



**Devolution and broadcasting
Second submission to the Silk Commission
by the UK Changing Union Project**

**prepared by the
IWA Media Policy Group**

1 Introduction

In our first submission to the Silk Commission we argued that

- the exclusion of the devolved administrations from any real power in the field of broadcasting and media does not accord with the spirit of devolution, and is no longer justified
- the resulting lack of engagement by the Welsh Government in broadcasting issues has led to a lack of effective Welsh influence in media matters that are vital to the cultural and democratic life of Wales
- responsibility for broadcasting and media matters needs to be shared between the UK Government and the devolved administrations.

We are conscious that broadcasting and other media in Wales face manifold problems over the coming years, and that it is not possible to devolve responsibility for all of these matters – ITV licensing, regulation of video on demand, electronic programme guides and online services to name only some of the most important. But we also reject the notion that nothing in this field should be devolved unless everything is devolved.

In our first submission we set out recommendations for a limited amount of devolution in this field, but sufficient to ensure a more secure level of engagement between Welsh and UK Governments, regulators and broadcasters. (See Appendix 1) We would now like to enlarge on these proposals. In doing so we are conscious that the complexities of the issue mean that we must also beware of unintended consequences, either for the total level of resources devoted to public service broadcasting in Wales or for the editorial freedom of those services.

2 A principled framework

It is important that any proposals should provide the clarity and stability that the Silk Commission sought in its first report, and that they can survive the pressures of technological change. It would also be preferable for them to be capable of operation across the three devolved territories. To that end any proposals should, therefore, conform with some recognised principles. In our view these should include the following:

- The editorial independence of public service broadcasters in the devolved territories must be maintained and safeguarded.
- The regulation, governance and management of broadcasting should better reflect the particular needs of the devolved territories in terms of media, culture and language.
- The appointment of people to represent a devolved territory at the UK level in media organisations and their regulators should be made jointly by the respective devolved governments and the UK Government. (This has already been enacted for Scotland in the Scotland Act 2012.)
- The devolved administrations should have a responsibility and capability – direct or indirect - to assess at regular intervals the media needs of their respective countries, in the round, across different media and languages
- The allocation of resources between different public service broadcast/online services within each devolved territory should be decided within that territory.

3 Appointments

The easiest and most obvious change that we recommended is to the process of appointing Welsh representatives to various media bodies. Since we proposed that responsibility for S4C should be devolved to Wales we also recommended that the Chair and Members of the Authority be appointed by Welsh Ministers.

In the case of the Welsh Member of the BBC Trust, we thought it should be done by way of joint appointment, rather than mere consultation with the Welsh Government. We also recommended that the BBC's Audience Councils should be replaced by National Broadcasting Trusts in each devolved territory, and that members of these Trusts should be appointed jointly by the devolved administrations and the BBC Trust.

4 Legal foundations

Current legislation and the BBC Royal Charter do not adequately reflect the importance of the media requirements of the devolved territories. This should be addressed in any new Communications Bill and in the next review of the BBC's Royal Charter that is scheduled to take place in 2016.

S4C

S4C's statutory basis rests in a succession of Acts of Parliament – the 1990 and 1996 Broadcasting Acts, the 2003 Communications Act and the Public Bodies Act 2011. The last of these represented a significant weakening in the statutory foundations of S4C, since it both removed the automatic increase in S4C's funding in line with inflation and gave to UK Ministers the ability 'to modify the constitutional arrangements' for S4C by ministerial order – such arrangements include matters such as its name, Chair and Members and governing procedures and arrangements.

There would be a benefit in defining S4C's statutory foundations anew, through a consolidation of the previous legislation, either in any new Communications Bill or in

any other Bill designed to implement the further transfer of powers to Wales. This would provide an opportunity to adjust S4C's remit to take into account more fully than hitherto the increasing place of online services.

It would also provide an opportunity to reassess the wording of the Public Bodies Act that, in Section 31, requires the Secretary of State to ensure 'sufficient funding' for S4C to fulfil its remit. The current wording is vague: there is no further definition of 'sufficient' or of how the Secretary of State should go about determining this matter. However, the section allows an option for the Secretary of State, 'to make payments himself or enter into an agreement with another person for that person to do so (or both).'

There is also currently a mismatch between the BBC funding and DCMS funding, in that the BBC funding is known up to 2016-17, while the DCMS funding is known only until 1015-16.

Whichever legislative vehicle is chosen to address the above issues, it would also be an opportunity to transfer responsibility for S4C to the Welsh Government. Such a transfer should also entail a simultaneous transfer of remaining direct DCMS funding of S4C, currently planned to be £6.787m in 2015-16 but so far undefined for 2016-17 – the last year of the BBC licence fee settlement, for which funding is known. Such a transfer of responsibility would reflect S4C's position as the deliverer of a key element of the Welsh Government's Welsh language policy.

BBC

One of the striking things about the current BBC Royal Charter is that, despite the progress of devolution, its references to the interests of the nations are more perfunctory than in any of its previous Royal Charters, at least since the 1952. (See Appendix 2) The fourth of its six stated public purposes in its current charter refers to "representing the UK, its nations, regions and communities". We currently lack any full appraisal by the BBC of what obligation this places on its services.

The 1952 Royal Charter established National Broadcasting Councils in Scotland, Wales and Northern Ireland "to control the policy and content of that service....which the Corporation provides primarily for reception in that country.....and exercising such control with full regard to the distinctive culture, interests, and tastes of Our People in that country." Although they could be over-ridden by 'reservations and directions' from the centre, the Councils had the power to regulate their own procedures, appoint additional advisory committees, and require employment of their own staff.

These functions remained largely unchanged until the 1996, when the function of controlling policy and content was dropped in favour of a more advisory role involving "ascertaining and monitoring the state of public opinion" and "ascertaining the needs and interests of members of the public in [that] country."

But the Councils were also required, in the 1996 Charter, to 'assist' the corporation in "the formulation of the objectives of the Corporation for programmes and services specifically aimed at audiences in the country for which the Council is established, the allocation of funding (within the global sum budgeted by the Corporation for programmes and services in that country) between different programme genres and services, and any significant change to the Corporation's resources in that country for making such programmes and providing such services, and in particular by

considering and making representations to the Corporation in relation to such proposals”.

In contrast, the BBC Trust’s Audience Councils that, in the 2006 Royal Charter, replaced the National Broadcasting Councils, were given a much more limited remit. Gone is the word ‘National’ in relation to the Councils, and gone is any reference to the “culture, interests and tastes of Our People in that country”. The thrust, if anything is reversed, emphasizing instead bringing “the perspectives of licence fee payers to bear on the work of the Trust, through the Councils’ links with diverse communities, including geographically-based communities and other communities of interest, within the UK.”

Gone is any reference to assisting the corporation with “the allocation of funding between different programme genres and services” and to any “global sum budgeted by the Corporation for programmes and services in that country” as well as to addressing any “significant change to the Corporation’s resources in that country”.

It does, however, require the Audience Councils to advise on “the potential contribution which programme makers in the respective countries could make to the Corporation’s programme output throughout the United Kingdom and on the extent to which a reasonable proportion of such output should and does consist of programmes mainly made by residents of the country for which the Council is established.”

The history of these changes illustrates how easy it would be to devise a Charter that gives a clearer and more convincing recognition to the need for an adequate response to the democratic and cultural imperatives of devolution. It also illustrates how easy it would be to create a more devolved structure for the BBC by adopting some of the language of its own past but, importantly, making a much more effective reality of the rhetoric.

The concept of a ‘a global sum budgeted for services in that country”, referred to in the 1996 Charter needs to be revived, so that the division of that sum between its various services in a devolved territory is a matter decided within that territory by the National Broadcasting Trusts that we have recommended.

We have proposed that the National Broadcasting Trusts should all operate under the umbrella of the BBC Trust but, in the light of recent debate, it is important to note that such a proposal is not dependent on the continued existence of the BBC Trust. In the event of the abolition of the BBC Trust and a return to a more unitary governance system, the remit we have proposed for National Broadcasting Trusts – ‘responsible for the policy, content and allocation of resources for all services delivered solely for audiences in their respective countries’ – would still be practical. A new linkage would need to be created with whatever body were to be replace the BBC Trust.

5 S4C and BBC Wales funding

In recent years there has been much discussion of possible ways of funding public service broadcasting. These run the gamut from direct taxation, through levies on telecommunications, and various mixes of public and private funding. This debate has fallen away since the onset of the recession in 2007, but it is not inconceivable that it will revive at some future date in better economic circumstances. However, in our view it is unlikely in the foreseeable future that any government will wish to

return S4C's funding base to direct taxation, or to give it hard and fast funding guarantees. We, therefore, deal here with the status quo.

We must expect that in future the devolved administrations will take a much greater interest in the BBC licence fee settlement than in the past. This interest will extend to Scotland and to Northern Ireland, but the Welsh interest cannot but be particularly acute given the decision to fund S4C through the licence fee, and the possible adverse impact that could have on the BBC's English language services in Wales now that all funding is coming from the same pot.

Given the transfer of S4C's main funding from the DCMS (and direct taxation) to the BBC licence fee, the devolution of responsibility for S4C to the Welsh Government would have the added advantage of giving the Welsh Government an immediate locus in UK-wide discussions on the BBC's licence fee. In this situation there is much less force in the argument that it would be wrong for the Welsh Government to have responsibility for one broadcaster and not others.

There is a wider issue. There will be a need to devise a process that would allow the devolved administrations to make considered inputs to the licence fee discussions. There should be a more public element to the process, to ensure that it is, and is seen to be evidence-based. A Joint Ministerial Committee would almost certainly have a role, and this would be in line with our general view that a better UK union will require more effective and sensitive inter-governmental relations.

It is vitally important for the independence of all public service broadcasters that their public funding should be determined on a long term basis, *certainly for not less than five years*. Less than this encourages undue political influence.

6 Information and scrutiny

In our first submission to the Silk Commission we pointed to the relatively poor scrutiny of the broadcasting organisations by the National Assembly. We said: "A combination of excessive courtesy and limited knowledge ensures that the process is not an ordeal. Often this arises because of a dearth of professional analysis, not helped by the fact that tabled annual reports from broadcasters tend to concentrate only on good news. A more direct accountability should be used to ensure a more rigorous assessment of performance."

Good scrutiny is crucially dependent on the quality and timeliness of information available to elected representatives. It is a gap that has to be plugged. It is worrying that Ofcom has been relieved of its obligation to conduct regular quinquennial reviews of public service broadcasting. While we appreciate the value of giving Ofcom flexibility in this regard, it has to be acknowledged that the need for reviews at the devolved level may not always coincide with Ofcom's UK-wide timetable.

We have to have the means within Wales to create an annually updated information base on our media if we are

- i) to ensure that the public are aware of what is happening to the services they consume
- ii) to ensure that Assembly Members and MPs have the relevant data through which to assess the adequacy and performance of services
- iii) to ensure that Wales can organise and strengthen its influence.

We would advocate the formation of a Media Scrutiny Panel with a brief to keep a regular watch on issues affecting the media in Wales. It would be accountable to the National Assembly and make at the very least an annual report, along the lines of Ofcom's Reviews of Public Service Broadcasting. As an independent body, its purpose would be to make a regular and expert assessment of the scale, range, performance and funding of services for Wales and quality, and to keep these issues in the public eye.

It would not duplicate the function of any existing body. Ofcom's Advisory Committee for Wales does address many of these issues, but its remit is to advise to Ofcom, and although the Welsh Government has a number of advisory committees in this area, their activities are opaque.

Once the Media Scrutiny Panel begins to deliver this level of regular, relevant and reliable information it is imperative that both Ministers and appropriate Assembly Committees take full advantage of it to hold the deliverers of services to account annually.

There has been an understandable concern that the devolution of any functions in the broadcasting field will bring politicians closer to the broadcasters and that this could have unhealthy consequences. It would be foolhardy to ignore this danger. It would be naïve to imagine that the robust relationship that often exists between broadcasters and politicians could or should be put aside. Ministers and Assembly Members must recognise the danger and develop the mature behaviours needed to match the responsibility. The purpose of devolving powers in this field is to allow Wales, democratically, to influence the big picture.

ENDS

Appendix 1**IWA Media Policy Group
Devolution and Broadcasting
First submission to the Silk Commission****Summary of conclusions and recommendations**

1. That the exclusion of the devolved administrations from any real power in the field of broadcasting and media does not accord with the spirit of devolution, and is no longer justified.
2. That responsibility for broadcasting and media matters needs to be shared between the UK Government and the devolved administrations. We reject the notion that nothing in this field should be devolved unless everything is devolved.
3. That responsibility for S4C should be transferred from the DCMS to the Welsh Government, along with the current DCMS budget of £7 million (but outside the Barnett formula)
4. That the Chair and members of the S4C Authority should be appointed by the relevant Welsh Minister.
5. That the appointment of the Welsh member of the BBC Trust should be subject to the approval of the relevant Welsh Minister – in effect a joint appointment with the DCMS.
6. That the current Audience Councils in Scotland, Wales and Northern Ireland should be replaced by National Broadcasting Trusts, operating under the umbrella of the BBC Trust, and responsible for the policy, content and allocation of resources for all services delivered solely for audiences in their respective countries.
7. That representatives of Scotland, Wales and Northern Ireland should be appointed to the main board of OFCOM, and that their appointment should be subject to the approval of the relevant Ministers in each of the devolved administrations.
8. That responsibility for the development of local and community radio policy and licensing in Wales be transferred to the Ofcom Advisory Committee for Wales, suitably re-named.
9. That responsibility within the Welsh Government for broadcasting and for Welsh language issues should be combined within a single culture portfolio.
10. That civil service support for the future broadcasting functions of the Welsh Government should be combined with the support functions in the creative industries and telecommunications fields.

Appendix 2**Extract from 1952 BBC Royal Charter**

The 1952 Charter first established the National Broadcasting Councils, headed by a National Governor, and having eight other members appointed by the BBC's General Advisory Council, five of whom were selected 'after consultation with representative cultural religious and other bodies' and three as representative of local government. The functions of the Councils were

- (4) Each National Broadcasting Council shall be charged with the functions following –
- (a) the function of controlling the policy and content of the programmes of that Service among the Home Sound Services which the Corporation provides primarily for reception in the country for which the Council was established, and exercising such control with full regard to the distinctive culture, interests, and tastes of Our People in that country;
 - (b) such other functions in relation to the said Service as the Corporation may from time to time devolve upon them; and
 - (c) the function of tendering advice to the Corporation in regard to all matters relating to other broadcast services of the Corporation which affect the interests of Our People in the country for which the Council are established

Provided that each National Broadcasting Council shall be subject to –

- (a) such reservations and directions as may appear to the Corporation to be necessary from time to time in order to secure the transmission throughout the United Kingdom of Great Britain and Northern Ireland of broadcasts by Us, Our Heirs and Successors, of broadcasts by Ministers of Our Government in the United Kingdom of Great Britain and Northern Ireland, of party political broadcasts and of broadcasts of national importance or interest, and the transmission of broadcasts intended for reception in schools.; and
 - (b) such reservations and directions as may appear to the Corporation to be necessary from time to time for reasons of finance or in the interest of due coordination and coherent administration of the operations and affairs of the Corporation.”
- (7) (i) Each National Broadcasting Council shall have power to regulate their own procedure and fix their quorum.
(ii) Each NBC could appoint its own advisory committees

(9) Each NBC may select and nominate for employment by the Corporation such officers and servants to serve wholly on the affairs of the Council (including the affairs of any advisory committee) as may appear to the Council to be requisite for the proper exercise and performance of their functions.

These functions of the National Broadcasting Councils remained the same until 1996, with the exception that by 1981 they were allowed to appoint up to 12 members and the provision for three nominations from local government had been dropped. In addition, in specifying reservations and directions the reference to school broadcasts had been dropped.

Extract from the 1997 BBC Royal Charter

12(4) Each National Broadcasting Council shall be charged with the following functions which shall be exercised with full regard to representing the distinctive culture, language, interests and tastes of Our People in the country for which the Council is established:-

(a) making arrangements for ascertaining and monitoring the state of public opinion among Our People in the country for which the Council is established about the programmes and services broadcast or transmitted in that country and for ascertaining the needs and interests of members of the public in such country;

(b) advising the Corporation on the extent to which the Corporation's objectives under paragraph 1(a) of Article 7 reflect the interests and views of audiences in Scotland, Wales, or Northern Ireland, as the case may be, and on the extent to which such objectives are being attained in relation to any matters which affect the interests of audiences in those countries;

(c) assisting the Corporation, with due regard to the objectives approved by the Governors pursuant to paragraph 1(a) of Article 7, in deciding the issues specified in paragraph 1(d) of Article 7, that is to say the formulation of the objectives of the Corporation for programmes and services specifically aimed at audiences in the country for which the Council is established, the allocation of funding (within the global sum budgeted by the Corporation for programmes and services in that country) between different programme genres and services, and any significant change to the Corporation's resources in that country for making such programmes and providing such services, and in particular by considering and making representations to the Corporation in relation to such proposals;

(d) monitoring and advising the Corporation on the extent to which the objectives formulated pursuant to paragraph 1(d) of Article 7 have been attained;

(e) ensuring that any comments, proposals or complaints made by audiences in the country for which the Council is established are given due consideration by and are properly handled by the Corporation;

(f) advising the Corporation on the potential contribution which programme makers in the respective countries could make to the Corporation's programme output throughout the United Kingdom and on the extent to which a reasonable proportion of such output should and does consist of programmes mainly made by residents of the country for which the Council is established;

(g) performing such other functions in relation to the Home Services as the Corporation may from time to time devolve upon the Council;

Provided that each National Broadcasting Council shall be subject to:-

(i) such reservations and directions as may appear to the Corporation to be necessary from time to time in order to secure the transmission throughout Our United Kingdom of Great Britain and Northern Ireland of broadcasts by Us, Our Heirs or Successors, broadcasts by Ministers of Our Government, party political broadcasts and broadcasts of national importance or interest; and

(ii) such reservations and directions as may appear to the Corporation to be necessary from time to time for reasons of finance or in the interest of due co-ordination and coherent administration of the operations and affairs of the Corporation.

Extract from the 2006 BBC Royal Charter

AUDIENCE COUNCILS

39. Audience Councils

(1) There shall be Audience Councils the purpose of which is to bring the diverse perspectives of licence fee payers to bear on the work of the Trust, through the Councils' links with diverse communities, including geographically-based communities and other communities of interest, within the UK.

(2) The Councils must use their engagement with and understanding of communities to advise the Trust on how well the BBC is promoting its Public Purposes from the perspective of licence fee payers, and serving licence fee payers, in different parts of the UK.

(3) There shall be four Councils, corresponding in geographical remit to the four nations for which Trust members are designated under article 14. Each Council shall be chaired by the designated Trust member for the nation concerned.

(4) In addition, there must be mechanisms for bringing together members from different Councils to consider how well the BBC is serving audiences in promoting the Public Purposes.

(5) The network of members across the four Councils must be recruited to ensure that they reflect the diversity of the UK, have connections with communities, and are able to take a view on how the Public Purposes should be promoted.

(6) The Councils have the following remit—

- (a) to engage with licence fee payers including geographically-based communities and other communities of interest;
- (b) to be consulted on all relevant proposals that are required to be subject to a Public Value Test by virtue of any Framework Agreement;
- (c) to be consulted, as part of any review of service licences which the Trust undertakes in accordance with the requirements of any Framework Agreement, on the content of the service licences and the performance of the services to which the review relates;
- (d) to be consulted on the BBC's performance in promoting the Public Purposes;
- (e) to submit a report to the Trust each year on the BBC's performance in each nation and advise on issues arising; and
- (f) to publish an Annual Review Report each year in the nation concerned, assessing how well the BBC is meeting the needs of licence fee payers in that nation.

(7) The detail of how the Councils are to be set up, run and recruited must be set out in a Protocol.

(8) The Trust shall make whatever arrangements it considers appropriate for supporting the work of Audience Councils, within a framework established by a Protocol.