

Agenda – Communities, Equality and Local Government Committee

Meeting Venue:	For further information contact:
Committee Room 2 – Senedd	Sarah Beasley
Meeting date: Wednesday, 18 November 2015	Committee Clerk 0300 200 6565
Meeting time: 09.00	SeneddCELG@Assembly.Wales

1 Introductions, apologies, substitutions and declarations

2 Inquiry into the BBC Charter Review: evidence session 5 – Deputy Minister for Culture, Sport and Tourism

(09.00 – 10.30)

(Pages 1 – 45)

Ken Skates AM, Deputy Minister for Culture, Sport and Tourism

Natasha Hale, Deputy Director of Sectors & Business, Welsh Government

Break (10.30 – 10.45)

3 Inquiry into the BBC Charter Review: evidence session 6

(10.45 – 11.45)

(Pages 46 – 63)

Dr Ruth McElroy, University of South Wales

Dr John Geraint, Green Bay Media

Angela Graham, Institute of Welsh Affairs (IWA)

Professor Tom O'Malley, Aberystwyth University

4 Papers to note

(Pages 64 – 78)



- 5 Motion under Standing Order 17.42 to resolve to exclude the public from the remainder of the meeting**

- 6 Inquiry into the BBC Charter Review – discussion of evidence received in sessions 5 and 6**
(11.45 – 11.55)

- 7 Historic Environment (Wales) Bill: order of consideration for Stage 2 proceedings**
(11.55 – 12.00) (Pages 79 – 80)

- 8 Correspondence from the Business Committee – Fourth Assembly Legacy**
(12.00 – 12.30) (Pages 81 – 88)

Document is Restricted

Ken Skates AC / AM

**Y Dirprwy Weinidog Diwylliant, Chwaraeon a Thwristiaeth
Deputy Minister for Culture, Sport and Tourism**



Llywodraeth Cymru
Welsh Government

Christine Chapman AM
Chair
Communities, Equality and Local Government Committee
National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

4 November 2015

Dear Christine

Since my appearance before the Committee on 16 September there have been a number of developments to report in relation to the Welsh Government's input to the BBC Charter Renewal process.

During recent months, Welsh Ministers and officials have liaised closely with the UK Government, to ensure that the Welsh Government is fully involved in the Charter Renewal discussions from the outset. I can confirm that the Memorandum of Understanding has now been signed by all parties – the Welsh Government, the UK Government, the BBC Trust and the BBC Executive. This enshrines the Welsh Government's formal, consultative role in the current and future Charter reviews, in full parity with arrangements in Scotland and Northern Ireland. The signed Memorandum of Understanding is attached.

As previously explained to the Committee, because of the timing of the Charter review process a decision was taken to develop an initial Memorandum that would formalise the Welsh Government's role now. It also commits all signatories to work with the National Assembly for Wales to develop a second Memorandum, which will include the National Assembly as a signatory and supersede the first. It will retain commitments from the first Memorandum and formalise both the National Assembly's role in ongoing scrutiny of the BBC and the related duties that will be placed on the BBC - to provide annual reports and statements of accounts to the Welsh Government and the National Assembly for Wales and to appear regularly before the relevant Assembly committee(s). These will be comparable to those already included in the Scottish Memorandum.

Welsh Government officials are already discussing this with officials from the Presiding Officer's office and DCMS. This second Memorandum of

Understanding should therefore be agreed and in place well before the next BBC reporting round in 2016.

In October the Welsh Government provided a detailed response to the UK Government's consultation paper about the future of the BBC, which was launched on 16 July. I am aware that DCMS received over 192,000 responses to this consultation. Our response is attached for your information.

Although the Welsh Government has a formal role in the Charter Review, the response provided an opportunity, early on in the process, to set out our observations on a number of the key issues under consideration in the consultation document, in a Welsh context.

Our response focused primarily on:

- the services which the BBC, as the leading Public Service Broadcaster in the UK, should be delivering for Wales;
- the need for it to be properly mandated and resourced to deliver them, and;
- the need to strengthen arrangements for accountability to, and scrutiny by, the nations and regions, including Wales.

In our response, we noted that following extensive devolution of powers to the devolved governments there has been no evaluation or assessment of whether current public service obligations remain fit-for-purpose. Over the same time period those obligations have been allowed to erode, largely for commercial reasons. We stated that such a review is now urgently needed and called for it to be conducted in parallel with the Charter review, to inform targets for delivery of services in the nations and regions in the new Charter, linked to a renewed set of public purposes and values.

Following the submission of our response, the First Minister wrote to the Secretary of State for Culture, Media and Sport on 19 October to reinforce some of these key points about the future of Public Service Broadcasting in Wales, both in English and Welsh. He stressed the urgent need for a review and called for it to focus very clearly on the BBC's public purposes in Wales, particularly in respect of its delivery to Welsh audiences and its portrayal of Wales.

The First Minister suggested that the review should consider changes arising from devolution and a changing UK, promoting and sustaining the Welsh language and culture, representation of Welsh people and life and current market failures in relation to Public Service Broadcasting in Wales.

Such a review would need to consider S4C, which despite its independence from the BBC has clear cultural, commercial and educational synergies. The First Minister made it clear that he was not suggesting that there should be any weakening of S4C's independence - in fact, to help secure S4C's strategic and financial independence, he had written the previous week to the

Secretary of State for Culture, Media and Sport calling for the UK Government to urgently commission the independent review of S4C which had been promised during the current spending review period. This was also reflected in our response to the BBC Charter Review consultation.

The First Minister concluded that the review should form the basis of a new Charter “contract” for Wales. This would set out a clear definition of what Wales needs and what the BBC has a duty to deliver in the decade ahead, both to audiences in Wales and about Wales to the rest of the world.

I look forward to providing a further update on these issues during my appearance before the Committee on 18 November.

Yours ever

A handwritten signature in black ink, appearing to read 'Ken Skates', with a stylized flourish extending to the right.

Ken Skates AC / AM

Y Dirprwy Weinidog Diwylliant, Chwaraeon a Thwristiaeth
Deputy Minister for Culture, Sport and Tourism

MEMORANDUM OF UNDERSTANDING: BBC CHARTER REVIEW/WELSH GOVERNMENT

Preamble

Following the final agreement of the Memorandum of Understanding between the UK Government, Scottish Government, Scottish Parliament and the BBC (see 'Background'), the UK Government is hereby seeking to establish parity for the Welsh Government in respect of a formal consultative role in the process of Charter Review and the ongoing scrutiny of the BBC

Parties

- The Department for Culture, Media and Sport (The Department)
- The BBC¹
- The Welsh Government

Commitments:

1. Charter Review

The BBC is established by Royal Charter. The Charter sets out how the BBC is constituted, its public purposes, and the respective roles and composition of the BBC Trust and the Executive Board. The current Royal Charter expires at the end of 31 December 2016.

The terms of the formal consultative role for the Welsh Government in the process of reviewing the BBC's Charter shall be as follows:

- The Department will consult the Welsh Government on the draft terms of reference for the Charter Review in advance of their publication.
- The Welsh Government will lay the final terms of reference for the Charter Review before the National Assembly for Wales.
- The Department will consult the Welsh Government through the process of reviewing the Charter.
- The Welsh Government will lay the draft Charter and Framework Agreement before the National Assembly for Wales, and should the Assembly deem it appropriate, schedule a 'take note' debate on the content of the draft Charter and Framework Agreement².

¹ In this Memorandum of Understanding - "the BBC" means the British Broadcasting Corporation; "the Executive" means the Executive Board of the BBC; and "the Trust" means the BBC Trust; and any reference to "the BBC" (without qualification) includes a reference to both the Trust and the Executive, so far as makes sense in the context. ² This would ensure parity with the processes in the UK Parliament for the last Charter Review in 2006. See the 'take note' debate in the House of Lords, 16 June 2006.

- The Department will consult the Welsh Government before recommending to Her Majesty in Council that the draft Charter is granted.

2. Annual reports and accounts, and appearing before committees

As part of 'Powers for a Purpose: Towards a lasting devolution settlement for Wales' in February 2015³, the UK Government indicated that it would '*...seek a commitment from the BBC and S4C that they should send their annual reports and accounts for laying in the Assembly*'.

Prior to the publication of the BBC's annual report and accounts for 2015/16 the signatories will work to agree a revised Memorandum of Understanding, to supersede this one, which would (subject to agreement⁴) include commitments in the following areas, to establish parity across the devolved Governments in relation to annual reports and accounts, and appearing before committees:

- A commitment from the BBC to send its annual report and accounts to the Welsh Government and a commitment from the Welsh Government to lay these before the National Assembly for Wales; and
- A commitment from the BBC to appear before the National Assembly for Wales committees on matters relating to Wales, on the same basis as it does in the UK Parliament

3. Next Charter

Subject to a Royal Charter for the continuation of the BBC being granted, the consultative processes relating to Charter Review set out above, and such commitments as are agreed in relation to the BBC's Annual Reports and Accounts, and appearing before committees referred to above will be enshrined in that Charter and in all subsequent Charters unless otherwise set in statute elsewhere.

<http://www.publications.parliament.uk/pa/ld200506/ldhansrd/v060616/text/60616-01.htm>); and the Commons debate on 10 July (see: <http://www.parliament.the-stationery-office.co.uk/pa/cm/cmvote/80710v01.htm>).

³[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408587/47683_CM9020_ENGLISH.p](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408587/47683_CM9020_ENGLISH.pdf)
df

⁴ Including with the National Assembly for Wales

4. Signatures

 <p>[For and on behalf of the Department]</p>	
 <p>[For and on behalf of the BBC Executive]</p>	 <p>[For and on behalf of the BBC Trust]</p>

5. Background

Following the referendum on the independence of Scotland on 18 September 2014, the Smith Commission Agreement, published on 27 November 2014⁵, made several proposals specific to the British Broadcasting Corporation (BBC). As set out in paragraph 36 of the Agreement:

There will be a formal consultative role for the Scottish Government and the Scottish Parliament in the process of reviewing the BBC's Charter.

The UK Government's Command paper, 'Scotland in the United Kingdom: An enduring settlement'⁶, published in January 2015, set out at paragraphs 5.2.1 – 5.2.3 how paragraph 36 of the Smith Commission Agreement would be enacted by a Memorandum of Understanding (MoU), stating;

5.2.1 Paragraph 36 of the Smith Commission Agreement, which relates to the relationship between the British Broadcasting Corporation (BBC) and the Scottish Government and Scottish Parliament, will be enacted by Memorandum of Understanding (MoU). This MoU, entered into by the UK Government, Scottish Government, Scottish Parliament and the BBC, will fulfil the Agreement's proposal by setting out commitments that guarantee a full consultative role for the Scottish Government and Scottish Parliament in the review of the Royal Charter and the ongoing scrutiny of the BBC.

5.2.2 The commitments outlined in the MoU will be:

- A commitment on the UK Government to consult with the Scottish Government and Scottish Parliament before recommending that any Royal Charter on the BBC is granted, and detail concerning the terms of engagement throughout the review process;*
- A commitment from the BBC to send its annual report and accounts to the Scottish Government and a commitment from the Scottish Government to lay these before the Scottish Parliament;*
- A commitment from the BBC to appear before Scottish Parliament committees on matters relating to Scotland; and*
- A commitment to enshrine all the above in the next Charter.*

5.2.3 Setting this out in an MoU, rather than draft clauses, ensures that the BBC's integrity and independence is secured by keeping its governance and constitutional arrangements off the statute books. Importantly, delivering this commitment by MoU will ensure that the Scottish Government and Scottish Parliament are able to have a

⁵ <https://www.smith-commission.scot/smith-commission-report/>

⁶ <https://www.gov.uk/government/publications/scotland-in-the-united-kingdom-an-enduring-settlement>

consultative role in time for the next Charter Review, which is due to commence after the 2015 General Election; any draft clauses in this respect, setting out a formal role for the Scottish Government, would necessarily come into force too late to guarantee such an involvement. Furthermore, the process, timing and scope of the review of the BBC's Charter are not set out in statute.

This Memorandum of Understanding establishes parity for the Welsh Government in respect of a formal consultative role in the process of Charter Review and commits all signatories to ensuring parity in respect of the ongoing scrutiny of the BBC.

Welsh Government's response to the consultation on the BBC Charter Review

Introduction

The Welsh Government welcomes the opportunity to respond to this public consultation on the BBC Charter Review.

In recent months, Welsh Ministers and officials have liaised closely with the UK Government, to ensure that the Welsh Government is fully involved in the Charter Renewal discussions from the outset. We have signed a Memorandum of Understanding with the UK Government and the BBC, giving the Welsh Government a formal, consultative role in the Charter review, in full parity with arrangements in Scotland and Northern Ireland. The signatories are committed to working with the National Assembly, to develop a further Memorandum that will enshrine the Assembly's ongoing role in the scrutiny and accountability of the BBC in Wales.

Although the Welsh Government has a formal role in the Charter Review, we are pleased to take this opportunity, early on in that process, to set out our observations on a number of the key issues under consideration in the consultation document, in a Welsh context. Our responses to some questions will be more detailed than others; at this stage we intend to focus primarily on:

- the services which the BBC, as the leading Public Service Broadcaster in the UK, should be delivering for Wales;
- the need for it to be properly mandated and resourced to deliver them, and;
- the need to strengthen arrangements for accountability to, and scrutiny by, the nations and regions, including Wales.

It is vital that the new Charter fully reflects the interests of the people of Wales and the current and changing devolved settlement. Wales is a nation in its own right with a unique culture and language. Its bilingual ethos and its nature and history are distinct within the UK; they need to be safeguarded and celebrated.

As reflected in the statement jointly signed by three party leaders in the National Assembly for Wales on 10 July 2015¹, there is significant concern about the challenges facing BBC Cymru Wales and S4C due to funding pressures. This was also reflected in Plenary debate on broadcasting in the National Assembly for Wales on 23 September 2015².

¹ <http://gov.wales/docs/drah/publications/150909-cross-party-statement-en.pdf>

² <http://www.cynulliad.cymru/cy/bus-home/pages/rop.aspx?meetingid=3429&assembly=4&c=Record%20of%20Proceedings#237962>

The Welsh Government and the National Assembly for Wales expect the BBC to stand by its own public statements that the deal announced on 6 July 2015 between itself and the UK Government in relation to the licence fee will be cash neutral for the BBC and will not affect services. The cross-party statement noted assurances from the BBC's management that this 'cash flat' deal will not therefore, impact on budgets at either BBC Cymru Wales or at S4C. We also expect the UK Government to honour the terms of that agreement and not impose further budget cuts or top-slicing of licence fee revenues on the BBC.

The statement expressed concern that neither the Welsh Government nor the National Assembly were consulted before this deal was reached and that it is undemocratic that the UK Government and the BBC made decisions behind closed doors and outside of the BBC Charter renewal process.

Why the BBC? Mission, purpose and values

Q1 How can the BBC's public purposes be improved so there is more clarity about what the BBC should achieve?

The BBC continues to have a crucial role as a Public Service Broadcaster, despite the multichannel world in which we now live and digital developments which have enabled new ways of delivering public service content across the UK.

The role of the BBC is even more important in Wales considering the weakness of the print media. There is limited coverage of Welsh public life and society in UK newspapers and on UK broadcast services, which comprise the main media outlets in Wales. The portrayal of Wales in UK media does not reflect the cultural diversity and richness of the nation.

Effective democracy relies on informed decisions by citizens. Wales has limited news coverage and too few voices, leaving most people dependent on UK news outlets that lack coverage of Wales. Although there is evidence that there have been improvements in the coverage of devolved political issues in Wales since the King Report, there is still room for improvement. The news media provide insufficient or inadequate coverage of Welsh issues and events. Most Welsh people have no easy access to the information and context needed to evaluate the success or otherwise of Wales' institutions.

As reflected in Ofcom's recent review of public service broadcasting, the BBC, as the cornerstone of public service broadcasting, provides the majority of PSB investment and output in Wales. The BBC dominates English-language programmes made specifically for Wales, producing 592 hours in 2013 compared with ITV Cymru Wales' 331 hours. The Welsh Government is naturally concerned that between 2011 and 2013 there was a decline of 101 hours in BBC non-network nations programming, with non-news declining most. However, we recognise that the BBC is still providing the bulk of non-

news non-network programming in Wales, providing 222 hours in 2013 in contrast to 34 hours by ITV Cymru Wales. It is also the most significant provider of non-network television news in Wales and, by a smaller margin, of current affairs programming.

In recent years, the BBC's investment in Wales has reduced, at a time when its investment in Scotland, Northern Ireland and key English regions has increased. Wales has seen a reduction in BBC expenditure and a corresponding fall in GVA from £292 million in 2009/10 to £288 million in 2011/12, while GVA in Scotland increased from £355 million to £410 million and in Northern Ireland from £138 million to £151 million³. It is vital that this is remedied during the next Charter period, with a clearer, stronger remit to deliver for Wales and the other nations.

All of the existing public purposes described in the consultation document are relevant to Wales. It is the view of the Welsh Government that public purposes encompassing citizenship and civil society, education and learning, creativity and cultural excellence, the nations, regions and communities of the UK, the UK's place in the world and the public benefit of emerging communications technologies and services align well with a balanced approach to delivering against Lord Reith's original remit for a Public Service Broadcaster – to 'inform, educate and entertain'.

We do not share the view that these purposes are too broad, nor that they should be reformed to exclude certain activities that some might consider inappropriate for the BBC, for whatever reason. Instead, acknowledging the more competitive and varied environment which now exists, we would be content for more detailed and specific descriptions to be developed of the subjects and activities that should be prioritised under each public purpose - but these should not be considered exhaustive, nor prohibitive by omission.

The evolution of technologies, services and markets over the last Charter period demonstrates that it would be foolish to assume now that we can accurately predict which of the BBC's current activities and services will be most valued by licence fee payers over the next ten years, which may become redundant, which might develop into services best suited to the commercial marketplace, or which yet to be developed services may come to be as important to the BBC's portfolio of services as iPlayer undeniably is today.

Naturally, the fourth purpose *Representing the UK, its Nations, Regions and Communities* is one that is of special interest to us and we will provide detailed information on this under question 7.

Q2 Which elements of universality are most important for the BBC ?

³ Source: *The Economic Value of the BBC*, published by the BBC on January 15th 2013 – <http://www.bbc.co.uk/blogs/aboutthebbc/entries/65a7abeb-7e74-3b2f-858e-72786cbc5790>

It is of course true that more and more options have become available over the last Charter period for audiences to watch, read and listen to content; indeed, the BBC has played a key role in the development and promotion of some of these. However, in many cases it is as yet unclear which of these services will mature and stand the test of time and which may fall by the wayside. This evolution in the delivery of content does not mean that the BBC's remit should now be more narrowly focussed on particular or underserved audiences – certainly it would be wrong to incorporate such restrictions into a binding Charter that will be set in stone for a number of years, whilst lives across the UK may be affected by as yet unknowable technological or social change.

The assumption in the consultation document, that the BBC's current approach is to provide programmes and services for all audiences, and on an equal basis, across every platform, seems fundamentally flawed. It is the BBC's job to serve everyone in the UK. However, we would accept that - at a UK level – the BBC does look to identify areas where special attention may be required, plus those where programming and services already exist in sufficient quantity and quality that it would add little value by providing more of the same (notwithstanding the genuine need for the BBC to provide some popular programming with mass appeal, in order to maintain the profile it needs to be effective in its role as the UK's leading Public Service Broadcaster). There is a real issue about inadequate provision of content for the nations and regions, which we will return to later, but that is more about lack of funding than it is about recognising the gap in provision (which the BBC has acknowledged in successive management reports).

These judgements will be required throughout the next Charter period, considering the situation at the time. Of course, it can be argued that the BBC's judgement hasn't always been correct in the past and we would agree that there is room for improvement in both decision making and content regulation. However, in our view the BBC plays a leading role in ensuring universality of provision across the marketplace and in driving up quality across the board, precisely because it has a clear remit to ensure that public service content is available to all.

Q3 Should Charter Review formally establish a set of values for the BBC?

We would support the development of a set of values for the BBC and we agree that the thematic list of potential values at Table 2 in the consultation document is a good starting point. All of these could be included in a new Charter, subject to further development. Issues of independence and impartiality will be explored further in our answers to later questions in this response.

However, in relation to the proposed value that the BBC should be 'diverse / representative', although we support more work to deliver against the priorities described in Box 1 in the consultation document, we are disappointed that no acknowledgment is made of the cultural diversity of the

nations and regions of the UK. Just as the BBC's public purposes include representation of the nations, regions and communities of the UK, so should the scope of the BBC's diversity strategy as applied to its workforce on and off screen. Any value developed to describe how the BBC will be diverse and representative in future should make this clear.

In our response to Q9 below we will discuss the potential for a clear set of values, in conjunction with the BBC's public purposes, to drive the quality, distinctiveness and diversity of the BBC's output.

What the BBC does: scale and scope

Q4 Is the expansion of the BBC's services justified in the context of increased choice for audiences? Is the BBC crowding out commercial competition and, if so, is this justified?

The BBC's focus on proportionate delivery of content and services that 'inform, educate and entertain', taking full account of its position in the marketplace and the activities of other broadcasters, provides balance to the BBC's output which, generally speaking, we do not believe is crowding out commercial competition. In fact there are areas where the BBC needs to do more, including programming for and about the nations and regions.

That being said, the Welsh Government is fully aware of the importance of ensuring plurality of English language television in Wales in news and also general programming aimed at Welsh viewers. Therefore ITV Cymru Wales continues to have a vital role to play as an alternative to the BBC for news and non-news programming.

Q5 Where does the evidence suggest the BBC has a positive or negative wider impact on the market?

We accept the argument that the BBC, as an independent Public Service Broadcaster with national reach and a stable, long-term source of funding, has a positive impact in raising standards across the marketplace. We acknowledge the concerns expressed in the consultation document about the perceived impact of its activities on competition in news provision, radio, online services and print media. These should be carefully monitored, but on balance we believe that the development by the BBC of innovative, positively received services in most of these areas has had a significant, net positive effect on the quality and availability of services. In those areas where the BBC has itself identified that it should play a part in helping to improve market conditions - notably local news provision in print - it has already developed proposals to do so which we will watch with interest, as this is a particular issue in Wales.

In our view the BBC's remit should not be curtailed via the new Charter to restrict its operations in some areas as a matter of principle. See also our comments on universality under Q2. However, It is important to stress that the BBC's potential to enhance the lives of citizens in the nations and regions has already been diminished by previous cuts (e.g., as a result of Delivering Quality First') and is likely to be eroded further by the impact of budget announcements in recent months. This must be addressed in the next Charter period; services for the nations and regions need to be strengthened, not subjected to further financial pressures.

Q6 What role should the BBC have in influencing future technological landscape including in future radio switchover?

The BBC should continue to be a key driver of technological developments and change, where these can improve availability, choice and ease of access to public service content and can encourage participation in culture, democracy and society. There are some regulatory issues to consider which we have articulated previously - these apply to all PSBs who may be developing services for new platforms, not just the BBC.

In the Welsh Government's response to Ofcom's consultation on its Public Service Broadcasting review in 2015, we agreed that a steady evolution is taking place in the global broadcasting market, providing new options for delivery and consumption of content. These are gaining traction with both broadcasters (who are diversifying their offer in terms of broadcast channels available and delivery of content via other platforms; e.g., VOD, online) and with viewers, for whom linear broadcasting remains important but who are increasingly taking advantage of the flexibility afforded by delivery over new platforms.

Universality and discoverability of PSB content remains important and these principles should be broadened and protected, so as to be relevant to a more connected world. We agree with Ofcom's assessment that an incremental change to the definition and regulation of universality is the most sensible approach, as various new service offers across multiple platforms mature. If broadcasters see value, whether financial or strategic, in moving the delivery of some PSB content away from linear programming on established PSB channels, then they should provide a sound business case to Ofcom for consideration - but this must show how the broadcasters or their delivery partners on other platforms will ensure that this PSB content is both discoverable and promotable to key audiences, whether they are across the UK or in specific Nations and regions.

From a regulatory perspective, consideration of such an approach would go hand in hand with Ofcom's suggestion that regulation by organisation rather than channel may be more appropriate in future. We agree that Ofcom should consider this in more detail and we stand ready to engage in discussions on this, which we said might sensibly proceed in parallel with the Charter Review. The BBC would seem to be the ideal candidate for early consideration of such

an approach, given its primacy as a deliverer of PSB content in the UK and the increasing diversification of its service portfolio.

The Welsh Government has consistently stressed that we would not be in favour of digital switchover for radio until there is a guarantee of at least 97% coverage for DAB throughout Wales. We welcomed the UK Government's announcement in December 2013 that it will continue to invest (with the BBC and commercial radio operators) in support of digital radio roll out. We recognise that there have been improvements in DAB coverage in Wales in recent years. We welcome the fact that the BBC is rolling out its national DAB network to a further 162 transmitter sites across the UK by the end of 2015. This programme will increase the coverage of its DAB network in Wales from 86% to 92% of homes.

The DAB service in Wales should not be worse than Welsh AM/FM radio coverage at present and should be available in areas where currently the national radio stations can only be received on the AM spectrum. This is particularly important in view of the fact that people in Wales listen to more hours of radio per week than the UK average, with 49 % of the total listening hours being to BBC network stations.

The Welsh Government continues to be concerned that even when the proposed criteria are met on a UK basis, there would almost certainly be a significantly lower level of DAB penetration in Wales. DAB needs to provide an enhanced service if listeners in all parts of the UK are to be persuaded of its merits.

We also have concerns about the availability of services across all platforms in a predominantly rural country like Wales. We were encouraged that BBC One Wales has been available on HD since 2013. There is an urgent need to resolve the comparable challenge surrounding the future of regional opt out programmes on BBC2. The considerable number of viewers who enjoy BBC2's programmes, including its rugby coverage in Wales, find it very difficult to accept that coverage is not also available in HD.

Q7 How well is the BBC serving its national and international audiences?

National

BBC Cymru Wales

Television

It is vital that the new Charter ensures sufficient funding for BBC Cymru Wales, for news and non-news programming in both Welsh and English. Outside of news and current affairs we are very concerned with the funding allocated to non-news English-language programming for Wales. The funding BBC Cymru Wales receives is currently insufficient to be able to provide English-language programming as well as delivering its Welsh language

output, especially in light of the plurality which already exists in provision of Welsh language content via S4C.

There was much interest in the speech by the BBC's Director General Lord Hall on 7 September, and in the paper which the BBC subsequently published, envisioning a more open BBC providing services which can be tailored for who you are and where you live.

We were pleased that the BBC has strengthened its commitment to reflecting the full diversity of life across the UK including Wales - and especially that it is committed to investing in drama and comedy programming that better reflects the nations and regions. BBC network drama is a great success story for Wales and the capacity and expertise we have developed here means we are well placed to deliver content for Wales as well.

Proposals to reconfigure news coverage to meet the changing needs of audiences in Scotland, Wales and Northern Ireland are welcome - as are the BBC's recognition of the impact that online news has had on the newspaper industry and its proposals to invest in local reporting capacity and share journalism resources which would be available to other news providers. We welcome the fact that the BBC will explore various options with a number of stakeholders, including the Governments of the devolved nations.

The BBC's commitment to further development of Welsh language services is welcome, as is its recognition that the provision of English-language programming for Wales has declined at a faster rate than in any other nation and must be addressed in the next Charter period.

Of course, Lord Hall raised a number of these issues when he spoke in Cardiff last year, but we have yet to see any significant improvements.

There are also some areas of real concern.

On 17 August the First Minister wrote to Lord Hall to highlight the growing gulf in funding between Wales and other parts of the UK, adding that an additional £30m is needed to ensure programming that truly reflects the lives of people in Wales.

In the context of the cuts that BBC Cymru Wales has absorbed over the last ten years, the Welsh Government believes that an additional £30 million is required specifically for English-language programming, bringing the total budget to £50m. This would allow Welsh audiences to have a credible national television station that could provide quality content in English, including drama, comedy and also potentially network contributions.

It is important to stress that our call for additional funding for English-language programming should not be top sliced from the funding allocated to S4C (or from the £20m BBC Cymru Wales receives for Welsh language programming). We are fully aware of the important role that BBC Cymru Wales plays in providing Welsh language content and of course this should continue.

Worryingly, the proposals published by the BBC fall far short of this. We would question how the BBC can deliver on the commitments made to invest in and improve services to the nations - including digital news, education and entertainment services for each Nation - when it has ruled out any net increase in spending and has committed to protecting funding for the nations only to the extent that it will be “cut less than other areas”. We accept that the BBC finds itself in a difficult situation due to cuts in its budget, but these proposals simply raise further questions over its future output in Wales.

The Welsh Government has been clear in discussions with the BBC Executive in Cardiff and in London that the development of Cardiff as an increasingly important centre for network productions provides no justification for reducing the BBC’s investment in local services. There should be a clear commitment to safeguarding and strengthening the core services which are aimed at Welsh viewers and listeners – in both languages, but especially in English, where there has been a notable reduction (17%) over the last few years, including news and non-news programming. We appreciate that BBC Cymru Wales has decided to prioritise spending in its news and current affairs output. However, it is lamentable that BBC Cymru Wales no longer produces any English language drama or comedy specifically for Welsh audiences – especially given its enhanced reputation for high-end TV productions, in the UK and internationally, thanks to the success of Doctor Who, Casualty, Wizards vs Aliens and more.

The BBC’s corporate vision should encompass the contribution which the BBC in Wales can make to the Corporation’s creative output for the UK as a whole. Developing BBC Cymru Wales as a major production centre for drama, with the support of the Welsh Government, has highlighted the possibilities in this area. The success of productions mentioned above, amongst others, underlines the fact that Wales has real potential as a production location. However, whilst we value the BBC’s drama presence here and the benefits it brings, it is not as secure as it would be if the BBC also had a commissioning base in Wales. This is something we hope to explore further.

We welcome the intention to strengthen network production in Wales and the other nations within the UK. This will bring creative as well as economic benefits for the BBC as a whole. We welcomed the BBC’s commitment to meeting the target of 17% for television programmes for the nations earlier than 2016. Our expectation is that that at the very least 5% of network production should originate in Wales, from a mix of in-house and independent productions – and this should represent a floor rather than a ceiling for Welsh creativity.

The Welsh Government remains committed to working in partnership with the BBC as it continues to build on its successes in Wales, to maximise the economic and cultural opportunities that will arise from the further development of drama and network production business in Wales.

Radio

As with the importance of BBC Cymru Wales' television output, we recognise the continuing roles of both Radio Wales and Radio Cymru in providing essential services for the citizens of Wales.

These radio stations have a vital role in ensuring that the citizens of Wales receive comprehensive coverage of the key policy decisions made by the Welsh Government. We also welcome the commitment across both services towards combining local and international news coverage. This underlines the distinctive nature of the news services provided by both national radio services and value of the service provided to listeners.

As a Government we are concerned that the range of non-news programming generally is narrowing. We therefore welcome the fact that Radio Wales and Radio Cymru continue to provide a comprehensive range of non-news programming. Indeed we see the breadth of programming provided across both services as central aspects of the public service they provide. In our view that breadth should be maintained and, whenever possible, strengthened.

Radio has a crucial contribution to make in providing a platform for Welsh talent to be identified and developed. This applies to the music content featured on both services and, equally, to writers and actors. Radio has a particular strength in allowing people to tell their own stories. The BBC has a long and continuing tradition of providing excellent sporting coverage on radio.

It is essential that both national radio services in Wales continue to strive to reflect as wide as possible a picture of life in Wales. Even as new digital platforms proliferate, we do not underestimate the particularly valuable role played by radio in this respect. Radio Cymru and Radio Wales continue to provide listeners with a range of programming increasingly denied to television viewers in Wales. The experience of television shows how quickly that situation can change.

As with television, we are concerned that Wales continues to be particularly under-represented on the main UK radio networks. Very little of the BBC's commissioning for UK network radio appears to come from Wales. We would like to see a greater contribution to the radio network being commissioned from BBC Wales; the BBC should set more stretching targets in this regard.

Whilst both national radio services in Wales have important roles to play as sources of information and entertainment, Radio Cymru plays an additional role via the contribution it makes in ensuring that the Welsh language continues to thrive. In this regard, its role is more than just a broadcaster. Therefore we are extremely disappointed that the consultation document highlights the following, questioning the value of indigenous language services in purely financial terms without any regard for their cultural or social importance:

“... these services come at a cost; cost per hour of indigenous language radio content in Scotland and Wales is considerably higher than cost per hour for English speaking content which raises concerns about value for money.”

We welcome the strengthened partnership which has developed over recent years between Radio Cymru and S4C. There continues to be only one Welsh language radio service and one Welsh language television service. It is therefore essential that the partnership between these two services should be as imaginative and productive as possible

S4C

It is vital that S4C has sufficient funding, as well as editorial and managerial independence, for it to maintain its ability to serve the Welsh audience and continue to play a crucial role in supporting both the Welsh language and the creative industries in Wales.

In over 30 years of operation, S4C has played a leading role in promoting and safeguarding the Welsh language. It has a key, ongoing role to play in ensuring that the language continues to thrive. It helps to establish and enliven Welsh as part of everyday life in Wales, and its services for children and young people make an important contribution to increasing their use of Welsh. Through its factual, historical and cultural programmes, S4C enriches Welsh society. It has an important part to play in delivering the vision set out in the Welsh Government's Welsh Language Strategy.

Our creative industries are a Welsh success story and make a vital contribution to our economy. S4C's commissioning policy has greatly contributed to the growth in the independent media sector in Wales, in both English and Welsh. Wales now has a number of highly successful independent production companies that are creating content for many channels and networks, but S4C has been central to their initial development.

Therefore we were very concerned to hear the comments of the Secretary of State for Culture, Media and Sport in July 2015 when he said it was "reasonable" S4C should make "the same kind of efficiency savings" being asked of the BBC.

Since the Comprehensive Spending Review in 2010 the Welsh Government has consistently expressed its ongoing concern to the UK Government about the impact that further funding cuts will have on S4C.

S4C has found itself in a very different position since the 2010 Spending Review. Now, 90% of S4C's funding comes from the licence fee. We welcome the fact that this funding has been guaranteed until the end of the current licence fee settlement in 2017, however S4C has not yet received confirmation of the expected DCMS contribution for 2016-17. It is vital that this is agreed as soon as possible.

Funding for the channel has reduced by 36% since 2010; it is inevitable that this will impact on the output available to viewers. We have consistently stated that there should be no further cuts to S4C's budget. All formal agreements regarding S4C funding will expire during the next two years. This uncertainty regarding future funding makes forward planning very difficult, both for S4C and the independent production companies who are key suppliers to S4C in Wales. We remain very concerned about S4C's financial position and we will continue to raise this with the UK Government. The Secretary of State for Culture, Media and Sport has a statutory duty, as outlined in the Public Bodies Act 2001, to ensure that S4C receives sufficient funding.

The Welsh Government welcomed the announcement in 2013 that a six-year agreement had been reached between the BBC Trust and the S4C Authority on the future funding, governance and accountability of S4C. The agreement also, importantly, protects the editorial and managerial independence of S4C. We are encouraged by the greater collaboration between the BBC and S4C - and also that the Operating Agreement is much wider than the funding and accountability arrangements, extending to a creative partnership at all levels within the BBC and S4C.

It is vital that S4C and the BBC work together to develop a sustainable future for Welsh language broadcasting. Because of the crucial importance of S4C's role, we also believe that the partnership should be subject to an independent review, agreed by all parties in the National Assembly for Wales. The commitment to seek agreement for such a review is outlined in our Programme for Government.

International

Although the BBC's priority should remain its mission, as a Public Service Broadcaster, to deliver services that 'inform, educate and entertain' people across the UK, the success of BBC Worldwide has been an important driver of employment and career development opportunities for the workforce in the nations and regions, including Wales. This positive impact is felt by the BBC itself and also by the independent producers of BBC-commissioned content who, through BBC Worldwide, can access the scale and reach of the BBC's global marketing. Their growth allows them to better compete for non-BBC commissions as well. In addition, BBC Worldwide provides revenue which the BBC can reinvest in content and services in the UK, although this should be seen as supplementary to - not a replacement for - core funding from the licence fee.

We will come back to proposals for changes to the BBC's approach to commissioning productions later in this response, as these would undoubtedly have an impact on opportunities for the independent production sector in Wales to work with the BBC in the future.

Q8 Does the BBC have the right genre mix across its services?

Please refer to our comments about the BBC's approach to delivering a balanced portfolio of content under Q2 on universality. Additionally, we have already discussed the importance of the BBC providing appropriate news and non news coverage in Wales, in Welsh and English, in our response to Q7.

Given the gap in provision of English-language services in Wales, which has long been acknowledged by the BBC, it is vital that appropriate funding is found to allow BBC Cymru Wales to deliver an appropriate genre mix of programming for Wales in the forthcoming Charter period, in both Welsh and English – without impacting upon BBC Cymru Wales' existing budget for Welsh-language programming or appropriate funding for S4C.

Q9 Is the BBC's content sufficiently high quality and distinctive from that of other broadcasters? What reforms could improve it?

Please refer to our comments under Q2 and Q4 about the BBC's approach to delivering a high-quality portfolio of content, taking account of the activities of other broadcasters but mindful of the need for it to retain its profile with audiences across the UK in order to remain effective as its leading Public Service Broadcaster. In general we are content that the BBC looks to provide high quality and distinctive content - and that where it provides content in genres which are also served by other broadcasters there is a good reason for doing so and one effect of the BBC's activity is usually to drive up quality across the marketplace.

In our response to Q2 we agreed that a clear set of values should be developed for the BBC. These values, together with a renewed commitment to the BBC's public purposes, should inform the creation of content development guidelines which would apply across the BBC's full range of services. These guidelines would ensure that the BBC's key statements of ideals and intent are given due consideration by commissioners and producers of BBC content and should further enhance the quality, distinctiveness and diversity of the BBC's output. They should be reviewed periodically during the Charter period, as services evolve, to ensure ongoing fitness for purpose.

Q10 How should the system of content production be improved through reform of quotas or more radical options?

We are pleased DCMS has agreed that how the BBC's content is commissioned and produced, including in the nations and regions, will be a key consideration during the Charter Review. Looking at the way the BBC determines how - and where - it spends £2.4 billion on content is a vital element of this process.

In policy and in practice, the BBC must take a more representative approach to commissioning and production from and for the nations and regions. As a Public Service Broadcaster, there is an onus upon the BBC to identify and

develop talent across all areas of production and to support, develop and deliver production across all of the nations and regions of the UK.

The Welsh Government has cautiously agreed with Ofcom that some consideration be given to the relationship between the PSBs and the independent production sector, given the consolidation and acquisition that is occurring. However, we would be wary of any quota changes that could allow the production of in-house content by the BBC and the other PSBs - and the commissioning of independent PSB content - to move away from the nations and regions and back towards London and the South-East.

Evidence is provided in the consultation paper that more should be done to ensure more and fairer distribution of production activity away from London and into the nations and regions, citing the economic benefits and the positive impact on skills development for the sector. With this in mind, any changes to quota levels - whether they might be for independent productions, productions in the nations and regions or the extent of the Window Of Creative Competition (WOCC) – must protect and enhance the steady movement towards increasing production in the nations and regions. Similarly, any changes to the current Terms of Trade, which set out how the BBC and other broadcasters work with independent producers, must protect the interests of both people and creative businesses in the nations and regions.

Based on the level of detail provided in the consultation document, we are not persuaded that a significant scaling back of BBC in-house production would be beneficial overall. We are not surprised that the BBC's in-house production team has only won a minority of WOCC commissions during the current Charter period. Presumably the majority of these were for one off or single series productions, where independent production companies would have the flexibility and lower overheads to compete well, whilst longer-term or repeat commissions, which the BBC might already be delivering internally and which it would have the scale and infrastructure to deliver most effectively, were excluded from the WOCC. If this is the case then the WOCC outcome does not demonstrate that the BBC's in-house productions are bad value for money for the licence fee payer in comparison to independent production companies; rather it serves to demonstrate that there should be appropriate opportunities for both over the next Charter period.

It might be the case that some minor scaling back of in-house productions could deliver benefits, but more evidence is required before a conclusion can be reached – including, crucially, evidence about the potential impact any such scaling back might have on the BBC's production hubs in the nations and regions, such as Roath Lock studios in Cardiff Bay.

We are particularly concerned by the detail of the BBC Studios proposal, as set out in the consultation document. The Welsh Government is not in favour of the removal of quotas for independent production or production in the nations and regions, as set out above; in fact these should be reconsidered and strengthened further.

We share the concerns set out in the consultation document that the transformation of BBC's production operations into a commercial subsidiary could significantly distort the market, affect the competitiveness of the independent production sector (including companies in the nations and regions) and give rise to serious State Aid concerns. Finally, this proposal brings with it the prospect of the BBC using licence fee revenue to develop proposals for productions commissioned by commercial broadcasters, with no guarantee of success. In our view, as a matter of principle, licence fee revenue should be invested in the BBC's content and services for the benefit of UK citizens, not directed elsewhere - and certainly not on a commercial risk basis without a guaranteed return for the licence fee payer.

The Welsh Government therefore takes the view that the quota system should be retained, although we are content that further consideration be given to whether the quotas themselves might be changed, and the BBC Studios proposal should not be taken forward.

BBC Funding

Q11 How should we pay for the BBC and how should the licence fee be modernised?

Given our comments under Q2 about the importance of universal access to the BBC's content and services, we would be opposed to any form of subscription based model for future funding. This would make it more difficult for some people to access the full range of public service content. The three pillars of Lord Reith's remit for Public Service Broadcasters to 'inform, educate and entertain' are rightly given equal weight, so the idea that we should differentiate between 'core' and 'premium' BBC services - and pay for the latter via a subscription to top the licence fee - is entirely at odds with the concept of universal delivery of public service content.

Accepting that other models such as revenue from advertising and general taxation are not appropriate, this leaves the licence fee or a household levy as the only two, realistic options which could be considered over the longer term. On balance we believe that retaining the licence fee is the most sensible option for the next Charter period. We would agree that the iPlayer loophole should be closed and will be happy to discuss the options for how this might be done in more detail in the coming months. An appropriately designed household levy might be appropriate in the longer term, but given the time needed to develop and legislate for this it would be impractical for the forthcoming Charter period.

Q12 Should the level of funding for certain services or programmes be protected? Should some funding be made available to other providers to deliver public service content?

Our answers to Q2, Q4 and Q9 above are relevant here.

As we have already emphasised, protecting and enhancing the funding available to BBC Cymru Wales and S4C, for the delivery of programming for Wales in Welsh and English, is crucial.

We have also already stated our view, as a matter of principle, that licence fee revenue should be invested in the BBC's content and services for the benefit of UK citizens, not directed elsewhere. As discussed above, we do not believe the BBC is crowding out commercial competition, so a redirection of licence fee funding to other broadcasters is neither needed nor justified. We also noted that where the BBC provides content in genres which are also served by other broadcasters there is a good reason for doing so and its activity generally drives up quality. Redirection of licence fee revenue via any form of contestable funding would dilute the positive impact of the BBC's activity across the marketplace and, even more importantly, would weaken the BBC's ability to deliver its primary mission as the UK's leading Public Service Broadcaster. Further, it would be difficult to administer and we entirely accept the argument that the additional burden of accountability that would be placed on other broadcasters who might consider competing for this public funding would result in very low levels of demand outside the BBC.

Q13 Has the BBC been doing enough to deliver value for money? How could it go further?

The requirement for BBC Cymru Wales to find budget savings of 16% over the four years from 2011 as part of the Delivering Quality First proposals represented a potentially disproportionate threat to the BBC's local services in Wales. The Welsh Government remains very concerned about budget reductions to BBC Cymru Wales. It is also vital that a national service, whether on television or radio, should extend beyond news and current affairs. The BBC has always played a crucial role in reflecting and reinforcing the culture of Wales, in both the English and Welsh languages. It is crucial that the BBC continues to produce and provide high-quality political coverage, despite concerns about the impact of budget cuts on BBC Cymru Wales' political output.

Therefore, any further efficiency savings should not be at the expense of Wales or other nations and regions which have been similarly impacted.

We accept that the examples cited in the consultation document of BBC projects which have not delivered good value for money for licence payers are valid. We also note recent comments by the Chair of the BBC Trust that the National Audit Office (NAO) is now in a position where it has full access to the information it needs to conduct high-quality reviews⁴. The fact that the NAO is in a stronger position to assess and articulate the financial impact of the BBC's activities should encourage a renewed focus on value for money;

⁴ During the BBC Trust event "Tomorrow's BBC: Who Governs?", at the University of Westminster in London on 1 October 2015.

equally, a renewed and better defined set of public purposes and values should enable the BBC to make improved value for money decisions. This would be further enhanced by clearer lines of managerial and regulatory authority, a stronger sense of genuine independence from Government, improved accountability to the public and greater scrutiny of the BBC by elected representatives across the UK. We will return to these themes in Q15 to Q20.

Q14 How should the BBC's commercial operations, including BBC Worldwide, be reformed?

We have already discussed BBC Worldwide and the BBC's commercial activities at some length in our responses to Q7 (where we look at international activity) and Q10. Beyond those remarks we would add that, at present, we are not convinced that full or part privatisation of BBC Worldwide would be appropriate. The borrowing restrictions that its status as a public body places upon BBC Worldwide may limit its ability to further develop some overseas markets. However, despite this it has achieved considerable success, without undue risk to the BBC's public funding. More importantly, consideration of the real value to UK licence fee payers of the BBC's public service output should not be driven solely, or primarily, by its retail value in international markets. As a Public Service Broadcaster, the BBC's purpose is not to make money - it is to inform, educate and entertain the citizens of the UK.

BBC governance and regulation

A combined response is provided below to the following four questions. We understand that Sir David Clementi will consider responses to this section of the consultation as one of the early stages of his independent review of the BBC's governance arrangements. The Welsh Government, representing the interests of the people of Wales, would be pleased to discuss the points made below with Sir David and his team.

Q15 How should the current model of governance and regulation for the BBC be reformed?

Q16 How should Public Value Tests and Service Licences be reformed and who should have the responsibility for making these decisions?

Q17 How could the BBC improve engagement with licence fee payers and the industry, including through research, transparency and complaints handling?

Q18 How should the relationship between Parliament, Government, Ofcom, the National Audit Office and the BBC work? What accountability structures and expectations, including financial transparency and spending controls, should apply?

Of the options for reform which are presented in the consultation document (i.e., reform of the BBC Trust, the creation of a unitary BBC board with a standalone regulator or a unitary board with Ofcom fulfilling the regulatory role) we would favour the option of a unitary board and a standalone regulator (the so-called 'OfBeeb' model). We accept that the current Trust plus Executive model, although well intentioned, does not deliver clear enough lines of responsibility and accountability and that there is a fundamental tension in requiring the Trust to act as a regulatory body while remaining part of the BBC. There is a case for change, but this is not without risks and must be handled carefully, making the most of the assets already in place rather than simply discarding them and starting afresh without due consideration.

We agree that moving regulation to an external body, fully separated in both structure and title from the BBC, would remove much of the criticism levelled at the BBC Trust about the conflict of being both regulator and cheerleader. To be clear, we would reiterate our position that no contestable funding pot should be top-sliced from the licence fee, so the new regulator would have no role in awarding contestable funding, to the BBC or to other broadcasters.

We also agree that key strategic and operational responsibilities should be brought together in a unitary board, with very clear lines of accountability and a strong non-executive membership that can ensure the interests of the British public are properly represented. However, unlike arrangements in the current Executive Board - whose Chairman can either be a non-executive or the Director General, but in practice has always been the Director General - the Chairman of the unitary board should always be a non-executive member. It is vital that the Chairman represents – and is seen to represent - the interests of licence fee payers, above the corporate interests of the BBC itself, as the new board would effectively take over from the Trust as the sovereign voice and decision making body of the BBC.

We acknowledge that a single purpose regulator can be difficult to set up in a way that does not lead to it being either overly dependent on or confrontational with the organisation it regulates. However, in our view there should be no need to start from scratch. Although the BBC Trust would be formally wound up if this model is taken forward, with its strategic decision making functions transferred to the unitary board, much could surely be retained in terms of people, organisational structures and physical or intellectual assets and repurposed as part of the new regulator. Although it would have a different, clearly defined role and be separate from the BBC itself, the experience of staff who have lived through the failures and (more recent) successes of BBC governance under the current arrangements would undoubtedly inform a smoother and more cost effective transition into the new structures than entirely discarding all vestiges of the Trust.

Additionally, we share Ofcom's own concerns, as articulated by its Chief Executive Sharon White during her keynote address in September this year to the Royal Television Society convention in Cambridge, about the appropriateness of Ofcom taking on decision making related to the scope of content at the BBC and about the upscaling of Ofcom's operations that would

be required if it were to take on significant additional responsibilities in relation to BBC regulation. We also share the concern set out in the consultation document that this could result in Ofcom becoming too powerful, expanding its already large remit and expenditure. A standalone regulator would be best placed to perform the oversight and regulatory functions which currently reside with the Trust, without being distracted by wider responsibilities.

If the specific model we have described above were adopted, including a non-executive Chairman for the unitary board, then we would be comfortable for decisions relating to new services to reside with the BBC board. As now, Ofcom would lead on market impact assessments, which would inform the board's consideration of the public value of a given proposal, where appropriate taking a view of the BBC as a whole and the role that service should play within it.

Ofcom is not well placed to adjudicate on public value tests for the BBC because of the way it is funded. Ofcom receives fees from the commercial broadcasters for regulating broadcasting and communications networks plus grant-in-aid from the Government. As such it would have to continually fight the perception that it might instinctively seek to level the playing field in order to protect the commercial broadcasters which provide its revenue, irrespective of the strength of any public value case for a new BBC service. It would also have to overcome concerns that it is not independent enough of Government to regulate an independent BBC. This would be unfair and distracting for Ofcom and potentially dangerous for the BBC itself.

We agree that the unitary board should engage in research about audience views and ensure even greater transparency and effectiveness in complaint handling. However, the opportunity now exists to develop a far-reaching strategy for greater, cross-platform engagement with the public – and as technology evolves further this could become even richer and more straightforward. There remains a central role for audience or broadcasting councils across the UK as part of this strategy and it is important that Wales and the other nations are fully represented. The Chairs of the audience or broadcasting councils should be non-executive members of the unitary board, so that they have a voice in decision making at the most senior level. The fact that the views of current audience councils can be entirely ignored by the BBC Trust if it so chooses is a key drawback of the existing arrangements.

We welcomed the references in the St David's Day Command Paper to increasing the accountability of broadcasters in Wales. The Welsh Government has regularly referred to the importance of improving the accountability of UK broadcasting institutions to the National Assembly and to Welsh viewers and listeners. We are therefore pleased that Memoranda of Understanding have been signed with the devolved Governments in Wales, Scotland and Northern Ireland to formalise their roles in this and future Charter reviews, and that comparable Memoranda are being finalised which will enshrine ongoing roles for the devolved Parliaments or Assemblies in the nations in the scrutiny and accountability of the BBC.

Any changes to the governance or regulatory arrangements of the BBC should also fully reflect the reality of devolved government in the UK. As such, the board of the new regulator should include a member responsible for representing the interests of each of the devolved nations, including Wales; the relevant devolved Government should lead on the appointment of their national representative.

It is important to reiterate here our strong view that the mechanism via which the recently announced licence fee settlement was imposed upon the BBC – following discussions between the BBC and the UK Government behind closed doors, without any consultation with the devolved Governments - was entirely unsatisfactory. As a result this Charter review is being undertaken after the most fundamental decision which could impact upon the potential scale and scope of what the BBC might achieve has already been taken.

Under current arrangements the UK Government is effectively free to dictate terms to the BBC without any Parliamentary scrutiny or public consultation. A debate is required in Westminster, but no vote. The devolved institutions across the UK play no part whatsoever. This must change. In future, given the UK-wide remit of the BBC and its specific aims in the nations and regions, any such proposals by the UK Government must be subject to public consultation, scrutiny by committee in Westminster and the devolved institutions and – crucially - must be approved via a vote in Parliament and each of the devolved Parliaments or Assemblies in the nations.

Q19 Should the existing approach of a 10-year Royal Charter and Framework Agreement continue?

We agree that a ten year approach to the BBC's Royal Charter should be the minimum applicable. We do not accept that a shorter timescale, say five years, is appropriate. Charter review is a costly and time-consuming exercise, so significant justification would be required to increase the frequency of reviews. We recognise that technological, social and market developments are fast moving, but the supposed risk that BBC's Royal Charter could become obsolete before it is due to be reviewed would only be realised if the Charter was either too restrictive in the first place or the BBC and / or the wider market in which it operates were inadequately regulated. As long as these factors are given due consideration before the new Charter is finalised and throughout its operation then that risk will be minimised as far as possible.

We do accept that there are grounds to consider a change to the length of the BBC's Royal Charter, to break the link between Charter reviews and the UK's electoral cycle. Some stakeholders have called for future Charters to be granted for eleven years, so that the review process is decoupled from the agenda of successive, incoming Governments. This would reaffirm the BBC's independence from Government, concerns about which are very much at the centre of the current debate, although they are not acknowledged directly in

the consultation document. As such, we would agree that this proposal should be given further consideration.

Conclusion

Over the next few years there are key decisions to be taken relating to broadcasting and regulatory arrangements in the UK and in Wales, including the renewal of the BBC Charter and further consideration of the findings of the Silk Commission on Devolution in Wales, the St David's Day announcement and the Smith Commission in Scotland.

There is little doubt that the broadcasting structures currently in place will change in the future. As a Government, we will continue to monitor developments and to be proactive in this debate, to ensure that any changes protect and serve the best interests of people and businesses in Wales. The significance of broadcasting to our emerging devolved life is such that new arrangements have to be found, within the existing constitutional settlement, that allow the interests of Wales to be debated, understood and argued for.

In relation to the BBC Charter, a number of the issues discussed in this response are also relevant to the other devolved nations. Earlier this year the Welsh Government wrote to the relevant Ministers in Scotland and Northern Ireland the North of Ireland seeking a meeting to discuss broadcasting issues, including the Charter review. On 4 August that meeting was held in Glasgow. During the meeting we agreed to work together to ensure that the BBC Charter review process reflects and prioritises our shared interests.

The Welsh Government welcomed the fact that Ofcom conducted a further review of Public Service Broadcasting. However, that work will inform an ongoing debate about what public service obligations should be in the future.

The role of the principal Public Service Broadcaster must be informed by a clear understanding of the needs of the people in the nations and regions of the UK. However, following extensive devolution of powers to the devolved governments, there has been no evaluation or assessment of whether current public service obligations remain fit-for-purpose. Over the same time period those obligations have been allowed to erode, largely for commercial reasons. This assessment is now urgently needed and should be done in parallel with the Charter review, to inform any targets for delivery of services in the nations and regions that might be included in the new Charter, linked to a renewed set of public purposes and values.

The Welsh Government will continue to play a full and active role in the Charter review, to ensure that the new Charter fully reflects the interests of the people of Wales and the current and changing devolved settlement. We will use our formal seat at the table to stand up for the services the Welsh people deserve.

Agenda Item 3

Yr Athro Tom O'Malley, Cydraddoldeb a Llywodraeth Leol
Communities, Equality and Local Government Committee
CELG(4)-29-15 Papur 2 / Paper 2
Yr Athro Tom O'Malley
Professor Tom O'Malley

1. This submission firstly examines the broader context within which Charter Review 2016 is taking place. It then offers some comments on the issues raised by the terms of reference issued by the Communities, Equality and Local Government Committee.

Context

2. The BBC's Charter is being renewed in the context of a communications policy framework which prioritises the expansion of market driven forms over public service. The *Report of the Committee on the Financing of the BBC*, published in 1986¹ advocated a future in which communications services would be provided by the market place, much like newspapers are, and public service broadcasting would be limited to providing those services which the market did not find economical. Once technology allowed consumers to purchase programmes directly on a one to one basis or as

¹ Home Office (1986) Report of the Committee on the Financing of the BBC, London: HMSO, Cmnd 9824

packages, then the BBC, or what remained of it, should become a subscription service.²

3. The Report provided the broad outline for the development of an increasingly market driven system of mass communications and led to an increase in under-regulated commercial competition, the removal of most of ITV's obligations as a regionally-based public service broadcaster³, and the growth of what was, in effect, the contracting out of sections of production by the BBC and ITV, through the support given by successive governments to the independent sector. This has been overseen by Ofcom which is, in essence, an organisation designed to promote commercial mass communications. Running parallel with this has been the development of a policy making process which has given priority to the views of well financed commercial organisations with the power and resources necessary to lobby governments for the outcomes they want. This was illustrated most sharply in the revelations about the links between News Corporation Executives and lobbyists the ministers in the Department of Media

² Tom O'Malley, *Closedown. The BBC and Government Broadcasting Policy, 1979-92*, London: Pluto, 1994:112-114.

³ Tom O'Malley, 'Wales, ITV and regulation', *Cyfrwng*, Volume 8 (2011): 7-22.

Culture and Sport during the Leveson inquiry.⁴ In the context of Wales, the lack of accountability and transparency in policy making was illustrated by the decision made by the Coalition government in 2010 to transfer S4C to the BBC without even the pretence of considered public consultation.⁵

4. One major consequence of the increase in competition and the squeeze on public service communications has been a reduction in spend on first run public service content in the UK, by 17.3% between 2008 and 2013.⁶ In Wales, as the work done by the IWA Media Policy Group for its 2015 Wales Media Audit has shown, the situation has become very serious indeed. After 2008, there was a significant reduction in spend, range and diversity of television programmes available both in English and Welsh for viewers in Wales. In real terms at 2014 prices, spending in Wales declined by 30%, from 2008 to 2014. Investment in news declined by 10% in Wales, and total spend

⁴Des Freedman, *The Politics of Media Policy*, Cambridge: Polity, 2008;

Leveson, Lord Justice Leveson, *An Inquiry into the Culture Practices and Ethics of the Press, Volume III*, London: The Stationery Office, 2012, HC780-III

⁵ T.P.O'Malley, *The Government, the BBC and S4C: A submission to the Welsh Affairs Select Committee Inquiry into the Welsh Language Broadcaster S4C* (Aberystwyth University, 15th November 2010) Published in: House of Commons Welsh Affairs Committee, *S4C*, (London: HC 614 Published on 11 May 2011, Fifth Report of Session 2010-2011, 27 April 2011) 2 Volumes, evidence in Volume 2 at www.parliament.uk/welshcom

⁶ Department of culture, media and sport (2015) *The Balance of Payments between Television Platforms and Public Service Broadcasters: Options for Deregulation*. Consultation Paper, London: DCMS: para 7, note 4).

by public service broadcasters on first-run originated output in news and current affairs in the UK and nations fell by 14% from 2008–2014.

In radio, commercial radio stations have closed and syndication of programming has increased at the expense of local content.⁷

5. The BBC Charter Renewal is being conducted, therefore, in a context where government policy is pressing for an overall reduction in the role of public service broadcasting in the UK, and Wales, relative to the size of commercial provision. This explains the secular decline of public service content in Wales. The situation has been exacerbated by the feeble structures of accountability in policy making in relation to Wales and by the pressures on broadcasting to fulfil obligations to properly represent Welsh interests in a context of declining resources and successive attacks on the BBC from political and commercial interests.

6. What follows are some comments and proposals in response to the terms of reference set out by the Committee.

The future provision of the BBC's services in Wales both in English and Welsh language Services.

⁷ Media Policy Group: *2015 Wales Media Audit Draft 2*, (Cardiff, IWA, 2015) at <http://www.clickonwales.org/wp-content/uploads/mediaauditsection1.pdf> accessed 26 October 2015

7. The future provision of BBC services in Wales is dependent on two factors. The first is finance. Significant aspects of the BBC's future finances were agreed in advance of the debate on Charter Renewal, for example the decision to force the BBC to pay for the licence fees of people over 75. This was clearly a case of putting the cart before the horse. It has been pointed out that this will result in the BBC being worse off in cash terms at the end of the next Charter period and indeed a former Director General of the BBC, Lord Birt, 'says the government had set "a very dangerous precedent" by doing a deal on BBC financing behind closed doors with no public consultation for the second time in five years – suggesting the BBC's independence from government has been compromised.'⁸ Director General Tony Hall announced in September 2015 that the BBC will see its annual funding cut by 20% over the next five years as a result of the settlement.⁹ So, the future of BBC services in Wales in both languages will have to take its share of these cuts, on top of the cuts they have experienced in recent years.

⁸ Anon, 'BBC to Fund over-75s' TV licences' and Nick Higham, 'Analysis', BBC, 6th July 2015, at <http://www.bbc.co.uk/news/uk-politics-33414693> accessed 26 October 2015.

⁹ Jane Martinson and Mark Sweney, 'Tony Hall: 'inevitable' that BBC services will have to be closed or cut', *The Guardian*, 7 September 2015, at <http://www.theguardian.com/media/2015/sep/07/tony-hall-bbc-cuts-bbc4> accessed on 26 October 2015.

8. The Communities, Equality and Local Government Committee and the Welsh Assembly Government should press both the DCMS and the BBC to review this settlement with a view to detailing its implications for Welsh broadcasting, and come forward with proposals that will see a real terms increase in funding over the next Charter period, one which does not come at the expense of funding in other areas of the BBC.
9. Proposals by the Director General to make up to 80% of BBC content open to contracting out,¹⁰ and the idea that parts of the BBC licence fee should be used to subsidise news gathering for print media organisations,¹¹ are measures which will weaken the BBC's capacity to produce sustained, critical and creative programming, and where the subsidy of news is concerned, open the door to further pressure for more top slicing of licence fee revenue. The BBC should be pressed to reverse these decisions.
10. The second factor influencing funding is governance. That the licence fee and or significant aspects of the BBC's finances should be largely determined twice in five years without proper consultations

¹⁰ Tara Conlan 'Biggest shakeup ever to BBC could see hit shows moved to private sector' *The Guardian*, 16 September 2015, at: <http://www.theguardian.com/media/2015/sep/16/biggest-shakeup-to-bbc-consultation-hit-shows-moved-to-private-sector> accessed 27 October 2015

¹¹ Tony Hall, 'Tony Hall speech at the Science Museum on the future vision of the BBC' 7th September 2015, at: <http://www.bbc.co.uk/mediacentre/speeches/2015/tony-hall-distinctive-bbc> accessed 27 October 2015

with the nations and regions in the UK is indicative of a deep failure in governance. This is addressed in the next section.

The BBC's current and future funding, governance and accountability arrangements as they relate to Wales.

11. The BBC's governance should be determined by statute not charter. The Charter leaves power in the hands of the Westminster government, not Parliament. It allows for opaque policy formulation and decision by, in effect, decree. A statute which safeguards the creative and editorial independence of the BBC, but which was renewed periodically under close Parliamentary scrutiny is arguably the best way of ensuring a more democratic approach to policy making, one which would give more opportunities for the voice of Wales to be heard.

12. BBC governance has remained too centralised. Successive members of the BBC Board of Governors and the Trust have been appointed, not elected. There is no independent body in Wales with powers to oversee the policy, content and allocation of resources of the BBC.

13. The BBC should be a federal structure, publicly funded by the licence fee, or possibly a household levy. This Scottish Government is currently pressing for a federalised BBC structure.¹²
14. There should be a Welsh Broadcasting Council (WBC). It should be composed of a majority of members appointed by the National Assembly for Wales and members appointed by the communications trade unions. It should also consist of members from civil society organisations in Wales, determined by the National Assembly, after consultation. These organisations would appoint their representatives by elections. The organisations would hold their positions on the Council for a fixed period and then be replaced by other organisations in a process of rolling consultation and review.
15. The WBC should have powers over the BBC devolved to it under the new Charter. These should include powers over the allocation of resources, policy and content. It would be charged with producing regular reports on the situation of the BBC in Wales for the National Assembly and Welsh Assembly Government.

¹² Libby Brooks, 'Scottish government pushes for a federalised BBC', *The Guardian*, 24 September 2015, at: <http://www.theguardian.com/media/2015/sep/24/scottish-government-targets-federalised-bbc> accessed 26 October 2015.

16. As long as the WBC has a clearly defined relationship with the centre this arrangement should be able to work very successfully, and is in the spirit of devolution of powers to the nations and regions of the UK.

17. For this to work the *Communications Act 2003* has to be amended to remove the BBC from oversight by Ofcom. The reason for this is because Ofcom is a market orientated regulator which, like the BBC itself, does not have an elected board, and is, arguably, totally undemocratic in its structures. Were Ofcom to be reformed, root and branch, and made a mechanism for promoting public service communications first and foremost, then the question of the relationship with the BBC might be revisited.

S4C's future: including its funding, operating and governance arrangements, and the services it provides.

18. Within the current, unreformed context, S4C should be re-established as a separate body, answerable to the Welsh Assembly Government, and funded, as prior to 2010, by direct grant from the

Westminster Government. Its funding over the next period should be restored, in real terms, to a level which allows it to develop its services on air and online. Its Board should be appointed in a manner similar to the proposals outlined for the Welsh Broadcasting Council.

How Wales's interests are being represented in during the renewal process.

19. Broadcasting is not a devolved matter. As a result neither the Welsh Assembly Government nor the National Assembly has had a specific and permanent department and committee structure devoted to the issue of communications policy in Wales. Nonetheless both organisations have spent time, in arguably a largely ad hoc fashion, responding to successive initiatives from Westminster, Ofcom and the BBC.

20. In the short term the Welsh Assembly Government should invite the UK government to spell out in detail the length of the period of consultation which will follow the announcement of government White Paper on Charter renewal in the spring of 2016. This cannot be less than 6 months to allow all parties in the nations and regions and civil

society to have time to consider and respond to the proposals. As far as I am aware, there is no such commitment from Westminster in place.

21. The Communities, Equality and Local Government Committee, should call representatives from the DCMS and the BBC before them to account for [a] the nature of the process and outcome of the 2015 funding arrangements [b] the creation of the situation, outlined above, where Wales' interests in broadcasting are suffering as result of cuts and planned cuts [c] to defend the opaque and non democratic forms of governance. It should also call members of the Ofcom Board before it, to seek clarification as to why it should continue to have oversight over key areas of BBC policy making, in particular the development of new services, and to justify its equally opaque and non-democratic forms of governance, especially in relation to Wales.

22. It is not good enough to allow Wales's interests in this process to be the upshot of what will inevitably be policy driven from Westminster, and filtered through the BBC central management. The Communities, Equality and Local Government Committee has the

opportunity to shed some light on current processes, and to test their fitness for purpose where the interests of Wales are concerned.

23. In the medium term the National Assembly for Wales should establish a cross party, Standing Committee on Communications. The fact that communications is not a devolved matter is of no consequence in this context; the Committee would be able to provide the backup and perspective necessary to inform consideration of policy regardless of whether communications is or is not devolved. It should be composed of a majority of National Assembly members, but should also include trade unions. It should include members of Civil Society appointed in the manner proposed above for the Welsh Broadcasting Council.

24. The Standing Committee's remit would be to conduct regular monitoring and research on communications in Wales. It should have a small budget to commission new research and literature reviews relating to communications policy. It should publish regular reviews of the condition of communications in Wales and make policy recommendations. It should invite all parties concerned with

communications in Wales to submit data regularly, and to appear, where necessary, before oral hearings.



Submission to the Inquiry into the BBC Charter Review by the National Assembly's Communities, Equality and Local Government Committee

from Dr John Geraint, Creative Director, Green Bay Media

1 The BBC is the cornerstone of public service broadcasting in the UK; and public service broadcasting is one of the cornerstones of a healthy democracy. Public service broadcasting is a reflection of - and stimulus to - a self-confident national culture. The way in which Wales and Welsh communities are represented in public service broadcasting is a crucial element in building a just and thriving society here.

2 In my doctoral submission *Representing Wales: Experience on Screen 1985-2010*, I argued that **representation** in the media has effects in the 'real world'. How we're seen determines in part how we're treated; how we treat others is based on how we see them; and such seeing comes from representation. So how people in Wales are represented affects how we see ourselves and others, how we see our place in society, our right to the rights a society claims to ensure its citizens.

3 Wales and its communities have been historically *under*-represented in the dominant media which Welsh people themselves 'consume'. And often, even such representation as we have had has been from the perspective of the outsider rather our own.

4 Even when it has been represented, Wales has struggled to ensure that its stories enjoy parity of esteem with the stories of the more powerful and privileged; and that is not only unfair in its own right, but it further entrenches inequality, injustice and lack of true respect and self-respect.

5 In the early years of this new millennium, the prospects for Wales in television looked relatively promising: we enjoyed increasing network and national output on a well-funded BBC; some years of plenty on S4C; a still-substantial body of output for Wales on ITV; and even a nascent English-language channel, BBC 2W.

6 The English-speaking audience has been used to a wide range of public service television programmes for Wales from plural sources. Historically, this extended well beyond news and current affairs, to quality documentary, arts, entertainment and drama programming which reflected the lives and concerns of the audience in a rounded way.

7 Welsh-language producers have enjoyed the security of a fully-funded and comprehensive pattern of commissioning at reasonable tariffs.



Y Pwyllgor Cymunedau, Cydraddoldeb a Llywodraeth Leol
Communities, Equality and Local Government Committee
CELG(4)-29-15 Papur 3 / Paper 3

8 All of the above (points 5-8) is now under threat or
already gone.





9 As the BBC's Director General himself has admitted, English-language programming for Wales outside of news and current affairs has been eroded to such an extent that it no longer represents the rounded life of the nation.

10 Unfortunately, public discussion as to how this inadequacy might be addressed tend to be reduced by BBC mandarins to a zero-sum game – i.e. *if we give more to Wales, we won't be able to do Bleak House*.

11 Wales needs to express a sense of outrage at this state of affairs.

12 BBC Network television has begun to commission more output from Wales, but this output has, for the most part, failed to represent Wales adequately.

13 Further cuts to S4C's programme budget will threaten its ability to represent Wales properly and to fund quality production.

14 We need to ensure that S4C continues to have the scope to work with producers in international markets. S4C's commitment and ambition has, over the years, bolstered companies like Green Bay in developing as players in their own right in international co-production, bringing valuable inward investment and allowing Welsh stories to reach a global audience (e.g. in Green Bay's recent historical documentary series *The Castle Builders*).

15 In his 2010 report, 'The Heart of Digital Wales', Prof Ian Hargreaves reminded us that media production is a cultural as well as economic activity: *'Because creative industries policy operates in a space which involves the pursuit of cultural as well as economic goals, a strong creative industries policy also requires a highly effective partnership with public service broadcasters and arts institutions, along with the bodies that fund them.'*

16 The Committee may wish to consider whether this balanced approach is being properly recognised by the Welsh Government in its support of the Creative Industries.

17 Green Bay sees itself as a business which operates in a cultural space. Our work – and that of producers like us – has a greater significance than can be calculated within the parameters of simple economic functions.

18 Put simply, television production has the potential to 'make the weather for Wales' – it can help determine both how we see ourselves in the world and how the world sees us. Regarding it simply in economic terms underplays its importance and is likely to lead to missed opportunities.

19 At its best, Public Service Broadcasting – at the BBC and S4C – maximises the synergies that operate and the connection between cultural and economic well-being. Wales needs PSB to be properly funded *and* to be

functioning so as to represent Wales in properly rounded way.



Dr John Geraint, Creative Director, Green Bay Media



John established Green Bay Media with Phil George in 2001.

Green Bay produces documentaries, drama and arts programmes for BBC, ITV, S4C, France Télévisions, National Geographic and other international broadcasters.

John was director and series producer of Green Bay's landmark history of the nation, *The Story of Wales* (BBC, 2012).

John's other credits for Green Bay include *Do Not Go Gentle*, nominated alongside blue-chip series *Band of Brothers* and *Blue Planet* at the 2002 Banff Rockies; *Gêm y Ganrif (Game of the Century)* which scooped the Gold Torc at the 2006 Celtic Film and Television Festival; and other award-winning programmes including the drama series *Calon Gaeth (Small Country)* and feature-length documentaries *Fel Arall (Otherwise)* and *Carwyn*.

John Geraint was previously at the BBC where he had a 20-year career as a programme-maker and executive, leading a department of 430 programme-makers, and doubling network output from Wales in the late 1990s.

John is a former chair of the Skillset Cymru National Board and of media development charity for young people, Zoom Cymru. He is a Trustee of the Arts Council of Wales.

John was educated at Porth County School in the Rhondda and at Corpus Christi College, Oxford. He holds an MBA in Public Service Management from Bradford University and a Ph D from the University of Glamorgan.

Agenda Item 4

18 November 2015 – Papers to note cover sheet

Paper No:	Issue	From	Action Point
Public papers to note			
4	Draft Wales Bill	First Minister of Wales to the Chair of the Constitutional & Legislative Affairs Committee	



Ein cyf/Our ref: MA-C/FM-/0014/15

David Melding AM
Chair
Constitutional & Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
Cardiff

11th November 2015

Dear David

Draft Wales Bill Inquiry: written evidence

Further to my letter of 30th October please find attached my written evidence on the draft Wales Bill to assist the Committee with its work.

In the Welsh Government's view, this Bill will be one of great constitutional significance, both for Wales and for the Union; it will redefine the role and place of the Welsh devolved institutions in the governance of the United Kingdom. As the Secretary of State himself said in his speech on 17 November 2014 launching what became the St David's Day process, "We have a unique opportunity to reshape the future of our Union". The content of the Bill should therefore be approached from the standpoint of constitutional principle, with a view both to strengthening Welsh devolution and securing the place of Wales within a reformed Union. We have set out our views on some of the broader questions on the future of the Union in Written Evidence to the House of Lords Constitution Committee in respect of its Inquiry into "The Union and Devolution", and our Evidence to your Committee in respect of the Wales Bill needs to be seen in that context.

I am copying this to other Committee Chairs.

I look forward to meeting you and your colleagues on 16th November.

Yours sincerely

CARWYN JONES

Competence tests currently under Part 4 of and Schedule 7 to the Government of Wales Act 2006

1. Does the provision relate to one or more subjects listed in Part 1 of Schedule 7?

If yes, go to question 2

If no – the provision is outside competence unless:

- (a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;*
- or*
- (b) it is otherwise incidental to, or consequential on, such a provision.*

2. Does the provision fall within any of the exceptions in Part 1 of Schedule 7?

If no, go to question 3.

If yes – the provision is outside competence unless:

- (a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;*
- or*
- (b) it is otherwise incidental to, or consequential on, such a provision.*

3. Does the provision apply otherwise than in relation to Wales or confer, impose, modify or remove (or give power to do so) functions exercisable otherwise than in relation to Wales?

If no, go to question 4.

If yes –the provision is outside competence unless:

- (a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;*
- or*
- (b) it is otherwise incidental to, or consequential on, such a provision.*

4. Do any of the restrictions in Part 2 of Schedule 7 apply having regard to any exception to those restrictions in Part 3 of that Schedule?

(a) Does the provision remove or modify (or confer power to do so) any pre-commencement function of a Minister of the Crown?

(b) Does the provision confer or impose (or confer power to do so) any function on a Minister of the Crown?

(c) Does the provision modify any of the provisions listed in the table in paragraph 2(1) of Part 2 of Schedule 7 (having regard to any relevant exceptions)?

(d) Does the provision make modifications of (or confer power to do so) any provision of an Act of Parliament other than GoWA 2006 which requires sums required for the repayment of, or the payment of interest on, amounts borrowed by the Welsh Ministers to be charged on the Welsh Consolidated Fund?

(e) Does the provision make modification of (or confer power to do so) any functions of the Comptroller and Auditor General or the National Audit Office?

(f) Does the provision remove or modify (or confer power to do so) any function or Her Majesty's Revenue and Customs?

(g) Does the provision confer or impose (or confer power to do so) any function on Her Majesty's Revenue and Customs?

(h) Does the provision modify provisions of GoWA 2006, other than those provisions referred to in paragraph 5(2),(3) and (4A) of Part 1 of Schedule 7?

If yes, the provision is outside competence.

If no:

5. Does the provision extend otherwise than only to England and Wales?

If yes – the provision is outside competence.

If no:

6. Is the provision incompatible with the Convention rights or with EU law?

If yes – the provision is outside competence.

If no – the provision is within competence.

Competence tests under section 108A and Schedules 7A and 7B of the proposed Wales Bill

1. Does the provision extend otherwise than only to England and Wales?

If yes – the provision is outside competence.

If no:

2. Does the provision apply otherwise than in relation to Wales or confer, impose, modify or remove (or give power to do so) functions exercisable otherwise than in relation to Wales?

If no, go to question 3:

If yes, is the provision:

(a) ancillary to a provision which is within the Assembly's legislative competence (or would be if it were included in an Act of the Assembly), and

(b) does it have no greater effect otherwise than in relation to Wales, or in relation to functions exercisable otherwise than in relation to Wales, than is necessary to give effect to the purpose of that provision.

If no – the provision is outside competence.

If yes:

3. Does the provision relate to reserved matters (see Schedule 7A)?

If yes – outside competence.

If no:

4. Does the provision breach any of the restrictions in Part 1 of Schedule 7B, having regard to any exception to those restrictions in Part 2 of that Schedule? (See questions 5 to 11)

5. Does the provision modify “the law on reserved matters” (see paragraph 1(2) of Part 1 of Schedule 7B)?

If no, go to question 6.

If yes:

*Is the modification ancillary to a provision which does not relate to reserved matters **and** has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision?*

If yes, go to question 6.

If no, the provision is outside competence.

6. Does the provision modify the private law (see paragraph 3(2) of Part 1 of Schedule 7B)?

If no, go to question 7

If yes:

*Is the modification (1) necessary for a devolved purpose or (2) is ancillary to a provision made which has a devolved purpose **and** has no greater effect on the general application of the private law than is necessary to give effect to that purpose?*

If yes, go to question 7.

If no, the provision is outside competence.

7. Does the provision modify the criminal law?

If no, go to question 8.

If yes:

*(ii) Is the modification ancillary to a provision which has a devolved purpose **and** has no greater effect on the general application of the criminal law than is necessary to give effect to the purpose of that provision?*

If yes, go to question 8.

If no, the provision is outside competence.

8. Does the provision modify any of the provisions listed in the table in paragraph 5(1) of Part 1 of Schedule 7B (having regard to relevant exceptions)?

If yes, the provision is outside competence

If no, go to question 9

9. Does the provision make modifications of (or confer power to do so) any provision of an Act of Parliament (other than this Act) which requires sums required for the repayment of, or the payment of interest on, amounts borrowed by the Welsh Ministers to be charged on the Welsh Consolidated Fund?

If yes, the provision is outside competence

If no, go to question 10.

10. Does the provision modify provisions of the Wales Bill/Act, other than those provisions referred to in paragraph 7(2)(3) and(4) of Part 1 of Schedule 7B?

If yes, the provision is outside competence,

If no, go to question 11.

11. Does the provision:

(a) remove or modify (or confer power to do so), any function of a reserved authority;

(b) confer or impose (or confer power to do so) any function on a reserved authority;

(c) confer, impose, modify or removed (or confer power to do so) functions specifically exercisable in relation to a reserved authority, or

(d) make modifications of, or confer power by subordinate legislation to make modifications of, the constitution of a reserved authority?

If no, go to question 12.

If yes, has the appropriate UK Minister consented to the provision?

If yes, go to question 12.

If no, the provision is outside competence.

12. Is the provision incompatible with the Convention rights or with EU law?

If yes, the provision is outside competence.

If no, the provision is within competence.

THE DRAFT WALES BILL
Written Evidence submitted to the Constitutional and Legislative Affairs
Committee by the Welsh Government

Introduction

1. The Welsh Government welcomes this opportunity to set out its views on the draft Wales Bill which was published on 20 October 2015.
2. The Independence referendum in Scotland, just over a year ago, marked a turning point in the constitutional governance of the United Kingdom. At that time the UK Government committed to developing a new and fair settlement that applies to all parts of the United Kingdom, stating that they wanted Wales to be at the heart of the debate on how to make our United Kingdom work for all our nations. For Wales this commitment manifested itself in the St David's Day process and the subsequent publication of the draft Wales Bill we have in front of us today.
3. It is with regret that the Welsh Government cannot agree that this draft Bill is either balanced or fair. The inquiry your Committee conducted earlier this year on the UK Government's proposals for further devolution to Wales identified four main principles that needed to be reflected in any new constitutional settlement. We continue to support your call for a Bill that enshrines the principles of subsidiarity, clarity, simplicity and workability. This Bill, as currently drafted, provides for none of these. The Welsh Government takes no pleasure in saying this, but this proposed Bill will be the third constitutional settlement for Wales in less than twenty years and neither of its predecessors has provided the long-term stability that devolution in Wales so richly deserves.
4. As this Committee has seen in the past, the frequency of questions arising as to the competence of the National Assembly to legislate in a number of areas is all too common. This was one of the reasons why we advocated moving from a conferred powers model to a reserved powers model. However, the reserved powers model proposed by the UK Government is, to all intents and purposes, a mirror of the current model and therefore proposes for us what is merely a technical change. Our call for a reserved powers model was not a call for a technical change in the drafting of the settlement. In calling for a reserved powers model, we have consistently advocated that decisions should be based on the principle of subsidiarity through which everything should be devolved unless there is a good reason for it to be retained at the UK level.
5. Furthermore, the draft Bill introduces a number of new constraints either by way of Ministerial consents or complex legal tests. All of these would result in a multiplication of the number of 'problem' areas within the devolution settlement.
6. We therefore believe that the draft Wales Bill does not offer a solution as currently drafted.

Principles to underpin the reserved powers model

7. As the Secretary of State for Wales himself said in his speech on 17 November 2014 launching what became the St David's Day process, "*We have a unique opportunity to reshape the future of our Union*". The content of the Wales Bill should therefore be approached from the standpoint of constitutional principle, with a view both to strengthening Welsh devolution and securing the place of Wales within a more coherent and therefore stronger Union.
8. This position is underpinned by the clear view of the people of Wales expressed in the 2011 referendum which gave a mandate for an effective Welsh legislature and confirmed the electorate's wish that the National Assembly should have primary legislative powers of broad scope.
9. The comparatively narrow nature in UK terms of the Welsh devolution settlement, and the single legal jurisdiction of England and Wales, have led in the past to the drawing of an incoherent boundary between reserved and devolved areas of activity. Disagreements about where the boundary lies (as has repeatedly happened, for example in relation to local government and the police service) hinders the development of joined-up policy and leads to tensions between administrations. This is in marked contrast to the position in Scotland and Northern Ireland where the devolved administrations have genuine coherent autonomy within the devolved areas.
10. The UK Government's proposal for resolving the issues that arise when there are significant connections between what is devolved and what is not, is to limit further the powers of the National Assembly. This would be done by maintaining a narrow settlement and by making more powers subject to Ministerial consent or by introducing new complex legal tests. Our solution is to move the boundary so that these tensions can be avoided and a more coherent and stable, and therefore long-lasting settlement, can be developed.
11. The Welsh Government considers that, as was agreed by the National Assembly on 7 October 2015, "*the creation of a Welsh legal jurisdiction would be the most desirable and effective legal framework to accompany the implementation of a reserved powers model for devolution*". The retention of the existing England and Wales jurisdiction will result in a measure of complexity for the Welsh settlement which is incompatible with the Secretary of State's aspirations for clarity and workability. The reservation of policing also introduces complexity into the delivery of emergency services in Wales, as does the executive reservation of civil contingencies.
12. As stated during the First Minister's response to the debate in the National Assembly:

"The jurisdiction goes further than simply the way the law is actually administered; jurisdiction is at the heart of the drafting of the Wales Bill. If you don't have a separate jurisdiction, you make it far harder to draft a Bill that defines powers. And so we are in a situation where we're the only legal jurisdiction anywhere in the world where there are two legislatures within the same jurisdiction. It means that defining the powers of each legislature becomes progressively more difficult because of that issue."

13. The Lord Chief Justice recently said that *“it is right for me to say that there is no reason why a unified court system encompassing England and Wales cannot serve two legal jurisdictions”*. As an interim measure, this could mean the creation of a Welsh legal jurisdiction that is distinct but not separate from that of England – a Welsh legal jurisdiction supported by a shared Courts system, run by the Ministry of Justice with the same judiciary and administrative system, buildings, etc as now. The Welsh Government will be undertaking further work with regard to the thoughts of the Lord Chief Justice over the coming weeks.
14. As a Government we believe that the Lord Chief Justice’s comments are worthy of further consideration by the UK Government. If that is not to be the case then a number of issues highlighted in the following sections will need to be addressed.

Assessment of the proposed Reserved Powers Model

15. At present, the National Assembly’s legislative competence is founded in s.108 of and Schedule 7 to, the Government of Wales Act 2006. The new Bill replaces s. 108 with a proposed new s.108A, and Schedule 7 is replaced by two new Schedules, 7A and 7B.
16. It is a matter of public record that the Secretary of State for Wales shared a draft of the proposed s.108A and Schedules 7A & B with the Welsh Government and the National Assembly for Wales on 31 July 2015. The Welsh Government responded formally with two letters which it has subsequently published, one on 7 August and another on 7 September setting out our initial views and latterly our more detailed position.
17. This paper does not fully re-rehearse the arguments made in these letters but sets out the key areas where further discussions with the UK Government are of paramount importance to the Welsh Government before we can consider supporting the Wales Bill as proposed in draft.
18. In a Report published earlier this year, your Committee argued that the proposed new reserved powers model should be assessed against the principles of subsidiarity, clarity, simplicity and workability. Accepting that there is some measure of overlap between the last three of those principles, the Welsh Government agrees with that conclusion.
19. So far as subsidiarity is concerned, this is principally relevant to the proposed new Schedule 7A, which lists, at some length, the individual reservations proposed by the Secretary of State. The First Minister set out his views on this in his letter of 7 September to the Secretary of State. In the Welsh Government’s view, the list of reservations the Secretary of State has proposed in Schedule 7A includes a significant number which either do not seem to us to be appropriate for inclusion in a document of constitutional importance such as the Wales Bill will be, or which cover matters far better suited to National Assembly rather than Parliamentary attention, being only of particular significance internally to Wales. **We therefore believe that the number of reservations in Schedule 7A can and should be significantly reduced, without impact on the UK Government’s legitimate interests in respect of Wales.**

20. We also draw attention to a drafting aspect of the proposed Schedule 7A. In very many places, individual reservations are stated as “*The subject-matter of [specified Acts of Parliament]*”. **In the Welsh Government’s view, this drafting approach is defective; the reservation as drafted does not explain on its face exactly what is being reserved**, and so does not achieve the simplicity and clarity which both we and the Secretary of State are seeking in the new settlement. Furthermore, it is not always clear why particular Acts have been specified in this way; for example, the list of such Acts in the ‘Employment and Industrial Relations’ field is considerably longer than the equivalent for Scotland, but we have had no explanation as to why that should be so.
21. Schedule 7B needs to be assessed by reference to the principles of clarity, simplicity and workability. **The Welsh Government has considerable difficulty with what is proposed in this Schedule**. One way of assessing the impact of the provisions is to compare the tests required for deciding whether a provision in a Bill is within competence under the existing settlement with the tests that would have to be applied if the new Bill’s provisions were in place. Annex 1 sets out, in text form, flow charts identifying the questions that have to be asked in respect of each Bill provision under each settlement. **The current settlement presents its own complexities, but it will be seen from Annex 1 that the settlement proposed in the Wales Bill, far from resolving any of these, imposes new layers of complication entirely at odds with the Secretary of State’s aspiration for a clear and robust settlement.**
22. We have a number of concerns with the detail of Schedule 7B. At present, the National Assembly can modify the law of contract, common law and other areas of private law and criminal law wherever those modifications *relate to* a devolved subject. This might include, for instance, simplifying how contracts work in, or creating a criminal offence in relation to, areas of devolved life where that is appropriate to make Assembly legislation effective. **The draft Bill significantly curtails this ability, by limiting the National Assembly’s power to modify the private law to provisions which are either ‘necessary for a devolved purpose’ or ‘ancillary’ to another provision within competence, and limiting the National Assembly’s power to modify the criminal law solely to provisions which are ancillary to another provision within competence.** In both cases, the provisions are further prohibited from having any greater effect on ‘the general application [whatever that might mean] of the private or criminal law’ than is *necessary*. But preventing the Assembly from modifying the criminal law for a devolved purpose is too restrictive. **The choice about whether it is necessary, appropriate or expedient to modify the private or criminal law for a devolved purpose is one properly for the National Assembly, not for the courts, but this new limitation dramatically increases the likelihood of Assembly legislation being challenged in the courts.**
23. There is then an entirely new and very broad general restriction on the National Assembly’s power – i.e. the inability to modify ‘the law on reserved matters’. **The need, in the Welsh context, for this restriction has not been adequately explained; what is it about a reserved powers framework that requires it when it was not required under the conferred powers model?** A reserved powers model means that the National Assembly cannot legislate in relation to reserved matters unless doing so is consequential or incidental. The restriction will, therefore, bite only on such provisions and it is not clear why such an

elaborate and complex restriction is needed. It applies a ‘no greater effect... than is necessary...’ test. ‘Necessity’ can mean different things in different contexts; this makes it very difficult to predict how the test will be interpreted by a court, and makes the settlement unstable, unclear, and, ripe for further legal challenge. Under these provisions decisions about how best to give effect to Welsh laws would therefore shift inexorably from elected Assembly Members, accountable to the electorate, to unelected judges.

24. The draft Bill significantly extends the requirement for Ministerial consents to Assembly legislation. UK Government consent would be required for the Assembly to be able to modify:

- any UK Minister function, even if it is within the Assembly’s devolved competence. It is hard to see how this can be reconciled with the Secretary of State’s aspiration for a clearer boundary between devolved and reserved spheres?
- any UK government department function, again even if within devolved competence,
- any function of a reserved authority (the definition of which is extremely wide: for example, it includes the water industry regulator, OfWAT, notwithstanding that the activities of this body are of fundamental importance to Wales).

25. The practical effect of these new consent requirements is that Assembly legislation will be vulnerable to delay, or worse still, frustration, by Whitehall. This is irreconcilable with the Secretary of State’s expressed desire for “*a settlement that fosters co-operation not conflict between either end of the M4*”, and for “*Welsh laws to be decided by the people of Wales and their elected representatives.*”

Other Bill Provisions

26. As noted above, the Welsh Government has had sight of 31 of the 33 clauses of the draft Bill only since the afternoon before publication on the 20 October 2015. Our comments must therefore be of an interim character until we have had time to analyse the detailed drafting. That said:

- We welcome clause 1, confirming that the devolved institutions form a permanent part of the UK’s constitutional arrangements, but we are aware that the equivalent provisions in the Scotland Bill are being considered for strengthening, and we believe that the two sets of devolved institutions for Scotland and Wales should be treated equally in this respect in the two Bills;
- So far as the statutory underpinning of the Sewel Convention (clause 2) is concerned, we believe that the clause provides an incomplete statement of the convention. It needs to be stated explicitly that Parliament will not, without the Assembly’s consent, legislate in a way which impinges on the Assembly’s legislative competence. This lacuna needs to be corrected (as it should also be in the Scotland Bill);
- We strongly support the provisions which will enable the Assembly to become, in effect, a self-governing institution (with its procedures largely

specified in its Standing Orders rather than by statutory provision), enable it to decide on its own electoral system and, if it wishes, to choose a new name (and we are content with the proposal that super-majorities should be required in the Assembly in respect of those latter matters); and

- We will be giving careful consideration to the drafting of the clauses providing various enhancements to the Assembly's and the Welsh Ministers' respective competences, and Welsh Government officials will be discussing these as necessary with the Secretary of State's officials before the Bill is made ready for formal Introduction into the House of Commons next year.

An Incomplete Bill

27. As the Secretary of State has made clear, inter-governmental discussions about the Bill will continue in parallel with the Committee's pre-legislative scrutiny process. The Committee should therefore be aware that in those discussions we will be seeking additional Bill provision, as follows:

- The First Minister has written to the Secretary of State, identifying certain matters in respect of which the Smith Commission made recommendations for additional powers for Scotland and which the First Minister considers should equally be made available to Wales. Examples include provision that public sector bodies should be able to operate rail franchises in Wales, devolution of responsibility for road signs, and new powers to regulate Gaming Machines. Devolution to Scotland of each of these is now provided for in the Scotland Bill, and we will be seeking equivalent provision for Wales;
- There is then a set of issues, some of which were referred to in our Evidence to the Silk Commission but on which the Commission made no recommendation, in respect of which we believe devolution would now be appropriate. Examples here are that the Assembly should have legislative competence in respect of Alcohol Licensing and the Community Infrastructure Levy (both of which are designated as reserved in the draft Wales Bill), and executive competence in respect of Civil Contingencies, where transfer of these responsibilities would reflect the reality that in emergency situations in Wales, it will usually be the First Minister who will be expected to take the political lead in the handling of the matter.

Conclusion

28. The Welsh Government believes that the draft Wales Bill on which the Committee is undertaking this review as part of the UK Government's pre-legislative scrutiny process is not fit for purpose in its current form. The Welsh devolution settlement would continue to be incoherent and unstable. Importantly, it would also be extremely difficult to understand. This all impacts upon democracy in Wales and the respect that people have for institutions of Government in London and Cardiff. The Welsh Government will continue to work with the UK Government to deliver a Wales Bill that reflects the mandate given by the people of Wales in the 2011 referendum and consolidates the work of the Silk Commission.

**Welsh Government
November 2015**

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