

**Holding the BBC to account for the delivery of its Mission and Public Purposes.
A response from the Welsh Government.**

July 2017

The Welsh Government welcomes the opportunity to respond to this consultation on the first BBC Operating Licence of this new Charter period. We were closely involved in the Charter renewal process, which led to a much stronger remit being given to the BBC to deliver for people in the nations and regions of the UK, including Wales. It is vital that the new BBC Board and Ofcom both play a full and proper role in ensuring that these duties, along the related commitments which the BBC has subsequently made, are fully delivered upon. With this in mind we expect Ofcom to set appropriate objectives or conditions in the Operating Licence. There are some significant shortcomings in the draft Licence from a Wales perspective which need to be addressed before it is finalised; we have set out our views on these below.

We would be very happy to discuss this response with Ofcom as needed.

Ofcom's remit in setting the BBC Operating Licence

We agree that the first four Public Purposes as set out in the BBC Royal Charter are of obvious concern to Ofcom, as they clearly relate to the BBC's UK Public Services; namely:

- 1) To provide impartial news and information to help people understand and engage with the world around them.
- 2) To support learning for people of all ages.
- 3) To show the most creative, highest quality and distinctive output and services.
- 4) To reflect, represent and serve the diverse communities of all of the United Kingdom's nations and regions.

We also agree that structuring the Operating Licence in order that high-level objectives and regulatory conditions are set against each of the Public Purposes make sense.

However, Ofcom should not be entirely ignoring the BBC's fifth public purpose:

- 5) To reflect the United Kingdom, its culture and values to the world.

This has the clear potential to both enhance and impact upon on the other purposes.

Ofcom's explanation for the exclusion of the fifth public purpose from the draft Licence identifies the World Service as the sole mechanism its delivery, stating this is separate to the UK Public Services and a matter for the BBC Board. However, the BBC's Annual Plan for 2017/18 sets out *three* strands for delivery against this Purpose – the World Service, commercial news services and *BBC Worldwide*. A major part of BBC Worldwide's remit is to commercialise content originally created for the UK Public Services. With that in mind, this purpose carries with it an opportunity (to reflect more and better content produced for or about the nations and regions to the rest of the world) which is fully compatible with the fourth Purpose. It also carries a risk (that with declining Licence fee revenues, the driver to monetise public service content via BBC Worldwide might erode the quality and distinctiveness of that content); this would be contrary to the third Purpose and a disbenefit to UK Licence fee payers.

Ofcom should consider its role in monitoring and regulating on these matters, not leave them to the BBC Board. It should amend the final Operating Licence accordingly.

Ofcom's regulatory approach

We agree that there is a balance to be struck between preserving the BBC's editorial and creative freedom and regulating to ensure that it delivers against its Mission and Public Purposes. We agree, for example, that Ofcom shouldn't get involved "in the detail of the BBC's creative decision making, scheduling decisions or manage structures" (paragraph 4.17 of the consultation document). However, although we consider Ofcom's approach of developing clear performance measures to be a positive one, which should in time (in conjunction with the BBC's own reporting obligations) provide a robust time series of metrics against which the BBC can be held to account, it seems clear that it could take several years to compile compelling data which evidences over or under performance in many key areas.

In the meantime, we are not convinced that Ofcom's approach is sufficiently challenging. The BBC has a new unitary Board and we wish it well - but it should expect to have to earn the trust of the regulator and Licence fee payers through its actions. In setting the landscape for the BBC to move forward, Ofcom should be seen to be scrutinising its actions very closely, to be taking early warning signs about potential issues very seriously and be prepared to use its powers early on if required, whether that involves changing Licence conditions, directing the BBC to act or imposing sanctions. In contrast, the consultation document and draft Licence appear almost apologetic in tone whenever a condition is set that might be construed as restricting the BBC's freedom of movement. This is both unnecessary and inappropriate for a regulator that expects to be taken seriously by the BBC.

Ofcom's powers to direct or sanction the BBC if it fails to comply with a regulatory condition are set out at 1.11 in the draft Licence. Financial penalties as they relate to the BBC have the effect of taking Licence fee revenue (which was paid by UK citizens to support our Public Service Broadcasting system) away from the BBC and handing it back to HM Treasury. We would expect the BBC to take whatever steps are needed to avoid incurring a financial penalty, but should Ofcom need to impose one (and there are precedents for this) then it cannot be right that this money is taken out of the PSB system. The Government and Ofcom should consider options for making any funds generated from such financial penalties available to the other PSBs, to support the delivery of additional public service content in the UK.

We are very concerned about the lack of consistency in Ofcom's approach as set out in the draft Licence. Ofcom is clearly willing to increase several quotas where BBC has routinely performed above current requirements (e.g.; original production quotas); however it seems unwilling to do so in other, extremely important cases (e.g.; spend and hours of production in the nations). Ofcom considers this latter example to be a series of 'new' quotas; in fact they are really existing UK quotas applied at a more granular level - an expansion of the existing 'out of London' principle. Setting these quotas below historic and current performance levels is clearly contrary to the requirement in the Charter and Agreement for the first Licence to *increase* current requirements to secure provision of more distinctive output and services. We will return to this subject in more detail under Public Purpose four, but the underlying point here is that these quotas should be revisited before the final Operating Licence is imposed.

Ofcom's statement that the Licence will evolve over time

We agree with Ofcom that services and modes of consumption will continue to evolve over the next Charter period, at a rate which may well exceed the pace of change we saw during the last Charter. With this in mind we welcome the clear statement in the draft Licence that Ofcom expects to amend the Licence regularly during the period. There will now be an expectation that Ofcom will act upon this commitment whenever it is necessary.

We welcome Ofcom's intention to scrutinise the BBC's interim Annual Plan for commitments against which the BBC can be held to account. Ofcom should provide a statement alongside the final Licence which sets out its conclusions about the BBC's interim Annual Plan and any impact this has had on the final version of the Licence.

The relationship between the Operating Licence and other regulatory responsibilities

There is a clear crossover between the Purpose to support the creative economy across the UK and the BBC's impact on competition - especially given the removal of BBC in-house production quotas, the creation of BBC Studios and the advent of specific production quotas for the nations and regions. We expect the BBC's positive impact on the sector in Wales to derive from an appropriate mixture of (on the one hand) the further development of BBC Studios production operations and (on the other) the commissioning of an increasing range of network and Wales productions from independent producers – in both cases coupled with an enhanced, partnership role in talent and professional development. Ofcom should be looking for the BBC's plans to deliver a balanced approach on this and be challenging the BBC if this doesn't happen. Ofcom should consider setting a high-level objective for the BBC to address this in appropriate guidelines for its commissioners.

Public Purpose 1: To provide impartial news and information to help people understand and engage with the world around them.

The high-level objective at 1.22.2 in the draft Licence for the BBC to “seek to maintain its coverage of regional, national and international themes and stories within its news, current affairs and factual programming...” is wholly inappropriate. It implies that current activity is delivering sufficiently for people in the nations and regions, which is entirely contrary to the recognised need (at paragraph 4.30 of the consultation document) for the BBC to better serve all audiences and to “improve its representation and coverage of the devolved nations in its news, current affairs and factual output”. The BBC itself acknowledges this deficit. This objective should be significantly strengthened in the final version of the Licence.

This Purpose states that the BBC's news and information services should ensure “that all audiences can engage fully with major local, regional, national, United Kingdom and global issues and participate in the democratic process, at all levels, as active and informed citizens”. It is therefore surprising to see no regulatory condition or genuine performance measure to ensure or monitor for this. Hours of news broadcast in Wales will be measured, but there are no proposals to impose a thematic or qualitative condition, or to attempt to measure the impact of the BBC's news services on democratic engagement or awareness. This is very disappointing and should be addressed as a priority.

It is an accepted issue (across all of the PSBs, not just the BBC), that news values remain far too London-centric. News services should reflect the reality of life in the UK today. They should include more – and be clearer about - political debate and policy developments in the nations and regions. We welcome the lead the BBC has taken on this since the King Report in 2008 and we are pleased that BBC Cymru Wales has recently announced plans to significantly improve news services in Wales. However, these further improvements are yet to be delivered upon and this matter is too important not to be a condition of the Licence.

With regard to condition 2.16 in the draft Licence, ensuring that ‘adequate’ links to other sites are provided from BBC online, this should require adequate links at the nations and regions level, especially in news and current affairs, to highlight and promote the availability of other sources whenever possible and encourage plurality of both access and consumption.

Public Purpose 2: To support learning for people of all ages.

The high-level objective at 1.24.1 in the draft Licence, to provide a broad range of learning content, should be amended to say:

“... the BBC should endeavour to serve and reach the widest possible audiences with this content via its mainstream television channels, radio stations *and online platforms (e.g.; websites, mobile applications)*”;

The high-level objective at 1.24.3, on serving children of all ages, should include a clear reference to the different curricula in each nation, the importance of which is referenced in paragraph 4.52 of the consultation document.

We understand and agree with the BBC's strategic shift to delivering educational content online. However, although the consultation document states (at 4.59) that the relevant regulatory condition for BBC online will mandate for curriculum-linked support in each of the nations, the actual condition (at 2.30 in the draft Licence) does NOT do so (it simply says "In respect of **BBC Online**, the BBC must deliver content which supports children and teenagers in their formal learning in all parts of the United Kingdom"). This should be amended and made clearer in the final Licence; we would suggest the following:

"In respect of **BBC Online**, the BBC must deliver content which supports children and teenagers in their formal learning in all parts of the United Kingdom, including curriculum-linked support in each of the nations."

Public Purpose 3: To show the most creative, highest quality and distinctive output and services.

We agree with the points made at 4.63 of consultation document that "Many of the conditions associated with the first, second and fourth Public Purposes (providing impartial news and information; supporting learning; and reflecting, representing and serving the diverse communities of all of the UK's nations and regions) contribute to the distinctiveness of BBC output and services. Promoting these purposes contributes to distinctiveness". We would also agree that the delivery of original productions and first-run originations can contribute to this delivery, if the content is relevant and of sufficient quality.

We also agree with the point in paragraph 4.64 that Ofcom should consider the needs of the nations and regions in seeking to increase the BBC's duties to deliver distinctive output and services.

We further agree with comments at 4.71.3 and 4.72.4 of the consultation document (and reflected in high-level objectives at 1.27.3 and 1.27.4 of the draft Licence) about the importance of BBC's contribution to the creative economies of UK through investment in originated content, taking risks in terms of output and the range of organisations it commissions from, including a wide range of independent producers. However, the regulatory conditions do not follow through to ensure that the BBC must take steps to ensure this. This should be rectified in the conditions set out in the final Licence. To be clear, we would not expect quotas to be set, but a condition mandating the BBC to take "appropriate" action would be straightforward (i.e.; similar to condition 2.16 on 'appropriate' third party links).

We would expect that the high-level objective at 1.27.5 should mirror wording in the Charter; we suggest that it be amended to:

"in relation to the audience it serves, the BBC should ensure that its output and services cater for the diverse audiences *across the whole* of the United Kingdom, through both through its popular mixed genres services and its more specialist and single purpose services."

Ofcom should publish a statement alongside the final Licence which sets out its view on how BBC's Annual Plan and creative remit propose to address this purpose – especially as Ofcom has intentionally resisted defining many regulatory conditions in this area (see 4.82 of consultation), to give the BBC "strategic discretion". We would expect Ofcom to closely scrutinise the BBC in this area over the next year, to establish whether this degree of discretion is appropriate and to take the appropriate steps if not.

We note that original production quotas are increased in line with an average of the BBC's actual delivery over the last five years (4.84 of consultation). This must beg the question why production quotas in the nations are NOT set in line with performance, but instead set somewhat arbitrarily according to population share, with 50% reserved for the M25 area as a minimum (an area which is a historic centre of the creative industries but is home to just 13% of the UK's population).

We would agree that this Purpose should be an area of focus for Ofcom's performance measures and we note Ofcom's statement that it will set further regulatory conditions if the BBC's performance falls short in this regard. However, the comment that Ofcom will return to these proposals "in due course" is not encouraging – this should be a priority and monitored closely from the outset.

Public Purpose 4: To reflect, represent and serve the diverse communities of all of the United Kingdom's nations and regions.

We accept Ofcom's approach of separating out the nations and regions and diversity elements of this purpose, but we would make the point that there are overlaps between these areas which should be remembered and taken into account.

We note Ofcom's acknowledgement at paragraph 4.103 of the consultation document that delivery against all aspects of this purpose (i.e., provision of relevant content and supporting the creative industries in each nation) is more significant now because of devolution. With this in mind, the lack of apparent consideration of devolution and the accompanying political discourse in the context of Purpose one (news) is even more striking.

Nations and regions matters under this Purpose

In paragraph 4.105 of the consultation document, Ofcom highlights current levels of out of London network spend and then states:

"We consider it important for there to be stable levels of production outside London and across the nations and regions, so that the full economic and wider benefits of commissioning can be realised across the UK."

This would seem to imply Ofcom accepting that an implied 50% minimum quota for production with the M25 area remains appropriate, and that as long as the remaining 50% is aligned with population share across the nations and regions then that is somehow optimal for delivery of appropriate benefits in those areas. We cannot and do not agree with this position. We will discuss this further when we come to the relevant regulatory conditions below.

The BBC's recent announcements of additional investment in improved services in Wales and the other nations are to be welcomed. However, a statement from Ofcom is needed alongside the final Licence, giving its views on how these commitments have affected either the final Licence or Ofcom's priorities and plans for monitoring the BBC.

We welcome Ofcom's intention to review its guidance for PSB channels on regional productions, "to help ensure that programme-making which qualifies towards the relevant nations or outside the M25 regulatory conditions provides material benefits to the nations and English regions in line with the policy intent". We would be happy to contribute our thinking at the scoping stage as to what constitutes an impactful economic investment and on how we monitor the delivery of those benefits to ensure they occur. We would expect Ofcom to be very clear at the end of this exercise about how it will then improve regulatory requirements on the PSBs and improve the monitoring and measurement of delivery against those requirements.

Although we generally agree with the intent of the high-level objectives under this Purpose, we would again note the lack of any clear objective related to democratic engagement. This could be seen as being implied under 1.31.3 ("ensure programming for the nations and regions serves and creates content of interest and of relevance to the people living in the area for which the service is provided. Within Scotland, Wales and Northern Ireland this should include a wide range of genres, including drama, comedy, sports and indigenous language broadcasting") although news and current affairs are not explicitly mentioned. It would be better to include a clear statement on this, at the end of either 1.31.3 or 1.31.4, by adding the following phrase to the end of the paragraph - "... and appropriate coverage of issues relevant to that nation or region in news and current affairs services aimed at those audiences and on the network".

Turning to the regulatory conditions under this Purpose, we agree with a stronger focus on production in each nation and on guaranteed levels of programming; we also agree *in principle* with proposed new conditions. However, the targets set for delivery in the nations and regions are not appropriate - and could unfairly disadvantage Wales.

Paragraph 4.111 of the consultation document explains that quotas for programme making and programming in the nations and regions have been increased to capture “historic over-delivery”. This may be accurate in terms of delivery against previous BBC Trust targets on programming, but the programme *making* targets for the nations and regions (the ‘new’ quotas we discussed earlier) do not capture or reflect historic delivery at all, especially in Wales.

Paragraph 4.115 of the consultation document states:

“We consider that the quota levels we have proposed for production and hours of programming will help ensure audiences in the nations and regions are well served. *The levels have been calculated using five years of previous BBC performance data, and we believe the BBC should be able to meet the new requirements placed on them.*”

Paragraph 4.22 states however that data for the last four years was used. Whichever is correct, the actual quotas set are simply based on population share - which for Wales equates to 5%.

However, the actual proportion of network spend in Wales from 2010 onwards is as follows (taken directly from the BBC’s Annual Reports):

Year	%age spend in Wales
2010/11	5.0%
2011/12	5.3%
2012/13	6.8%
2013/14	6.8%
2014/15	6.5%
2015/16	7.1%

It can be seen at a glance that any analysis of these figures would not identify 5% as an appropriate target for Wales in 2017 – that could take us back to the position *seven years ago*. The picture in other nations and regions varies, with levels over the last few years sometimes falling below and sometimes exceeding a straight population share, depending on where you are. It is clear though that population share is not being used on an informed basis and does not reflect the current reality of the BBC’s spending across the UK.

In public discussions Ofcom has said that it is unwilling to protect current levels of production in the nations and regions (above a straight population share) as this would be a strategic intervention that could unduly constrain the BBC’s freedom of action. We do not accept this argument. No-one is arguing against greater distribution of the benefits of the PSBs’ activities outside the M25 area and Ofcom itself is wholly inconsistent in applying this logic; see paragraph 4.23 of the consultation document where it states:

“The BBC exceeded many of its 2015/2016 quota requirements in each of the five years, in some cases by a very wide margin. *We therefore propose in many cases to increase existing quota requirements.*”

This has not however been applied to expenditure and hours of production in the nations and regions.

We note Ofcom’s statement in paragraph 4.114 of the consultation document that “Increased BBC investment in the creative industries of the UK should contribute to a more diverse production sector”. Ofcom would presumably consider the reverse to be true, so it seems very strange that it would set quotas that might allow this precise risk to manifest itself in the nations and regions.

There is another element to this which Ofcom has raised in public discussion, namely that protecting the current levels in some nations and regions might force the BBC to constrain its activities in others,

because 50% is reserved for activity within the M25 area and there is only so much left to go around. Ofcom officials have referred to “statutory guidance” where this is mandated. We are not aware of the precise guidance being relied upon, or how long ago it was written (we have asked for clarification but not received it). Regardless, surely the key word here is ‘guidance’? We would prefer the BBC Board to be free to move more of its activity out of London if it wished to, rather than presumably being constrained by this same guidance! Certainly it should not be forced to protect activity in one nation or region by disadvantaging another, simply because Ofcom says it must retain 50% of this activity in the capital. If this constraint were removed it would enhance the BBC’s freedom of movement and there would be no reason whatsoever to fail to protect by regulation the levels of current activity in the nations and regions, as a baseline for future growth.

We therefore propose the following:

- The regulatory conditions from 2.39 through to 2.43.2 should be redrafted, to protect activity at a minimum level which is equal to the highest level of delivery in the relevant nation or region over the last five years (unless a population share would actually be greater, in which case it should be used for the time being). These conditions should be reviewed regularly, at least every two years.
- The targets at 2.39.1 and 2.39.3 (for overall levels of hours and expenditure on production outside the M25 area) should be set at 50% now, but rising to a minimum of 55% by the mid-point of the Charter period and 60% by its end.

This would demonstrate a clear willingness on Ofcom’s part to move on from previous, outdated guidance which says that 50% should be reserved for activity within the M25 area. It would also show that Ofcom is prepared to challenge the BBC to evolve its business in line with economic and social changes across the UK.

Turning to other conditions, we agree that Ofcom should not set genre targets for the nations and regions; this is a matter for the BBC.

We would query the quotas set in the regulatory conditions for news coverage on BBC Radio Wales and BBC Radio Cymru (2.69.1 and 2.70.1 respectively) – why are the minimum levels of weekly news provision different for these stations (32 hours and 23 hours respectively)? No explanation is given and this seems to disadvantage Welsh language listeners.

Diversity matters under this Purpose

We strongly agree with comment at 4.122 in the consultation document that:

“To reflect and portray the UK as it is, we consider that the BBC will need to constantly challenge itself to do better. Its development of talent, its employment decisions, budgets and how it commissions content all have a crucial role to play in delivering this objective.”

We welcome the high-level objective at 1.32.2 that the BBC should “reflect the diversity of the United Kingdom’s nations and regions appropriately in its output, services and genres”.

We welcome BBC’s own move to create diversity commissioning guidelines, but at the same time we also welcome the regulatory condition at 2.81, mandating the BBC to establish and comply with a code of practice on diversity, approved by Ofcom. It is worth noting the experience of Channel 4, which has undoubtedly led the PSBs on diversity issues over the last few years. Whilst this is laudable, we were disappointed that Channel 4 failed to recognise the diverse cultures of the nations and regions when creating its diversity strategy. Ofcom and the BBC should avoid making this same mistake.

We note Ofcom’s statement in paragraph 4.131 of the consultation document that “These conditions should be achievable for the BBC as they complement the BBC’s commitments outlined in the BBC’s Diversity and Inclusion Strategy”. We agree – but if this approach (alignment with BBC strategy) is appropriate for diversity, why isn’t it appropriate for (say) production quotas? Delivering more content in and for the nations and regions is also an aim of BBC strategy (and is underpinned by the

requirements of the Charter and Agreement), so why set targets that may allow the BBC to do less? The final Licence must take a more consistent approach.

Setting and amending the Licence

We are generally content with the proposals on procedures for setting and amending the Licence - on the assumption that an intention from Ofcom to set or amend Licence conditions might just as easily be informed by third party representations about serious gaps or shortcomings as it could be by Ofcom's own conclusions, drawn from performance measures, periodic reviews or ad-hoc reviews, or via receipt of a proposal from the BBC itself. It would be useful if the final Licence (or an accompanying statement) confirmed this to be the case.

Performance measures

We agree that the use of a wider and richer set of indicators is entirely appropriate, to be considered in conjunction with outputs from the BBC's own reporting. The principle of monitoring for early warning signs of potential issues is also to be welcomed, as long as Ofcom is prepared to follow through as needed.

The proposed measures under each Public Purpose (i.e.; availability, consumption, impact and contextual factors) seem appropriate. It is unclear however (except in the case of specific nations and regions indicators) which outputs will be available at a UK level only and in which cases data for the nations and regions will also be available. We would appreciate clarification on this point alongside the final Licence.

We would note that at a nations and regions level, some of Ofcom's assumptions may not stand (e.g.; that spend on first run output is a reliable proxy for quality, which Ofcom accepts as a principle for the UK as a whole). How will this be addressed, if at all?

We would again note that measures of democratic engagement are lacking. This should be addressed before the final Licence is set (possibly via appropriate qualitative audience research on impact within the nations and regions).

We also consider the principles of measurement to be generally appropriate. However, it is unclear how long Ofcom expects it to take to develop trend data with which it is confident to challenge the BBC. Ofcom should make this clear in a statement alongside the final Licence and also outline how it will amend its approach in the meantime to ensure that it can challenge the BBC on an informed basis from the outset. We would suggest that in the absence of data on outcomes, even closer scrutiny of the BBC Board's actions is needed.

We are generally content with the proposals on procedures to set and amend performance measures. However, it is important that the consultation principles are applied robustly and that Ofcom is seen to be willing to enhance or implement new measures early and as needed.