Law Unit. She is editor of the leading text on Charity Law, *Tudor on Charities*, published by Sweet & Maxwell and has many articles in the area of Charity Law. She is also a Part-Time Charity Commissioner, but this work should not be taken to reflect the views of the Charity Commission.

The empirical work for this Guide and the main report, *Legal Issues in Charity Mergers*, was largely undertaken by Louise Platt, who was employed as Research Assistant on the project. Other members of the research team were Debra Morris and Andrew Cartwright.

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To respect their confidentiality, all examples in the Guide have been anonymised and potentially identifying circumstances have been altered.

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## MERGERS: A LEGAL GOOD PRACTICE GUIDE

1. This guide is intended to help charities to anticipate and deal with the legal problems that can arise when a merger takes place. It also includes some practical advice. The guide does not deal with the important managerial and organisational changes which a merger entails nor does it consider the various human and social factors which can help to make merger between charities work. A charity contemplating merger might find it helpful to refer to one or more of the publications on the wider aspects of mergers listed in Annex A.

### Thinking about merging

2. Charities can start to think about merging for a wide variety of reasons, for example, a desire for greater effectiveness and efficiency, pressures on funding or a desire to avoid duplication of services. Whatever the driver for a proposed merger charities need to consider carefully if merger is the best solution to their particular problem. An alternative form of joint working such as a sharing of resources or a joint project may be more appropriate. A merger arrangement can include termination provisions but other forms of joint working are easier to withdraw from if the arrangement does not work as the charities anticipated. Some useful publications on alternative forms of joint working are listed in Annex B.

3. This guide is for charities that have decided that merger is right for them. Every merger is different and whatever is written can only be a general guide and can never be a substitute for very careful thought by the merging charities about their particular circumstances. Nor is this guide a substitute for professional advice in connection with the various complex legal and accountancy problems that can arise in mergers. What this guide does do is to provide a general route map towards merger, alerting charity trustees to those occasions when they should consider seeking further advice whether by using the qualifications, experience and skills of one of their own number or by taking outside advice.

### First steps

4. Research has shown that charities which have clear, up to date governing documents and well organised working practices find the whole process of merger much easier. A charity which carries out the following steps will find that it is in a much better position to respond to any later proposals for merger or joint working even if the present merger proposal does not succeed.

1. Check the governing document, looking in particular to see if there is power to amalgamate and transfer property and, if there is a membership, what voting majorities are required. If necessary, take

appropriate steps to up date the governing document either by using amendment powers in the governing document itself or by approaching the Charity Commission for a scheme, see paras 20-24.

2. Ensure that all contracts with employees are clear and in writing and that arrangements with volunteers are also clear and mutually understood, see paras. 41-48.
3. Check that the charity has the relevant documents for all the property that it uses. If the arrangement for the use or occupation of any property is missing or unclear try to come to an agreed documented arrangement with the owner, see paras. 49-52.

### Carrying Through a Merger

5. Mergers between two or more charities can take place in a variety of ways. Once charities have decided that they do want to merge, they need to decide what form is best for their particular merger. Some of the more common forms are set out in para. 9 below. Not all forms of merger are possible for all charities and the merging charities need to check carefully that they can legally use their chosen form. Additional steps may have to be taken to get the charities legally fit for merger, see paras. 19-24.

6. The merged charities will have to live with their new form for a long time, so it is important to get it right. Experience has shown that early consideration of some matters helps towards a successful merger and these are discussed in paras 25-27.

7. The process from initial agreement to merger to final merged charity usually takes between six months and a year, but can take longer. There are a number of ways in which the process can be made easier and these are considered in paras. 28-33. Merging charities have found that particular problems arise in relation to due diligence, the rights of employees and volunteers and the use and retention of assets; these areas provide the final four sections of this Guide.

### Form of Merger

8. Mergers between charities take place in one of three basic ways:

- Complete take-over and absorption of one charity by another.
- Formation of a new charity.
- One charity taking control of another, but leaving the other in existence as a subsidiary.

Charities obviously have different governing instruments and different ways of operating so the actual route to either take-over or a new charity can vary enormously.

9. The following are some of the more common forms which merger between charities can take:

1. Charity A transfers its assets to Charity B and is then dissolved.
2. As (1), but in addition Charity B is renamed Charity C with a revised governing instrument.
3. Charity A transfers its assets to Charity B and remains as a “shell” charity.
4. Charity A becomes corporate trustee of Charity B.
5. As (4), but in addition Charity B transfers its assets to Charity A and is then dissolved.
6. Charity A and Charity B transfer their assets to a new Charity C and are then dissolved.
7. As (6), but Charities A and B remain as “shell” charities.
8. Charities A and B become subsidiaries of a new Charity C, a holding company, which is the sole member of Charities A and B.
9. Charity A carries out its operations through a subsidiary trading company. Shares in the trading company are transferred to Charity B and Charity A is dissolved.
10. A number of smaller charities are grouped together by scheme.

### Choosing a Form of Merger

10. Research shows that there is no such thing as the ‘best’ form of merger. Nor is there agreement that a merger between particular types of charity, for example charitable companies, or between charities operating in a particular way, for example service providing, should always take place in the same way. Each group of merging charities will need to choose the form of merger that is going to be most appropriate and effective for them.

11. When merging charities are deciding on the form their merger should take they might find it helpful to consider those factors set out below which are relevant to them. Some forms of merger may create legal problems for particular charities. Experience shows that if trustees, staff and members of merging charities have strong views on the form the merger should take it is better to be guided by those views and to seek, if at all possible, to remove the legal obstacles to their preferred form of merger.

### Factors Influencing the Form of Merger

12. Trustees, staff, volunteers and members of the merging charities may feel strongly that they do not want to be part of a take-over. In such circumstances, a form with a new charity such as Form 6 and, possibly, Form 2 should be considered. This



form can also be appropriate where trustees of the merging charities want to make a fresh start.

13. If one of the merging charities is in financial difficulties and is being rescued by another charity, absorption by the rescuing charity as in Forms 1 or 3 may be appropriate. If it is important that the identity of the failing charity is maintained Form 4 may be more appropriate. This form is also appropriate if the rescuing charity does not wish to take on, or be exposed to the risk of, the liabilities of the failing charity.

14. At least one of the merging charities may have membership support and interest and that support may be very important for the success of the merged charity. In those circumstances Form 2 may be appropriate where Charity B is the charity with the membership structure best suited to the future activity of the merged charity

15. If the merging charities wish to retain their own identity, but to reduce overhead expenditure, a group of subsidiary charities as in Form 8 should be considered.

16. Merger of a large number of small charities, for example prize funds, is probably best carried out by scheme as in Form 10.

17. If the merging charities have more than a small number of employees, the potential liability on any transfer of staff, see paras. 40-47, means that a form involving the retention of existing charities as in Forms 4 or 8 should be considered rather than transfer and dissolution as in Forms 1 or 6. If only one of the merging charities has employees, Form 2 may be appropriate.

18. Present and future sources of funding can be relevant factors in determining the form of merger to be used. If a funder is not prepared to transfer funding to the new merged charity, the use of shell charities, at least until that particular funded project has ended, as in Forms 3 or 7 may be necessary. Similarly, if one of the merging charities expects future legacies, it may be prudent to leave it as a shell charity. There are, however, administrative costs in keeping a shell charity, for example in preparing annual accounts, and the Charity Commission may remove a shell charity from the register if it is not operating.

### Legal Considerations

19. Not all forms of merger are possible for all charities and once the merging charities have decided the general form they would prefer their merger to take they need to consider a number of particular legal matters relating to the constitutions of their charities. These legal matters may dictate the final form of the merger or they may be preliminary matters that have to be settled before the merger can proceed.

20. Charities should check their governing instruments to see that they have the relevant powers to undertake their chosen form of merger. For example, if the charities have decided on the take-over route as in Form 1, 2 or 3 does the charity being taken over have power to transfer its property to the other charity? If not the charity will need to obtain the relevant power either by using a power of amendment in

the governing instrument or, if that is not possible, by approaching the Charity Commission for a scheme. Alternatively, the merging charities may decide to use their powers to wind-up and then transfer any surplus assets to a new charity.

21. If a form of transfer to one charity, as in Form 1, 2 or 3, is contemplated the objects of the receiving charity must not be so wide that the trustees of the transferring charity will be in potential breach of trust by applying the property of their charity outside their objects. The width and contents of each charity's objects may dictate which is to be the final merged charity.

22. Where the merging charities consist of an unincorporated association and a charitable company, the trustees of the merged charity may want limited liability making it preferable for the charitable company to be the merged charity. The governing instrument of the merged charity should be checked, and if necessary amended, to make sure that members retain the same level of participation that they had in the unincorporated association.

23. If any of the charities has a membership, the agreement of the members will usually be needed for merger. The relevant charities' governing instrument will set out the necessary majority required for such agreement. If a very high majority, for example 75% of all members is required there may well be practical difficulties in getting the resolution passed. That charity may need to amend its governing instrument to reduce the necessary majority before the resolution for merger is placed before the members. Merging charities should also check that there is an up to date list of members. If there is difficulty in tracing members, legal advice should be sought as to the extent to which it is possible to dispense with the consent of members.

24. The age and legal structure of the merging charities may, to a certain extent, dictate the form of merger. Generally speaking, the more recently a charity has been formed the more likely it is to have a constitution which is easy to use and adaptable. In the absence of any other strong considerations, it is preferable for the newer charity to form the basis of the merged charity.

### The New Charity

25. In most forms of merger the merging charities become one body, with one constitution even if shell charities remain. To a certain extent the success of the merger depends upon the governing instrument of the new merged charity. If the governing instrument in any way inhibits future activity or causes difficulties in governance, the future working of the merged charity may be put in jeopardy. Research shows that careful thought given to the constitution of the merged body pays dividends in the future.

26. Merging charities need to think about what they want to do in the future and how they want to do it. The objects of the merged charity should be wide enough to encompass future plans and the necessary powers should be included. If an existing charity is being used as, for example, in Form 2, it is not safe for the merging charities to assume that the existing governing instrument will be adequate. Merging charities

are strongly advised to seek legal advice at an early stage on the drafting of the governing instrument for the merged charity.

27. Merging charities also need to give early attention to the way in which the merged charity is to be governed. This is not only to ensure that the merged charity has effective governance, but also to help to keep on board for the new charity those who have supported the merging charities. Thought should be given to the size and skills mix which the governing body of the merged charity will need for its future work. Interim arrangements can help to make the transition to a more effective governing body. Interim arrangements can involve a governing body of all or some of the trustees from all the merging charities followed by no further appointments until a workable number has been reached or followed by early elections at the next Annual General Meeting for a smaller workable body of trustees.

### The Process of Merger

28. The usual practice after charities have decided to merge is to delegate the detailed work to a joint merger group with members from all the charities. The membership and size of such a group is dependent on the number and size of the charities involved in the merger. Good practice indicates that the group should:

- not be so large as to be unworkable
- have equal representation from all charities
- include at least one trustee from each charity, preferably the chair, to provide trustees with assurance that the merger remains in the best interests of each charity
- for larger charities, include the chief executive and finance directors

29. The group will need to decide how it is going to carry out its work. For example for larger charities this may mean separate sub groups looking at funding and service delivery. Whatever the method of working chosen, the merger group must report back regularly to trustees of the individual charities. The final decisions must be those of the trustees and not the merger group and all trustees' decision should be recorded in writing.

30. Some merging charities have found it helpful to appoint a consultant to act as a neutral facilitator to keep the merger process on track. Funding may be available for such a consultant either from a grant awarding trust or a common funder of the charities that is keen to encourage the funded charities to merge.

31. Experience has shown the importance of keeping everyone informed about the progress of a merger and its implications for individual stakeholders. Effective merger committees have been astute to keep good lines of communication open with employees, volunteers, members, patrons and funders.

32. The extent to which outside professional advice is taken will depend on both the complexity of the merger and the expertise ready to hand in trustees and staff of the merging charities. There is general consensus that it is better to take legal advice, whether from outside or in house, at an early stage. This allows a route map to be

drawn up, potential problems to be highlighted and a realistic assessment made of what the merging charities can do themselves and at what stages further legal advice is likely to be necessary. Although there is potential conflict of interest, research shows that with care it is possible to use one legal adviser for all the merging charities. An additional advantage of taking early legal advice is that any legal bars to merger or merging in a particular form can be pointed out and appropriate action taken, see paras. 19-24.

33. It is also considered good practice to inform the Charity Commission at an early stage in the merger process. This is partly to check if there are problems with the form of merger chosen and also to allow relevant advice to be given.

### Due Diligence

34. Merging charities need to know as much as possible about each other for good practical and financial reasons. There are also important legal reasons for making sure detailed information about the merging charities is made available. Charities need to know what the potential liabilities are and which charity will be responsible for particular liabilities. For example, which charity will be liable for employees? What is the rent on the property the merged charity will be using and is there any liability for arrears?

35. The process by which merging charities, or indeed other organisations, seek the information that they need is called “due diligence”. In a merger of commercial organisations due diligence is a very rigorous process and usually involves a number of professional reports. Commercial process of due diligence provides a helpful starting point for merging charities but in practice charities have to adopt a far more flexible process. For example, in a commercial merger where one organisation is being taken over by another, usually only the former organisation will be subject to due diligence. But because all charity trustees are under a duty to act in the best interests of their charity, it is considered advisable that all the merging charities should carry out some form of due diligence of the charities with which they are merging. Even if the assets of one charity are simply being transferred to another, the trustees of the charity which is in effect being taken over need to have sufficient information to be able to assess whether the merger is within their powers and in the best interests of their charity

36. A due diligence exercise should provide sufficient information to enable potential merging charities to assess whether the merger is feasible and, if the merger proceeds, to identify and allocate most liabilities. In practice, charities may not be able to find some relevant documents, for example, contracts of employment or leases, and information will have to be obtained from trustees and employees. Part of the due diligence process for many charities will be assessing how much time and effort they want to put into pursuing enquiries about the other merging charities when seen against the likelihood of the risk of potential future liabilities.

37. The first set of enquiries that any potentially merging charities are advised to make is to see that merger is legally possible and that the merging charities are compatible. The former requires an examination of each charity’s governing

documents and a consideration of the terms on which any restricted funds are held. The latter involves a wider examination of the relevant charities mission statements, business plans, working methods, major contracts, etc. Compatibility or ‘cultural fit’ is often the key to a successful merger.

38. If as a result of the initial due diligence exercise charities decide to continue with merger, further due diligence will be needed in the areas of finance, employment, assets and governance. The documents to be examined and questions to be asked will vary depending on the form of merger and size and activities of the charities but the main areas to be checked are standard. Due diligence in the area of finance usually involves consideration of the accounts for at least the last three years, the accounting records and then follow up of any problems apparent from those accounts, for example, unexplained expenditure. Questions will also need to be asked about potential tax liabilities, particularly if one of the charities has trading operations. Charities should ensure that they have accurate information on the number of employees and their individual contracts of employment. Enquiries should be directed to establish an accurate list of the assets which the other charity holds, the basis on which they hold it and whether there are any restrictions on the use of those assets. In relation to governance, enquiries should be directed to checking as an absolute minimum that the charity trustees have been acting within their governing instrument and have been complying with the statutory obligations for the delivery of accounts and reports. In all areas due diligence is directed to ensuring that potential liabilities are known before merger; potential liabilities can range from debts and breaches of the terms of a lease to breach of trust by the charity trustees.

39. Who carries out any due diligence exercise will often depend upon the resources available. A three-stage process has been found helpful in previous mergers:

- Charities take professional advice from solicitors as to what needs to be found out and draw up a checklist.
- Trustees or employees of the charity try to obtain the relevant information either from documents or by asking questions using the checklist as a guide.
- The charity returns to the solicitor for advice on those areas where problems have been revealed.

If the financial aspects of the merger are critical, the charity may find it advisable to have the financial aspects of due diligence carried out for them by their accountants or at least seek additional professional advice from accountants.

40. There are obviously risks that a due diligence exercise will not reveal all the potential liabilities, particularly if one or more of the merged charities has not been well administered. Can the merged charity be protected from unknown liabilities? There are two possible ways: Warranties and indemnities. A warranty is a statement that a particular state of affairs exists, breach of which gives rise to damages. An indemnity is a binding contract to reimburse another if they suffer a loss. If the relevant merging charity is a company, a warranty and/or an indemnity can be taken from the company. If the charity is a trust or unincorporated association or a company

which is to be wound up, any warranty or indemnity will have to be given by the charity trustees or the members. There is a natural reluctance to impose additional liability on trustees or members by getting them to enter into warranties or indemnities where they are volunteers and unpaid. This is particularly so where the merging charity's assets have been transferred and are no longer available to meet any claim under an indemnity or warranty. In practice indemnities are not sought for charity mergers. Warranties, however, can be a useful means of encouraging charity trustees to find and produce information which they might not otherwise do and making the due diligence exercise more effective. The precise wording of a warranty is important, for example, a trustee warranting that something is true "to the best of their knowledge or belief" is under a much lower risk of liability. If warranties are contemplated, both those seeking and those giving warranties should take professional legal advice because of the potential for future litigation.

### Employees and Volunteers

41. Merging charities that have employees face particular problems, not only from the natural concerns of staff about their jobs post merger, but also because the law which protects employees when any organisations merge is not clear. Volunteers do not have legal protection on a merger but good practice dictates that they, like employees, should be kept fully informed about the merger and its progress. Past experience stresses the importance of good consultation with staff as a key factor in a successful merger.

42. The Transfer of Undertakings (Protection of Employment) Regulations 1981 as amended (commonly known as TUPE) provides that where there is a "transfer of undertaking", employees of the old employer when the undertaking changes hands automatically become employees of the new employer on the same terms and conditions. Any dismissal by the old or the new employer in connection with the transfer is unfair unless it is because of an economic, technical or organisational reason (ETOR) causing changes in the workforce. TUPE also imposes a duty to inform employees and in some cases consult with representatives of employees affected by a transfer. Most forms of merger of charities will come within TUPE and employees of all charities will be protected. The detailed application of TUPE is not clear and there are particular problems in applying the law to charities.

43. As TUPE requires the new employer to maintain an employee's terms and conditions a merged charity can end up with several groups of employees on different terms and conditions - those of the merging charities and new employees of the merged charity. If merging charities have employees and particularly if they are likely to want to change the terms and conditions of employment of any employees, they should take specialist legal advice. Charities may also want to seek the assistance of the Advisory Conciliation and Arbitration Service (ACAS).

44. Merging charities who are potentially affected by TUPE may want to consider keeping a charity in existence which has employees with the second charity taking control, for example, by becoming the sole trustee of the first charity, rather than transferring the employees to the second charity. (see para. 9 Form 4) This avoids a

transfer of undertaking, but may simply delay problems if the charities do eventually want a unified workforce under one employer.

45. It is important that each charity knows who its employees are and what are their terms and conditions as employees of merging charities will become employees of the merged charity on their existing terms and conditions. Sometimes it is not clear who is an employee. Recent employment law cases have held that some individuals whom a charity regarded as volunteers were in fact employees because, for example, they were receiving expensive training and were required to work a minimum number of hours a week. A charity which is paying more than minimal expenses to its “volunteers” is advised to take specialist legal advice.

46. Charities should have details about every employee’s contract of employment. If an employee after transfer finds that there has been a fundamental change for the worse in their terms and conditions of employment as a result of the transfer they will generally have the right to terminate their contract and claim unfair dismissal. It is possible to negotiate changes in terms and conditions of employment of employees of merging charities, but a charity intending to negotiate terms is strongly advised to take specialist legal advice at an early stage. The adviser will need to know the full conditions of employment of each employee, which includes those established by custom and practice as well as those set out in writing.

47. A merger may mean that some employees will be redundant, but a dismissal for redundancy at the time of merger will not also automatically be unfair if there is an ETOR. (see para. 42) If the mergers will only be cost effective if there is a restructuring, there may well be an ETOR. The law requires the charity to prove that there is an ETOR, so merging charities should keep evidence of changes they have been advised to make to try to ensure the merger is effective.

48. A merged charity faced with employees with different sets of terms and conditions can simply wait and rely on staff turnover to reach a state of all employees on the same terms and conditions. Minor changes to terms and conditions, for example, to working practices, can, however, be made without giving employees grounds to resign. When all employees are working for the merged charity they may be more prepared to accept changes to their terms and conditions to reach harmony, but any charity seeking to negotiate more fundamental changes to employment contracts is advised to take specialist legal advice.

### Assets

49. Whatever the form the merger between charities takes, assets will usually have to be transferred from one charity to another. It is important, therefore, to identify not only what property each charity has, but whether there are any restrictions on the use of any property. Restrictions will remain attached to the property after merger and the merged charity may be subject to potential liability if it does not recognise those restrictions.

50. A merger will be quicker if each merging charity starts as soon as possible to identify all the property which it owns or uses and intends to transfer to the merged

charity. The aim is to have a document for each asset which details the asset and the owner. For example, if a charity occupies premises it should have either a lease or licence for those premises and if the lease or licence is held by former trustees it should have contacted all those former trustees and made sure that they are able to sign a transfer of the lease. If there is no document for a particular asset the charity will need to enter into a formal arrangement with the owner if that property is to be transferred to the merged charity. If merging charities have a number of premises they should consider seeking professional advice as to the terms on which each property is held and whether some leases or licences need to be renegotiated.

51. A lease may require the consent of the landlord to be obtained before it can be transferred. Such consent should be sought before the merger. It is not advisable to rely on the landlord simply accepting rent from the merged charity without objection. A lease may also restrict the purposes for which the property can be used. The restriction will need to be considered in the light of the proposed activities of the merged charity and, if necessary, a variation sought from the landlord.

52. It is not safe to assume that the owners of other property used under contract, for example photocopiers, will automatically agree to the contract being transferred to the merged charity. It is advisable to contact all such suppliers before the merger takes place.

53. A charity may have permanent endowment, i.e. a fund of which only the income and not the capital may be spent on the stated charitable objects. The fund will remain permanent endowment in the hands of the merged charity. A merged charity that is a charitable company will have to hold any transferred permanent endowment as trustee, not as part of its corporate property. If the fact that the fund is permanent endowment means that the charity with the fund cannot operate with any degree of effectiveness and the existence of the permanent endowment is blocking a proposed merger, the Charity Commission should be approached for guidance.

### Funding

54. It is advisable to tell the main funders of the merging charities about the proposed merger and the reasons for it as soon as possible to try to ensure that the funding continues after the merger has taken place. Merging charities also need to check whether the consent of any particular funder needs to be obtained before a grant can be transferred to another charity. For example, grants from the National Lottery Charities Board may not be transferred if the merged charity is materially different from the grant-holding charity and NLCB conditions are not met. If funding is received under a contract, the merging contract will similarly have to seek the agreement of the funder for the transfer of the contract to the merged charity. If funders will not agree to transfer grants or contracts, the original charity may have to be kept in existence until the relevant projects have been completed.

55. Merging charities should ensure that they can properly identify all the different funds which each charity holds. A charity's fund should be set out in its accounts if they have been written in accordance with the Accounting and Reporting by Charities Statement of Recommended Practice, SORP 2000. Funds held for limited purposes,



restricted funds, will be subject to the same restrictions after the merger as they were before. In order to give it as much freedom as possible to operate, the merged charity is advised to check that restricted funds really are subject to a legally binding restriction and not merely a non-binding wish as to use of the funds. The merged charity may also want to ensure that donors in future are discouraged from giving restricted funds. Merging charities with a variety of different funds may find it helpful to seek professional advice as to the potential use of funds by the merged charity.

56. If a charity is receiving funds under covenant from donors strictly speaking the donor's agreement is needed for the money to be paid to the merged charity. In practice, few donors will object if the money is collected by the merged charity and the Inland Revenue does not object, which allows the merged charity to reclaim the tax. The merged charity may, in any event, find it better to try to persuade all donors to sign a Gift Aid declaration as soon as possible as such a declaration can cover future gifts.

57. Legacies will not go to a new merged charity, they can only be collected by the named charity. If legacy funding is important for any merging charity or the charity is aware of a potential legacy, it will be necessary to keep that charity as a shell charity after the merger to ensure that legacies can be collected but see para. 18 above.

## ANNEX A – WIDER ASPECTS OF MERGER

Allison, C, “Implementing Merger Objectives” *Charities Management*, Spring 1998, p.18-21.

Cornforth, C, *Merger. An Option for Charities?*, 1997, CAF.

Cowin, K, and Moore G, “Critical Success Factors for Merger in the UK Voluntary Sector” *Voluntas*, 7:1 1996, p.66-86.

Guthrie, M, *Mix, Match, Merge?*, 2000, VOLPROF

Johnson, G, and Carter, M, *The Urge to Merge*, 1999, London: The Homeless network

Mullins, D, ”Managing Ambiguity: Merger activity in the nonprofit housing sector” *International Journal of Nonprofit and Voluntary Sector Marketing*, Vol. 4, No. 4, November 1999, p.349-364.

Palmer, D, *Working Together – A Practical Guide to Mergers and Alternative Options for Crossroads Schemes*, 1999, Rugby: Crossroads – Caring for Carers.

Phillips, A, “Merging into a Technicolour Sunset – How Charities Get Together” *NGO Finance*, October/November 1995, p.20-22.

Piper, A-M, “Amalgamate by the Book” *The Lawyer*, 9<sup>th</sup> June 1998, p.19.

Singer, M, and Yankey, J, “Organizational Metamorphosis: A Study of Eighteen Nonprofit Mergers, Acquisitions and Consolidations” *Nonprofit Management & Leadership*, 1991, Vol 1 No. 4, p.357-369.

## ANNEX B – ALTERNATIVE FORMS OF JOINT WORKING

Billington, A, “Take Your Partners – the Many Tunes for the Charity Dance” *NGO Finance*, December 1998, p.22-23.

Lamonth, S, “Pulling together for the future – Charities find their feet in partnership.”, *NGO Finance*, April 1999, p. 18-21

Leat, D, and Passey, A, *Joint Working and Mergers in the Voluntary Sector*, 2000, London: NCVO.

Wethered, S, “Stopping Short of Wedding bells – But Getting Acquainted for Mutual Benefit” *NGO Finance*, July/ August 1998, p.22-23.