

2016

BBC Charter Review

*A submission to the independent review
into how the BBC is governed and
regulated*



Institute of Welsh Affairs
Media Policy Group



**MAKING
WALES
BETTER**

BBC Charter Review

**A submission to the independent review into
how the BBC is governed and regulated**

by the

**Institute of Welsh Affairs
Media Policy Group**

Executive Summary

1. The damaging effects of the confusion between governance and regulation, implicit in the BBC Trust arrangement, have become evident in recent years. It is clear that the current system is not fit for purpose. It is in the interests of the BBC that it should be externally regulated.
2. Any new system of regulation must be comprehensible and useful to the public, avoid unnecessary complexity, be able to respond to rapidly changing technology and customer behaviour, and strengthen the independence of the BBC.
3. The BBC has yet to adjust fully to the new shape of the United Kingdom. The current review of the BBC's Charter is the right moment for the management, governance and regulation of the BBC to become better aligned with the letter and spirit of the devolution process. This can be done without injury to either the essential unity or the effectiveness of the institution as a whole.
4. It would be better to regulate the BBC via Ofcom, rather than via the creation of a separate regulator for one organisation. This would have the virtue of clarity and simplicity, and ensure a useful bringing together of the regulation of all broadcasting and telecommunications. The dangers of the concentration of regulation in one body are less apparent than the real drawbacks of recent fragmentation.
5. Regulation via Ofcom would also be able to take advantage of existing advisory systems in each of the nations. In Wales it would also ensure that the BBC and S4C are subject to the same regulatory regime.
6. The determination of the licence fee would remain a matter for the UK Government. The government would also approve that portion of the licence fee to be passed to the S4C Authority, utilising the current provision of the Public Bodies Act.
7. The BBC should be governed by a unitary Board that would include an independent Chair and a majority of non-executives. The non-executives should include representatives of Scotland, Wales and Northern Ireland.

8. Equivalent Board structures should be created to govern the BBC in each of Scotland, Wales and Northern Ireland. Each national Board would include at least three non-executives. The independent Chair for each national board would represent that nation on the main Board.
9. The services *within* and *for* each nation would be set out in a national service licence. This would be accompanied by a single funding allocation to cover all services provided for that nation.
10. The current Audience Councils in the nations should be abolished. They should be replaced by a National Broadcasting Council in each nation that would,
 - approve the allocation of resources between the services
 - monitor and review annually the delivery of the national service licence
 - ascertain and monitor the state of public opinion
 - ascertain the needs and interests of members of the public
 - assist the Board in each nation in the formulation of objectives for that nation's services
 - monitor that nation's contribution to the BBC's network services as well as the coverage and portrayal of that nation in those services
 - advise the BBC centrally, as it sees fit, on any matters relating to the output, management, governance or reputation of the BBC.
11. Public appointment of national representatives on the main BBC Board and the non-executives and Chair of each nation's Board should be subject to the approval of the relevant Minister in the devolved government, in effect making them joint appointments with the DCMS.
12. The BBC as a whole, as well as the National Broadcasting Councils, should be required to lay before the respective devolved Assemblies or Parliament and devolved governments, annual reports on all the BBC's operations in and affecting that nation. The scope and specification of these reports should be agreed with the devolved administrations.

1. Background

1.1 The Institute of Welsh Affairs is an independent, membership-based think tank, dedicated to promoting the economic, social, environmental and cultural well-being of Wales. From its inception in 1987 it has owed no allegiance to any political or

economic interest group. Its only interest is in seeing Wales flourish as a country in which to work and live.

1.2 The IWA has pursued an active interest in media issues for many years. In 2008 it carried out a media audit of Wales – *Media in Wales: Serving Public Values* - on behalf of the Welsh Government. It repeated that audit exercise in 2015 through its own resources.

1.3 It sustains an active Media Policy Group whose membership is drawn from the media sector, academia and wider civil society. It is also able to draw on advice from a number of people who have had senior experience in broadcast production and regulation in Wales and across the UK.

1.4 The IWA's 2015 audit formed the basis of our submissions in response to the DCMS Green Paper on BBC Charter Review and the BBC's own proposals, as well as to inquiries by Parliamentary and National Assembly Committees. This submission also draws on the IWA's submissions to the UK Government's Commission on Devolution in Wales (the Silk Commission).

2. The regulation of the BBC

2.1 The BBC is usually regarded as a quintessentially British institution, in much the same way as we regard the NHS. It is held in an affection and respect that manages to transcend the inevitable weaknesses and failings that afflict large organisations from time to time. That respect is also an international phenomenon that benefits the reputation of the United Kingdom worldwide.

2.2 The system of regulation devised at the time of the last Charter review has not served it well. It has led to a confusion between governance and regulation, bringing to the surface the inherent conflict in the BBC Trust arrangement between leadership and critical appraisal – champion and regulator - of the organisation. Even by the admission of the BBC Trust's own Chair, the system is not fit for purpose. This has also contributed to a perceived loss of independence for the BBC, exacerbated by the pressure on public funding. This is a vital matter, as the BBC's independence is crucial to public regard both at home and abroad.

2.3 For these reasons we believe that, in its own interests, the BBC has to become subject to external regulation. Such regulation must

- be clear and comprehensible,
- be useful to the mainstream public,
- avoid unnecessary complexity
- be able to respond to rapidly changing technology
- have an awareness of the wider communications market - strengthen the independence of the BBC

2.4 There seem to be only two choices: regulation via the existing broadcasting and telecommunications regulator, OFCOM, or via a new body to be created solely to regulate the BBC. **We believe that it is by giving**

the responsibility for the regulation of the BBC to OFCOM that the above criteria can best be met.

2.5 The BBC already has to observe many of OFCOM's rules and standards. The relationship between the two bodies is set out in legislation and in the Framework Agreement between the DCMS Secretary of State and the BBC, covering such things as guidance on listed events, a standards code, a fairness code, quotas for independent producers, market impact assessments and international obligations. No one has suggested that any powers should be taken from OFCOM in order to give them to a new BBC regulator. If, therefore, a new regulator were created solely to regulate the BBC, its regulation would continue to be divided between two bodies. While this has been the case since the creation of OFCOM, arguably the time has come to end this fragmentation.

2.6 When OFCOM was being created two main arguments were advanced against incorporating regulation of the BBC under the new body. The first was that this would entail an excessive concentration of power in one body. Experience, particularly in recent years, suggests that the dangers of concentration are less apparent than the drawbacks of fragmented regulation.

2.7 The second argument was that the new organisation already faced a tough task in bringing four or five other regulators together into one organisation. It was feared that having to digest the regulation of the BBC at the same time would have caused a dangerous overload. By now more than a decade has passed, OFCOM has established systems and considerable experience across broadcasting and telecommunications. It has also acquired a prodigious knowledge of public service broadcasting (psb) through the successive reviews of psb required of it under the Communications Act.

2.8. The recent emergence of telecommunications companies that, in turnover, far exceed the size of the BBC, means that there is now a distinct advantage in having a single regulator able to look at the whole of the broadcasting/telecommunications eco-system.

2.9 Finally, regulation via OFCOM would also be able to take advantage of existing advisory systems in each of the nations. In Wales, it would also mean that both BBC and the S4C Authority (already responsible to OFCOM) would be usefully subject to the same regulatory regime.

3. Funding

3.1 Those arguing for the creation of a separate regulator responsible solely for the BBC have argued that it would have the advantage of being able to act as the recipient and distributor of the licence fee income, much as the BBC Trust does today. It would be much more difficult to give this responsibility to OFCOM, a body that in some senses holds the ring between contending forces in the marketplace.

3.2 This has a particular relevance in Wales where both BBC Wales and S4C receive their funding from the BBC Trust. Currently, S4C negotiates for

its funding with the BBC Trust not with the BBC's management board which would certainly be conflicted. Since there is a wide consensus in Wales in favour of preserving the independence of S4C this issue would need to be resolved.

3.3 It seems to us that the common sense approach would be to admit the reality of the government's involvement in setting the level of the licence fee. The Secretary of State for Culture, Media and Sport also has a duty under the Public Bodies Act to ensure that S4C has sufficient funding. This would allow him/her to determine that portion of the licence fee that would be passed to the S4C Authority. The process should also allow for consultation with the Welsh Government.

4. The governance of the BBC

4.1 We have assumed that the creation of an external regulator would require the day to day governance of the BBC to be entrusted to a unitary board, including an independent Chair and a majority of non-executives. Since the board of OFCOM is soon to include specific representation from Scotland, Wales and Northern Ireland, it would only be right to ensure that similar non-executive representation of the nations would also be a feature of the main BBC Board.

The BBC and the nations

4.2 Within the UK the BBC has, from its inception, also been a key institution in reflecting the distinct cultures and politics of the UK's constituent nations. In recent decades it has assumed an ever greater importance in Scotland, Wales and Northern Ireland as government has been increasingly devolved. The BBC has sought to reflect the changing cultural and political dynamics of the UK mainly by decentralising production, creating centres for *network* production in Manchester, Glasgow, Cardiff and Belfast. But at the same time it has tended to resist any decentralisation of decision-making, even weakening previous systems of advice and consultation in the nations. (See Annexe 1)

4.3 In addition to its UK network services the BBC provides extensive services to audiences in each of the three devolved nations, and we were disappointed that the Green Paper as well as the BBC's own document – *British, Bold Creative* – failed to address issues around the scale, adequacy, management and accountability of these services. This was particularly disappointing given the extensive public debate on these issues in the nations over at least the last decade, not to mention the evidence of successive OFCOM reviews of public service broadcasting.

4.4 This issue is of particular importance in Wales because the BBC is the dominant media presence in Wales, in terms of the scope of its services, its news provision, its audience penetration across television, radio and online and its total spend (despite the recent sharp decline in spend). This dominance has increased in recent years as a result of the decline in ITV's regional output, a reduction in local output by some commercial radio providers as a result of the consolidation of ownership, and declining newspaper circulations. Arrangements for accountability within Wales have not kept pace with these developments.

4.5 The BBC has yet to adjust fully to the new shape of the United Kingdom. We believe that the current review of the BBC's Charter is the right moment for the management, governance and regulation of the BBC to become better aligned with the letter and spirit of the devolution process. We also believe that this can be done without injury to either the essential unity or the effectiveness of the institution as a whole.

4.6 A deepening consensus on these matters in the nations – in the devolved governments, Parliaments and Assemblies as well as in wider civil society – makes it imperative to address this issue in the current review.

4.7 Within the BBC the apparatus already exists to create a more responsive structure that would allow a greater degree of local decision-making and accountability within each country, while still retaining a UK-wide unity of purpose and values essential to the delivery of its network services. This is not a zero sum game.

4.8. In the context of the current review, the fact that the IWA has had to conduct two major audits of media in Wales to chart significant changes in the BBC's delivery and funding, itself points to a weakness in the current arrangements for the governance of the BBC in Wales and, by extension, in Scotland and Northern Ireland.

4.9. We believe that this requires changes to the current structure of service licences as well as to the BBC's governance arrangements in Scotland, Wales and Northern Ireland.

Service licences

4.9. The IWA's successive media audits have been attempts to provide a holistic view of media provision in Wales. We believe this has been necessary because of rapidly changing technology and consumer behaviour in the communications field. This has made us very conscious of the anomalous structure of the BBC's service licences, where the definition of the service for each nation is currently dispersed through different radio, television and online licences.

4.10 This fragmentation might not be a problem in itself were it not for the fact that two things flow from it:

- i) first, the fragmented approach to the service licences is also reflected in separate budgetary allocations and constraints on virement and
- ii) second, it has also been reflected in the structure of the BBC Trust's reviews of services. At no point does the BBC Trust review the service to each nation in the round, across all media.

4.11 It is for this reason that we advocate the creation of a single national service licence for each nation supported by a single budgetary allocation to cover all services. This would allow a much more considered approach to the

formulation of each national licence and give managements greater freedom to respond to local circumstances.

Accountability in the nations

4.12 In its evidence to the Silk Commission the IWA gave the following account of the way in which the advisory systems had worked to date:

4.13 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 1) 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.

4.14 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 overridden 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.

4.15 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.”

4.16 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”.

4.17 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.”

4.18 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”.

4.19 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.”

4.20 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.

4.21 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.”

Reforming BBC governance in the nations

4.22 Much of the above remains highly relevant to any process of reforming governance of the BBC in the nations. If the BBC is to move to a system of external regulation, arrangements must be put in place in each nation that would allow “responsibility for the policy, content and allocation of resources for all services delivered solely for audiences in their respective countries” to be discharged in that nation. This would require the following:

4.23 The creation of a unitary management board in each of the three nations, including an independent Chair and at least two other non-executive members.

4.24 The services *within* each nation *for* each nation would be set out in a national service licence. This would be accompanied by a single funding allocation to cover all services in that nation.

4.25 The current Audience Councils in the nations should be replaced by National Broadcasting Councils that would, in each nation,

- approve the allocation of resources between the services
- ascertain and monitor the state of public opinion
- ascertain the needs and interests of members of the public
- assist each nation’s Board in the formulation of objectives for that nation’s services
- monitor that nation’s contribution to the BBC’s network services as well as the coverage and portrayal of that nation in those services
- advise the BBC centrally, as it sees fit, on any matters relating to the output, management, governance or reputation of the BBC.

4.26 Public appointment of national representatives on the main BBC Board and the Board in each nation should be subject to the approval of Ministers in the relevant devolved government, in effect making them joint appointments with the DCMS.

4.27 The BBC as a whole as well as the National Broadcasting Councils should be required to lay before the respective devolved Assemblies or Parliament and the devolved governments, annual reports on all the BBC's operations in and affecting that nation.

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 coordination 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.