

GETTING THE LAWYERS INVOLVED AT THE DESIGN STAGE...

How to put in place shared service agreements



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Once the business case is signed off, and the baton passed to the Design Stage, it is important to consider the wide range of legal implications as early as possible.

Entering into a shared service is not the easiest option especially as it can be much more complicated than a traditional outsourcing or commissioning arrangement. So, when the focus should be on delivering the vision for the shared service and the benefits to be gained, exploring the legal implications could feel like the rain clouds have arrived to spoil the carnival.

Whether or not the partners discuss them openly, there may be some issues that are lurking in the background and it is important to agree how they should be dealt when the partners are working well together, instead of at a future time when relationships may be under considerable pressure.

Examples of unanswered questions could be....

- How do we handle things if something goes wrong?
- I am handing over my budgets/staff, what control will I have?
- How much of our limited time/resource are needed to pull an agreement together?
- We have got this far, so surely we can sort things out amicably if there is a problem!
- I have downloaded this agreement from the internet and it seems fine to me, so why not use it?

Whilst, partnership trust is essential, some written assurances will still be required especially where staff moves are involved, budgets committed and joint services are to be provided.



The best time to start drafting these is when there is a preferred model that the design will be based on the Shared Vision.

Legal Agreement or a Memorandum of Understanding – what is the difference and when might they be used?

You may want to talk to your legal people about using a Memorandum of Understanding (MoU) initially because it may take some time to resolve the details for a properly drafted agreement.

The MoU is not a legal agreement and will not normally be legally binding. However, it can be used by the parties at an early stage once they have determined what they want or need, and should record agreed actions, commitments or intentions. There is an example tool for drafting an MOU between partners in the *SSA Trust & Shared Vision Toolbox*¹.

Once the Design Stage begins, and the implications for staffing, budgets and governance become real, you should consider recruiting at least one legal adviser to the Design Team.

They will help you move from an MOU to more formal Legal Agreements.

¹ (2013) *The Shared Service Architect's Trust & Shared Vision Toolbox*. Tool 5.03, p225. SSA Publications.

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These documents will bind the partners to actions, so the accuracy and attention to detail of experienced, skilled legal minds is critical.

The agreement will not adequately reflect the arrangements into which the parties are entering unless certain basic points have been resolved including: -

- What is the scope of the new collaboration - e.g. whole authority, or specific functions?
- What is the chosen model - collaboration, partnership, hosting, commissioning or agency?
- What are the Business Case imperatives and financial issues that require legal agreements?
- How will Staffing arrangements be structured - e.g. Secondment/TUPE?
- What are the obligations of each party and consequences of any breaches?
- How will the governance, accountability, control and risk be managed

What terms might be included?

One size does not fit all, so the details will depend on the arrangements made by the parties.

On the next page I have set out a number of the areas I would expect to see in an agreement if you asked me to review.

Hope for the best, prepare for the worst

It is worth investing time and resources to produce an agreement that accurately records the arrangements, intentions, and consequences of failure to deliver on promises made by the parties.

In addition to the obvious protections and assurances, a written agreement can provide guidance for others when future difficulties arise – e.g. governance arrangements, performance arrangements and steps to be taken if a party does not fulfil their obligations.

Finally, it is advisable that the agreement should not be produced by lawyers in isolation. The legal advisers should have a good understanding of reasons behind the parties' agreement; and the arrangements they have devised to ensure that their Vision for the Shared Services is achieved and objectives are met.

Take the lawyers 'back to the floor'...

It is also helpful if lawyers have a good understanding of the challenges encountered when implementing or operating a shared service.

Why not take ask them to experience the work being carried out by the service to be shared. Get them to meet the staff and even the residents, students or patients who will benefit from the new service.

It will convert their legal advice and activity from a dry exercise, they develop in a remote office, to a very human interaction that will bring a passion for success to their work.

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What I would be looking for, if I was reviewing your shared service legal agreement....	
The Parties (and key players)	Who is the agreement between and who holds the responsibility for success? Is it between two or more organisations, or between departments/business units? Are there named representatives who take responsibility for the success of the project, or is it a job role (e.g. Head of Corporate Services) who has responsibility?
Legal powers	What legal powers are being harnessed to give the organisations the power to partner? For example is it Section XX of an Act or Power.
Model	What is the chosen model of partnership? For example is it a hosted service, is it a company, or a collaboration?
Length	How long is the partnership set to last? Are there partnership review dates? What are the terms of renewal of the partnership?
Governance, decision-making and scrutiny	Who is nominated from the partners to sit on a governance group? How frequently will they meet? What powers will they have to sanction partners who do not deliver on their side of the deal?
Dispute resolution	If disputes arise that threaten the new service, what resolutions can be put in play to overcome the dispute and keep the collaboration alive?
Liabilities, indemnities and insurance	What risks are recognised and how will they be addressed if they occur and how will the cost of liabilities, indemnities and insurances be shared?
Performance/Review	When and how will performance be reviewed? Who will be responsible for under performance and how will it be addressed?
Data sharing	What data sharing protocols will be put in place? Who are the data protection managers who will have responsibility for oversight? How frequently will data be reviewed to ensure it meets the Data Protection Act principles?
Employment and Staffing arrangements	Who will be the employer of the staff in the service? Where will they work and how will they be managed? Is there reference to a terms and conditions document?
Financial arrangements – costs and savings	How will investments be made? How will budgets be fixed and how will they be protected? How will savings be shared and when?
Conflicts of Interests	How will conflicts of interest be declared between the organisations, their leadership and staff? Who will judge that a conflict has occurred?
Assets and premises	What and where are the assets and premises that will be used to conduct the new service? Will there be satellite offices, hot-desking, home workers, shared vehicles...and how will that be managed?
Third party contracts	What are the names of third party organisations who are not partners, but will be involved in the service delivery? What is their clear role and responsibility and what is their contractual relationship with the shared service?
Disclaimers or restrictions	What is in-scope and out of scope in the relationship and are they clearly described in the agreement?
Termination/withdrawal/ Exit costs	How can the collaboration be dissolved and under what circumstances? How much notice must exiting partners give and what costs would they incur?