Exploring governance and legal forms for the South Lincolnshire Water Partnership

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Paper prepared for the SLWP December Meeting
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1. Background

Pete Barbrook-Johnson is a Research Fellow and UKRI Innovation Fellow based at CECAN, University of Surrey. His Innovation Fellowship is conducting research on, and for, innovative public-private partnerships in food, energy, water, and environmental domains (more information is available at www.innovativeppp.org).

In November 2018, Pete was asked by the SLWP to prepare a paper for discussion on possible governance structures and legal forms for the partnership as they continue their work.

2. Purpose

This document is intended as a starting point for detailed scoping and discussion of potential governance structures and legal forms the SLWP could adopt. It does not seek to make any recommendation about which options might be best, but rather, lays out all of the characteristics of different options, and considers the key lenses through which preferences might be formed.

Further discussion and more detailed information on particular options of interest (in particular, example governing documents) will be required before the SLWP can begin to think about making decisions on governance structures and legal forms.

3. Issues that might inform preferences

Before reviewing some of the different governance and legal form options, it is important to consider what the specific issues are that might differentiate options, and create preferences for different types. The SLWP is likely to need to have some agreed mutual expectations under each of these issues. They fall into the following categories:

Governance: ownership, leadership, and decision making structures:

- **Ownership and or leadership responsibilities**: which partners are willing and able to be co-owners of any assets the SLWP might build or buy? Which partners are willing and able to be members, shareholders, or directors of any legal entity the SLWP sets up? These roles bring with them a range of responsibilities and administrative duties which some members may not be willing or able to take on. The SLWP could gather each partners' views on whether they wish to, and can, be owners or take on formal leadership roles, now and in the future.

- **Who has input into decision making**: Does the SLWP wish all partners to have an equal vote in decisions, do they wish to give veto powers to some or all members? Should decision making power or votes only be given to those making certain contributions to activities, or with specific responsibilities in any legal entity the SLWP sets up, or assets it owns? The SLWP could start developing an opinion on these questions, or wait until specific circumstances or projects and activities require a position to be decided.

Sources of income: some legal options will preclude some of the potential incomes sources below.

- **Government funding**: are there specific legal forms which are unable to apply for the types of government funding the SLWP is likely to want to apply for in the future. The SLWP may wish to scope out and record eligibility rules here.
- **Other grant funding**: are there specific legal forms which are unable to apply for other types of grant funding the SLWP may want to apply for in the future. For example, research funding, or trust funding. The SLWP may wish to scope out and record eligibility rules here.
- **Trading**: will the SLWP generate income from selling goods or services. If so, its legal form should allow for this.
- **Raising debt and selling equity**: does the SLWP intend to sell shares to raise investment? Might the SLWP wish to take out loans? Only certain legal forms will enable these activities.
- **Purchasing and ownership of assets**: will the SLWP intend to own land and/or assets itself, or is it happy for these to be owned by individual partners?

Flexibility: How highly do the members of the SLWP prize the ability to be flexible in being involved directly, or not, in different activities of the SLWP? Flexibility can be maintained but will likely mean more detailed discussions and bespoke legal and governance arrangements are needed on each individual project or activity.

Changes through time: The SLWP's plans are ambitious, and if successful imply big changes in the scale and nature of the partnership. Does the SLWP hope to use a legal and governance structure that does not need to be changed through time as their activities shift and change in scale? Or would the SLWP rather adopt a structure that makes sense for now, but will likely need to be adapted and updated as activities change and increase?

4. Legal form options and governance options

This section outlines a range of legal forms the SLWP may wish to take, and outlines key characteristics of each, and considers the governance and governing documents under each (including examples where reliable sources exist). In the interests of length, descriptions are kept short, with links to more detailed information in the resources section.

When we refer to a legal form and governance, or legal structures, we're really talking about two things:

- **Legal form:** the legal form is the sort of organisation SLWP is in the eyes of the law.
- **Governing document:** A governing document is a written statement that sets out any group's structure, purpose and how they will operate. The term 'governing document' is a general term; depending on legal form, this document might be called one of a number of different names. A governing document should contain information about all the practical matters related to how a group will be run including: aims, objects and how they will be achieved; who members are, how they can become members and how they make decisions; whether there is a governing body, what is it called, how it is appointed and how it meets and makes decisions; what happens to any surplus; and what happens to assets when the organisation is sold, taken over or broken up. It is thus the governing document which will describe the actual governance structure being used under any legal form. There are many example and model governing documents available.

The following legal forms are outlined in the rest of this section (there are also overviews of 'unincorporated' an 'incorporated', and legal forms, in the appendix):

- Continue in current form
- Unincorporated
    - Unincorporated association
    - Partnership
    - Limited Partnership
    - Trust
    - Charitable Trust
- Incorporated
    - Limited company
        - Company limited by guarantee
        - Company limited by shares
    - Community interest company
    - Limited Liability Partnership
    - Charitable incorporated organisation
    - Community benefit society
    - Cooperative society
- Combination or hybrid models

	Characteristics	Governance
Continue in current form	• Informal partnership – no legal entity • Business Plan and IWRM in development with aims • Could also produce Memorandum of Understanding, which may or may not be legally binding depending on its form. • Easy for partners to continue to be involved • May become insufficient as activity develops	Informal and flexible

Unincorporated (i.e. no single legal entity).

	Characteristics	Governance
Un-incorporated association	• Unincorporated Association is the simplest available legal structure and is the most common structure for small groups. • This simple structure allows small not for profit groups to operate without a complex legal structure or associated costs. • This structure is most appropriate for groups which have low incomes, do not intend to employ staff, acquire property or enter into contracts, and want a simple, low maintenance structure • Not required to report to a regulatory body, so relatively easy to run • Offers a democratic structure with flexible procedures • Cannot hold property or enter into contracts in its own name • Members may be held personally liable for the group's debts or legal action against the group • An association's governing document is usually called a constitution.	Flexible: will depend on what is included in the association's constitution. Example constitutions: here and here.

	Characteristics	Governance
Partnership	• Partners usually draw up a legally binding partnership agreement, setting out such matters as the amount of capital contributed by each partner and the way in which they will share profits and losses. • Partners share the risks, costs and responsibilities of being in business. • Each partner is self-employed and pays tax on this basis on their share of the profits • Legal persons other than individuals – such as Limited Companies or Limited Liability Partnerships – can also be partners in a partnership. • Simple way for two or more legal persons to set up and run a business • No separate legal personality. • Partners usually raise money for the business out of their own assets, and / or with loans, although again being unincorporated limits borrowing in practice.	Flexible: depends on partnership agreement contents.

	Characteristics	Governance
Limited Partnership *NB: Not to be confused with a Limited Liability Partnership*	• Two sorts of partner: general and limited. • Limited partners may not be involved in the management of the business and their liability is limited to the amount that they have invested in the partnership. • Flexible form of partnership • No separate legal personality. • Limited partnerships must register at Companies House, and do not come into existence until they are registered. • Changes to the partnership must also be registered.	Flexible: depends on partnership agreement

Trust	Characteristics	Governance
	• Essentially, legal devices for holding assets so as to separate legal ownership from economic interest. • A trust holds assets on behalf of an individual or another organisation and governs how they are to be used. Trusts are often used in conjunction with unincorporated associations, which cannot themselves own property. • A trust is run by a small group of people called trustees who are legally responsible for the administration of the trust and personally liable for any debts or claims against it that cannot be met out of the trust's own resources. • Trusts do not typically raise finance – they simply manage assets and do not distribute profits. • Trusts make their own set of rules – enshrined in a trust deed – which sets the trust's objectives and may be used to ensure that assets and profits are used for a particular purpose. • No legal identity of their own.	Flexible: depends on trust deed. Example trust deed here.

Charitable Trust	Characteristics	Governance
	• A charitable trust is a type of charity run by a small group of people known as trustees. • The trustees are appointed rather than elected, and there is no wider membership. • Cannot enter into contracts or own property in its own right. • To set up a trust your group must write and sign a trust deed, which must show that the organisation is legally charitable. • Charitable trusts must register with the Charity Commission if they have income over £5,000 per year.	Flexible and depends on trust deed. Example trust deed here.

Incorporated

	Characteristics	Governance
Company limited by guarantee *NB: Can be for-profit, or not-for-profit. Common for community and social enterprises*	• Company Limited by Guarantee is a popular form of incorporation for not-for-profit organisations. • The governing body in this model is called a 'Board of Directors'. • 'Limited by guarantee' means that each member's liability for the company's debts is limited to an amount written into the governing instrument often as little as £1 each. • The organisation has separate legal identity and can be liable separately from its members and directors. • Must register its incorporation with Companies House and regularly provide them with certain information • Possesses legal personality separate from members, can own property and hold contracts • Directors can be paid • Responsibility for people involved – become company directors • May be difficult to raise philanthropic donations/grant aid? • Unlike with a Community Interest Company (see below), assets are not protected by an 'asset lock'.	Flexible: depending on what is written in the company's articles. Example articles here.

	Characteristics	Governance
Company limited by shares *Typically for profit, most trading companies are limited by shares.*	• Most frequently adopted corporate structure • The governing body in this model is called a 'Board of Directors'. • There is no limit on dividends that can be paid to shareholders • Members/shareholders' liability for the company's debts is limited to the amount of their contributions this can be as little as £1 each • Organisation has separate legal personality and liability from that of its members and directors. • In return for limited liability the company must register its incorporation with Companies House and regularly provide them with certain information. • Companies can be incorporated with a single member • Not subject to the additional regulatory requirements of a CIC (see below) • Good investment model - ability to pay dividends may make it easier to attract private investors • Embeds entrepreneurial drive; shareholders benefit form Company's success. • Directors can be paid. • Can own property or enter into contracts in its own right. • Potential conflicts of interest between individual social entrepreneurial and broader shareholder constituency • More responsibility for people involved – become company directors • Cannot generally raise philanthropic donations/ grant aid, therefore need to be entirely self-financing or financed through private investment. • Unlike with a CIC (see below), assets are not protected by an 'asset lock'.	Flexible: depending on what is written in the company's articles. Example articles here.

	Characteristics	Governance

Community Interest Company	• CICs can be private companies limited by guarantee or by shares, or a public limited company (typically by guarantee)
	• They can adopt the co-operative, not for profit or general commercial company model.
	• CICs have two main features which distinguish them from private companies. These are:
	  ◦ **Asset lock.** Assets owned by the company can only be used for the good of the community.
	  ◦ **Payment limitations.** These limitations are applied to dividend and interest payments to shareholders and financiers. They allow profit to be made while keeping the company's the primary focus on community benefit.
	• There are a number of obligations that a CIC has to meet in addition to those imposed on an ordinary company.
	• Must satisfy a community interest test (looks at the underlying motivation of the company in terms of what it will do, who it will help and how it makes a profit or surplus, what the company will do with it)
	• Must adopt certain statutory clauses in its constitution (asset lock and preventing the CIC falling under control of non-members).
	• Must deliver an annual community interest company report with its accounts.
	• Distinct brand for social enterprises
	• Combines freedom of entrepreneurial activity with protection of 'asset lock'
	• Directors can be paid
	• Has a separate legal identity from its members. Can own property or enter into contracts in its own right
	• Dual regulation from Companies Act and the CIC Regulator.
	• More responsibility for people involved – become company directors
	• May be difficult to raise philanthropic donations / grant aid.
	• Cap on dividends ("asset lock") could depress from investors
		Flexible: depends on governing articles.
		
		Examples here:

	Characteristics	Governance
Limited Liability Partnership (LLPs)	• A hybrid between a partnership and a limited company • is a separate legal entity conferring full limited liability on its members. • The LLP Act does not require a limited partnership agreement to be registered at Companies House. • An LLP agreement can be as simple or as complex as required by the circumstances.	Flexible depending on partnership agreement.

	Characteristics	Governance
Charitable Incorporated Organisation	• A type of charity which is incorporated. It is quite a new legal structure – it was introduced in 2013. • The are two types of CIO: Association Model and Foundation Model. Association Model CIOs are membership organisations and hold elections, whereas Foundation Model CIOs are run by a small group of appointed trustees. • CIOs must be registered with and report to the Charity Commission, regardless of their income. Unlike charitable companies, however, they do not need to register with Companies House. This means the reporting requirements are simpler for CIOs than for charitable companies.	Flexible: depending on constitution. Example constitutions here.

	Characteristics	Governance
Community Benefit Society	• Essentially run and owned by their members, but which may operate for the benefit of the community in addition to benefiting the members. • A Society can own property, enter into contracts, issue shares and take out loans. • It has to be registered with and regulated by the Financial Conduct Authority (FCA). The aim of the society and the way it is run must comply with certain conditions in order for the FSA to accept and maintain the registration. • A Society must have at least three members. • Good for promoting democratic ownership and control through co-operative structures • Has a separate legal identity from its members • Less fit for purpose for organisations with hierarchical structures. • Not as well recognised as some of the other legal structures such as Company Limited by Guarantee or Registered Charity. • FCA, registration entails formalities (eg keeping and filing of accounts)	The governing document of a CBS is known simply as the 'rules'. Examples here.

	Characteristics	Governance
Cooperative Society	• A Cooperative Society is a similar structure to a Community Benefit Society, but its main purpose is to provide services to its members rather than the wider community. • Cooperative Societies must be based on the co-operative values of self-help, self-responsibility, democracy, equality, equity, and solidarity. • In general, membership to a Cooperative Society is open to people who use the services provided by the society, or work for the society, and profits may be distributed to members providing this is not the primary purpose of the organisation. • A Cooperative Society cannot be charitable because its beneficiaries are its own members, rather than the public. • A Cooperative Society is incorporated and can have paid directors.	The governing document of a society is known simply as the 'rules'. Examples here.

Combination or Hybrid Models

It is not uncommon for different legal forms to be used in combination, for a variety of reasons. For example, some housing associations use this model. Housing associations are not for profit organisations which take different legal forms. In some examples, a subsidiary of the housing association (i.e. a company owned by the housing association) raises debt (by issuing bonds) and lends funds to the association. The debt is serviced by loan repayments made by the association to the financing subsidiary, the source of which is (presumably) rents etc. which are paid to the association in respect of the social housing which has been constructed, in part, with the capital raised by the subsidiary.

However, an enterprise that is 100% funded by debt is unlikely to be commercially realistic. Lenders are likely to require some form of collateral as protection in the event of default on the loan repayments. In the housing association model, government provides an alternative source of funding. Historically, this has taken the form of Social Housing grants made available by the Housing and Communities Agency (now replaced by the Homes England) through the programmes such as the Affordable Homes Guarantee Programme. As a not for profit body, the housing associations are also eligible for grants from other sources such as Recycled Capital Grant Funds and may build up cash reserves over time.

Special Purpose Vehicles are another common approach which may use a combination of legal forms. A legal entity created for a limited purpose, SPVs are used for a number of purposes including the acquisition and/or financing of a project, or the set up of a **securitisation** or a **structured investment vehicle**. They are usually used because they are free from any pre-existing obligations and debts, and are separate to the parties that set them up for accountancy, tax and insolvency purposes.

A Joint Venture is another common phrase used to describe hybrid forms. Joint ventures are usually formed where two or more persons or companies come together to execute a particular business proposition or project in a contractual or corporate arrangement. Typically, a UK joint venture takes one of the following forms: limited company, a partnership, a limited liability partnership, a limited partnership, or an unincorporated, contractual arrangement.

5. Resources

The following resources may be useful to the partners of SLWP for further reading.

Websites with legal advice and overviews

- Resource centre: Legal structures for community groups and not-for-profit organisations
    - https://www.resourcecentre.org.uk/information/legal-structures-for-community-and-voluntary-groups/

- VAL: Legal Structures
    - https://www.valonline.org.uk/legal-structures

- Gov.uk advice:
    - Setting up a charity - https://www.gov.uk/setting-up-charity/structures
    - Setting up a business - https://www.gov.uk/set-up-business

- UK Cooperatives Legal advice on legal forms
    - https://www.uk.coop/resources/simply-legal

Income and financing models

- University of Cambridge Institute for Sustainability Leadership (CISL): report on multi-sector collaboration on water asset investment (pages 33-41 on financing models)
    - https://www.cisl.cam.ac.uk/business-action/natural-capital/natural-capital-impact-group/news/sink-or-swim

- FTI consulting report for Anglian Water on financing multi-sector water supply assets
    - https://www.fticonsulting-emea.com/insights/reports/financing-multi-sector-water-supply-assets

- Landscape Enterprise Networks approach (place-based payments for ecosystem services), consultant's website, and academic blog:
    - http://www.3keel.com/landscape-innovation/
    - https://blogs.ncl.ac.uk/cre/2018/11/29/what-role-for-public-private-partnerships-to-deliver-public-goods-post-brexit/

Organisations

Organisations which could provide support, networking, and/or sharing of good practice.

- UK Water Partnership - https://www.theukwaterpartnership.co.uk/
- UK Flood Partnership - https://www.ukfloodpartnership.co.uk/
- Water Hub - http://www.thewaterhub.org.uk/

6. Next steps

Potential next steps after initial discussions prompted by this paper could include:

- Deeper investigation into particular legal forms and examples of their governing documents.
- Seeking advice on more complex combinations or hybrid forms.
- Gathering views from partners on each of the questions in Section 3.
- Including discussion and any positions on legal forms and governance in other SLWP materials.

7. Appendix

Incorporated vs unincorporated at a glance

This table summarises the key differences between incorporated and unincorporated groups.

	Unincorporated	Incorporated
Liability and risk	Members are liable for the group’s action, may have to meet debts and any legal action against the group will, in reality, be against members themselves. This means members may take on significant risk.	Individual liability is limited and risk for each member is reduced.
Ownership	Unincorporated groups cannot enter into contracts or own property in their own right.	Incorporated groups can own property and enter into contracts in their own right.
Cost	Low or limited start-up cost.	Incur annual and start up costs to create and run the group. How much fees cost depends on type of incorporated structure.
Regulation	Not regulated by any legal body (unless a registered charity).	Regulated by at least one, possibly two, legal bodies. This increases administrative burden and requires more of committee members.

Summary of key features of legal forms

Source, UK COOP 2017
[https://www.uk.coop/sites/default/files/uploads/attachments/simply-legal-final-september-2017.pdf)](https://www.uk.coop/sites/default/files/uploads/attachments/simply-legal-final-september-2017.pdf)

Summary of the key features of the different legal forms

Legal form	Does its members have limited liability?	What is its governing document called?	Can it issue shares?	Can it pay a return on shareholdings?	Does it have to register with a regulatory body?	Is it suitable for charitable status?	Does it have an asset lock?
Partnerships	No	Deed	No	No	No	No	No
Associations	No	Constitution	No	No	No (unless a charity)	Yes	No (unless a charity)
Trusts	No	Deed	No	No	No (unless a charity)	Yes	No (unless a charity)
Limited Liability Partnership (LLP)	Yes	Agreement or Deed	No	No	Companies House	No	No
Company Limited by Guarantee	Yes	Articles	No	No	Companies House	Yes	No (unless a charity)
Company Limited by Shares	Yes	Articles	Yes	Yes	Companies House	No*	No (unless a charity)
Community Interest Company (limited by guarantee)	Yes	Articles	No	No	Companies House & CIC Regulator	No	Yes
Community Interest Company (limited by shares)	Yes	Articles	Yes	Yes – although it is subject to a cap	Companies House & CIC Regulator	No	Yes
Charitable Incorporated Organisation	Yes	Constitution	No	No	Charity Commission	Yes	Yes
Industrial & Provident Society (bona fide co-operative)	Yes	Rules	Yes	Yes	Financial Services Authority	No	No
Industrial & Provident Society (society for the benefit of the community)	Yes	Rules	Yes	Yes	Financial Services Authority	Yes	Yes (optional)

* In the past some charities were registered as companies limited by shares.