

# **A Review of the Governance and Regulation of the BBC**



**Sir David Clementi**  
**March 2016**





# **A Review of the Governance and Regulation of the BBC**

Presented to Parliament  
by the Secretary of State for Culture, Media and Sport  
by Command of Her Majesty

March 2016

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## **FOREWORD**

To the Secretary of State for Culture, Media and Sport

1. I have pleasure in submitting my Review of the governance and regulation of the BBC as part of Charter Renewal.
2. You announced on 16 September 2015 that you had asked me to carry out an independent Review. The terms of reference stated the objectives to be:  
  
“To conduct a review into the governance and regulation of the BBC and to make proposals in the context of the 2015–16 Charter Review in relation to:
  - a. the model of governance and regulation of the BBC,
  - b. the specific mechanisms of governance and regulation including but not limited to the Public Value Tests and Service Licences,
  - c. the way in which the BBC and the bodies that govern and regulate it engage with licence fee payers and industry, including but not limited to complaints handling procedures and transparency.”
3. The full terms of reference are set out in Appendix 1. The issues under review broadly follow questions 15 to 17 set out in the Consultation Paper that you published in July 2015.<sup>1</sup>
4. The Consultation Paper (sometimes referred to as the Green Paper) had a closing date for responses of 8 October 2015. My Review has been helped by the number and quality of responses received. Whilst a number of responses concentrated on questions relating solely to the BBC's mission and content, a large number addressed the questions of governance and regulation which are the subject of this Review.
5. I have benefited considerably from the openness of the discussions I have had with the BBC Executive, the BBC Trust and Ofcom. I am grateful to them for the

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<sup>1</sup> Department for Culture, Media and Sport (2015). *BBC Charter Review Public Consultation*. [On-line]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445704/BBC\\_Charter\\_Review\\_consultation\\_WEB.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445704/BBC_Charter_Review_consultation_WEB.pdf)

time they have spent, both explaining how the current system works and engaging in debate about possible reforms.

6. All the major UK broadcasters submitted thoughtful papers in response to the Consultation Paper. I have had the opportunity since to have separate meetings with each of them, and their input has been helpful in shaping my views.
7. A number of commentators, many of them from Universities, also submitted responses to the Consultation Paper. I have met many of them individually over the last few months, and held a roundtable meeting with some of them on 27 November 2015.
8. I have had the opportunity during the course of the Review to talk to representatives of each of the Devolved Nations about the issues within my terms of reference.
9. A full list of those I have consulted is set out in Appendix 2. To the extent that a consensus emerged in my discussions, it was that the existing BBC Trust model of governance and regulation should be dropped, albeit there were strengths within the current system that needed to be retained. In the discussion of models it is easier to criticise than to construct. Not surprisingly, therefore, there was less of a consensus about what should replace it.
10. What divides those involved in the debate is not so much the arguments for or against the different options, so much as the weight attached to individual arguments. Almost all want an independent BBC, properly accountable to the Licence Fee payer and to Parliament, but differ on how best to achieve it. I set out in this Review what I hope are clear recommendations, reached after proper consultation.
11. The issue of independence is present in almost every conversation about the BBC. It was also the dominant theme in responses from the public to the Consultation Paper questions on governance and regulation. I have made recommendations, in the areas within scope, designed to promote the independence of the BBC. But it needs to be recognised that the BBC is a Public Corporation with a privileged funding model, that it is answerable to Parliament, and that there is a legitimate role for Government at the time of Charter Renewal.
12. I was assisted in the Review by two officials from DCMS: Oscar Tapp Scotting, who also acted as Secretary to the Review, and Caroline Rowley. I am extremely

grateful to them for their insights into the issues under review and for their hard work. Although I received this assistance, I emphasise that I take full responsibility for the Review.

13. In pages 7–11 I set out a 'Summary of Main Recommendations'. The Review then follows closely the order of issues raised in my terms of reference:
  - Chapter 1 looks at the different models of governance and regulation;
  - Chapter 2 looks at specific mechanisms of governance and regulation, particularly around operating licences;
  - Chapter 3 looks at issues around engagement with the public; and
  - Chapter 4 looks at the issues around editorial standards and complaint systems.
  
14. I set out in this Review what I believe to be clear recommendations on the issues you have asked me to address. I hope you will feel the recommendations represent a sensible way to move forward as part of Charter Renewal 2016.

A handwritten signature in black ink that reads "David Clementi". The signature is written in a cursive, slightly slanted style.

Sir David Clementi  
March 2016



## **SUMMARY OF MAIN RECOMMENDATIONS**

1. The high-level recommendations of the Review are:
  - regulatory oversight of the BBC should pass wholly to Ofcom;
  - the BBC should have a unitary Board, with a majority of Non-Executive Directors;
  - the primary responsibility for the interests of the Licence Fee payers should lie with the BBC Board;
  - Ofcom should issue the BBC an Operating Framework, consistent with the revised Charter and Agreement, setting out the obligations placed on the BBC;
  - the Operating Framework should include Operating Licences in respect of the BBC's broadcasting content and distribution obligations; and should include Operating Licences in respect of services for the Devolved Nations;
  - the Charter should place on the BBC a duty to consult with the public both as consumers and as Licence Fee payers; and
  - the BBC should have a 'Broadcaster First' system of complaints; appeal above the BBC on editorial issues would be to Ofcom.
2. The discussion and argument behind these high-level recommendations are set out in the chapters that follow. Set out below is an executive summary.
3. **CHAPTER 1** considers models of governance and regulation for the BBC. The Consultation Paper proposed three possible models: (i) that the existing Trust model should be retained, albeit with changes to reflect the experience of the last ten years; (ii) that regulatory oversight should move to a new independent body, OfBeeb, a bespoke regulator for the BBC; and (iii) that regulatory oversight should move to Ofcom. The Chapter considers the advantages and disadvantages of each model.

4. The Chapter analyses the Trust model and concludes that it is flawed. It conflates governance and regulatory functions within the Trust. However re-structured, it would still leave two Boards within one organisation, with the likelihood of confused responsibilities.
5. If the Trust model were rejected, the Consultation Paper suggested that the choice lay between regulation by OfBeeb and regulation by Ofcom. In fact the choice lies between regulation by OfBeeb and Ofcom, and regulation by Ofcom alone. Nobody argues that the market and competition issues, which increasingly bring the BBC into contact/competition with commercial interests, should be overseen by anyone other than Ofcom.
6. The strongest, and simplest, argument in favour of the Ofcom model is that Ofcom is already the public service regulator for the United Kingdom's broadcasting industry. It already has regulatory powers in respect of the BBC, already has considerable experience in almost all of the regulatory issues that the BBC gives rise to, and has during its twelve years of existence built up a significant reputation for dealing with competition issues which are likely to come increasingly to the fore. Ofcom has scale and credibility. It would be a strong regulator to match a strong BBC. Against this background there would need to be a very powerful argument for the Government to want to set up a second public services regulator, OfBeeb. There are arguments in favour of such a bespoke regulator; but it should be recognised that the body would have responsibility for only one organisation, the BBC, and that precedent for a satisfactory 'single regulator–single regulatee' relationship is poor. The Chapter concludes that the arguments for consolidating the regulation of the BBC within Ofcom heavily outweigh those in favour of setting up a bespoke regulator.
7. If the recommendation of this Review is accepted, there would need to be a further discussion about how Ofcom dealt with the significant increase in its work–load: which responsibilities would be discharged in existing Ofcom teams, and which might best be discharged within a new separate board within Ofcom. Any new board should have a clear link to the Ofcom Board, similar to the Ofcom Content Board.
8. Alongside a single regulator, it is proposed that the BBC should have a unitary Board, with governance responsibilities for all its activities. It would consist of a Non-Executive Chair and Deputy Chair, a majority of Non-Executive Directors and a small number of Executive Directors. The Board of the BBC should continue to include members for the constituent Nations of the United Kingdom, able to

balance their representative role with an ability to contribute with specific skills to the significant workload of the Board. The Chapter includes recommendations about the size of the Board; the Directors would be in part appointed by Government and in part appointed independently via a Nominations Committee.

9. The primary responsibility for the interests of the Licence Fee payers should lie with the BBC: the relationship between Licence Fee payer and Licence Fee recipient should be direct, not via a regulator. It is proposed that the reporting requirements on the BBC would be substantial, requiring the Corporation to account in detail for how it had complied with the regulatory obligations placed upon it by the Charter, Agreement and related documents. The obligations placed on the Board, and time commitment expected of Directors, would be considerable.
10. **CHAPTER 2** looks at mechanisms of governance and regulation of the BBC. It describes the current framework, covering Public Purposes, Purpose Remits, Quotas, Service Licences, Statements of Programme Policy and other related documents. It proposes a revised framework, which would flow from the new Charter and Agreement, both as regards duties placed on Ofcom and obligations placed on the BBC.
11. For Ofcom, the key 'forward looking' documents would be an Operating Framework, which would set out how the BBC should operate across all its activities in areas such as competition in services, distribution of content and relationships with independent producers; and, flowing from the Operating Framework, a series of Operating Licences, setting out what the BBC should be delivering in its television, radio and other activities including on-line. It is also proposed there would be Operating Licences in respect of the Devolved Nations.<sup>2</sup>
12. The key 'after the event' obligation placed on Ofcom would be the production of an Annual Report, providing an overview of how the regulatory duties had been delivered, and including a review of BBC delivery against Operating Licences. Ofcom would also undertake an in-depth assessment of the BBC's performance against its remit once every four years.
13. The BBC Board would be required to produce a Workplan and Creative Remits document, providing a 'forward looking' view of how it planned to deliver against its Operating Licences. This would include associated budgets. The key 'after the

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<sup>2</sup> The Devolved Nations of the United Kingdom are Northern Ireland, Scotland and Wales.

event' document would be the Annual Report and Accounts, detailing the BBC's performance against a long list of obligations placed on the unitary Board.

14. The Chapter goes on to look at the mechanisms for making changes to licences in the periods between Charter Reviews. The current operation of a Public Value Test is described, and proposals made for its evolution. There should be greater flexibility so that changes to services face appropriate and proportionate scrutiny whilst being determined to a tighter timescale. The determination of whether a full Public Value Test were required would rest with the Board of the BBC. This responsibility would be balanced by a broad right of Ofcom to 'step-in' to investigate where it felt that the public interest issues had not been fully considered. Where a full Public Value Test were carried out, Ofcom would be the final arbiter of whether the change was in the public interest.
15. **CHAPTER 3** considers the way in which the BBC engages with the public. Under the current Charter, specific duties are placed on the BBC Trust in respect of engagement with Licence Fee payers in a broad sense: to know the views of audiences both in regard to issues around individual programmes and services, and also in regard to wider issues such as value for money. The new Charter should place similar obligations on the Board of the BBC.
16. The Chapter discusses the existing out-reach work of the BBC Trust, and in particular the Audience Councils, which are prescribed in detail in the current Charter. Having these Councils chaired by a Director of the BBC unitary Board would bring the Councils closer to the decision-making body of the BBC. Furthermore, the introduction of an Operating Licence for each of the Devolved Nations would give greater substance to the work of the related Council.
17. Overarching these issues is the growing ability for any organisation to relate to its public through digital platforms. New technologies and techniques should mean that during the next Charter period the BBC will be able to engage more effectively with the public and understand the public interest better than ever before. The BBC already has a considerable audience linked to its platforms; and the new Charter should encourage the BBC in its work to reach out to the public as widely as possible. Given the speed of change, it is proposed that the Charter should be less prescriptive than at present in how the out-reach obligations are met.
18. There would be a requirement on the BBC to demonstrate in its Annual Report and Accounts how its Charter obligations had been met, and delivery in this

respect would be subject to oversight by Ofcom. Ofcom itself is likely to broaden the audience research it already carries out.

19. **CHAPTER 4** looks specifically at the Editorial Standards and Complaints System of the BBC. The current system is complicated and confusing, since the remit of the BBC Trust and Ofcom overlap. Ofcom can hear complaints against the BBC, subject to certain exclusions of which the most important is editorial complaints about 'accuracy and impartiality'. The BBC Trust can investigate any complaint, even if it is within the Ofcom remit. Although the majority of complaints do go direct to the BBC and are dealt with by the Corporation itself, complaints may also go direct to Ofcom.
20. It is proposed that the BBC should adopt a formal 'Broadcaster First' rule, subject to a right of 'step-in' by the regulator, Ofcom, in exceptional circumstances. The Chapter includes suggestions for simplifying the existing BBC arrangements for handling complaints. Complaints to the BBC would be judged against the BBC Editorial Guidelines, which would be the responsibility of the unitary Board.
21. Appeals against judgements of the BBC would be made to Ofcom and would be heard against the Ofcom Broadcasting Code. It is argued that this would not lead to any diminution in the BBC's editorial standards. This is in part because the Editorial Guidelines of the BBC and the Ofcom Code are similar in how they define the important editorial test of 'accuracy and impartiality'; and in part because the responsibility for upholding the highest standards of editorial integrity rests not with the Regulator, but squarely with the BBC itself, as a key part of the remit of the unitary Board. Whilst the reputation of Ofcom and its Content Board for editorial integrity is high, regulation by Ofcom represents a second line of defence. The Chapter also includes recommendations for broadening the scope of Ofcom's existing coverage of the BBC's output.
22. Overall I believe that the recommendations in this Review would add significantly to the transparency and accountability of the BBC. The Corporation would have a unitary Board responsible for all its activities; it would have a single regulator, Ofcom, to whom it would be accountable. The Board must act in accordance with the obligations placed upon it by the Charter and related documents and should have a clear responsibility for the interests of the Licence Fee payers who fund it.

## **CHAPTER 1: MODELS OF GOVERNANCE AND REGULATION**

### **Introduction**

1. The issues around the governance of the BBC, and how it should be regulated, have been much discussed over a considerable period. This Review has benefited from a number of documents which deal at length with the issues. I refer in particular to the ‘Independent Panel on the BBC Charter Review’ chaired by Lord Burns, with the final report dated January 2005 (‘The Burns Report’);<sup>3</sup> and to the House of Commons Culture, Media and Sport Committee report ‘Future of the BBC’ dated February 2015 (‘the CMS Select Committee Report of February 2015’).<sup>4</sup>
2. As a result, most of the arguments for and against different models have been in the public domain for some time. But whilst the questions may be the same as those asked in the past, it is reasonable for the answers to be different, informed by further evidence of how existing models have worked, and by developing views on what represents good practice.
3. The Consultation Paper was published in July 2015 by the Secretary of State and set out three possible models:
  - i. the existing Trust model, with the BBC Executive and BBC Trust both covered by the BBC Charter, would be retained, albeit with some changes to reflect things which have gone well and those which have not;
  - ii. the OfBeeb model, leaving governance of the BBC within a unitary Board, and removing the regulatory functions to a new public services broadcasting body, OfBeeb; and
  - iii. the Ofcom model, again leaving governance of the BBC within a unitary Board, but moving the regulatory role to Ofcom.

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<sup>3</sup> Burns, T. (2005) Final advice presented to the Secretary of State [On-line]. Available at:

[http://webarchive.nationalarchives.gov.uk/+http://www.bbccharterreview.org.uk/pdf\\_documents/050123a\\_Governance.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.bbccharterreview.org.uk/pdf_documents/050123a_Governance.pdf)

Burns, T. (2004). *Independent Panel on BBC Charter Review* [On-line]. Available at:

[http://webarchive.nationalarchives.gov.uk/+http://www.bbccharterreview.org.uk/pdf\\_documents/041130\\_emerging\\_themes.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.bbccharterreview.org.uk/pdf_documents/041130_emerging_themes.pdf)

<sup>4</sup> House of Commons Culture, Media and Sport Committee, (2015), *Future of the BBC Fourth Report of Session 2014–15*, [On-line].

Available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmcmds/315/315.pdf>

4. In the OfBeeb model the new regulatory body is occasionally referred to as a Public Service Broadcasting Commission (PSBC). It would be possible in principle for such a body to regulate all the public service broadcasters who, in addition to the BBC, include the Channel 3 licensees (ITV, STV and UTV), Channel 4, Channel 5 (owned by Viacom) and the Gaelic and Welsh language channels, BBC Alba and S4C. This would give the new body a view across the full range of Public Service Broadcasters. But such a model would create at least as many problems as it might resolve. For the commercial Public Service Broadcasters, such as ITV and Channel 5, it would mean that part of their operations would be overseen by the PSBC regulator, and part would remain with Ofcom. This model of a 'wide' remit PSBC was not put forward as an option in the Consultation Paper, in my view correctly. So where in this paper the term PSBC is used, it is taken to be a 'narrow' public service regulator dealing essentially with the BBC.
5. This Review has the benefit of evidence from nearly ten years of operation of the current system. It also presents an opportunity to re-visit some of the issues of principle which should determine a good regulatory system. Foremost of these is the split between governance and regulation.
6. Governance and regulation need to be thought about as separate activities. Governance is about how an entity organises itself in its boards, committees and other decision-making bodies, setting strategic objectives and budgets for the organisation, seeking to be effective and efficient, as well as accountable to those it serves and those to whom it is responsible. The final authority of the entity, generally a Board or a Council, will be accountable for the organisation and will speak for its activities. Regulation is the exercise of oversight by an authority to ensure that the regulatee is fulfilling the obligations placed upon it, for example by Charter, by statute or direct from the regulatory authority under powers granted to it in areas such as standard setting. A regulator should be independent of those it regulates.
7. Accountability should be thought of not as a function separate from governance and regulation, but as an inherent part of a good governance and regulatory system. The interests of accountability are well served by a model in which bodies have clear responsibilities; and poorly served by a model in which the parties have overlapping responsibilities with the potential for confused accountability.
8. There are some criteria which any revised model for the BBC needs to satisfy:

- i. Does the model provide a clear and independent split between those responsible for governance and those responsible for regulatory functions?
  - ii. In respect of regulation, is there clarity about where responsibilities lie, such that any duplication is minimised?
  - iii. Is there confidence that the model provides adequate protection for those outside the BBC who may be affected by the Corporation's activities, in particular in respect of competition issues?
  - iv. In respect of governance, is there a clear split between executive and non-executive functions?
  - v. Are the responsibilities placed on the Board of the BBC clear and consistent with the obligations placed on it by the Charter, Agreement and related documents?
  - vi. Is there a clear line of accountability from the BBC to the Licence Fee payers and to Parliament in respect of the obligations placed on the Corporation?
9. Overarching all these considerations there needs to be confidence that, if a 'correct' governance system is laid alongside a 'correct' regulatory system, the Executive of the BBC would still have the vitality to produce distinctive, high quality and innovative programming. Everybody wants a BBC which is editorially independent, properly answerable to Licence Fee payers and accountable to Parliament. We also want a BBC which in its programming is not risk averse, but vibrant and occasionally irreverent.
10. The remainder of this Chapter is set out in the following order:
- Section 1 looks at the BBC Trust option;
  - Section 2 looks at the proposal that the regulatory responsibility should be in a new body, OfBeeb;
  - Section 3 looks at the proposal that the regulatory responsibility should move to Ofcom;



- Section 4 discusses some of the detailed aspects of a unitary Board for the BBC, such as membership and appointments; and
- Section 5 sets out conclusions on the issue of models and the unitary Board.

## **Section 1.**

### **The BBC Trust Option**

11. The existing Trust model under the BBC Charter has a two-tier Board. The Executive Board (which has on it a number of Non-Executive Directors) is responsible for the day-to-day operations of the Corporation. The Trust Board has oversight of the operational performance of the Executive Board, but also has responsibility for the strategic direction of the Corporation. In addition it has powers to issue Service Licences for all BBC television and radio channels, and the power, subject to consultation with Ofcom in respect of market impact, to alter Service Licences via a Public Value Test process. Through its Editorial Committee it has regulatory oversight of all of the BBC's output.
12. There are areas where the Trust has done good work. These need to be safeguarded in whatever model is eventually put in place. In particular, in the responses to the Consultation Paper, it was felt:
  - i. that the BBC Trust's work in the issue and review of Service Licences, together with the Public Value Tests, was an important step forward relative to what had gone earlier. This is considered further in Chapter 2;
  - ii. that the out-reach work in respect of audiences carried out by the Trust needed to be maintained. This is considered in Chapter 3; and
  - iii. that the work done by the Editorial Committee of the Trust was of considerable value. The issue of editorial oversight is considered in Chapter 4.
13. Whilst the Trust has achieved some success, it has also been the subject of criticism. The particular issues around accountability for remuneration and IT systems have illustrated the confusion about where responsibilities lie between the Executive and the Trust. There is also concern about duplication of effort. The Annual Budget has to go through a full approval process, involving Non-Executives at the Executive Board level, and again at the Trust Board level. The

Audit Committee of the Executive Board and the Value for Money Committee of the Trust Board often look at the same issues.

14. It might be possible to reform the current arrangements to improve some of the weaknesses of the Trust model. But there are two weaknesses which are inherent in the structure and which would be hard to eliminate: (i) the model involves a two-tier board and there will always be a residual confusion as to governance responsibilities in such an arrangement; and (ii) the model conflates governance and regulation, contrary to the broad principle that they should be kept separate.

### The Two-Tier Board Structure

15. In respect of 14(i) above, since the BBC Trust Board is part of the Corporation and stands above the BBC Executive Board, the BBC is recognised as having a two-tier board structure. Within the governance arrangements for the BBC, there is a paper entitled 'Review of BBC Internal Governance', dated December 2013 and signed by both the Trust Board and the Executive Board.<sup>5</sup> The paper sets out how they are to work together and where responsibilities lie. As a generalisation it is intended that operational issues should lie with the Executive Board, and strategic issues with the Trust Board. But this distinction on paper breaks down in the face of events. There are many day-to-day functions, for example running an IT system, which are plainly operational matters for the Executive Board, but when they go badly wrong become a matter for the Trust Board. It is inevitable that there will be overlaps, and gaps, between the operation of the two Boards. When things do go wrong, there will always be the question: "who knew what?" For this reason good governance, certainly within the United Kingdom, holds that a single tier Board is to be preferred to a two-tier system.
16. It is a truth commonly observed that good governance does not guarantee good decision-making. But at least in a single Board structure there is no doubt as to which Board is responsible when things go wrong, and where the responsibility lies for putting things right.

### Governance and Regulation

17. In respect of 14(ii) above, the BBC Trust is set up under the Charter and is part of the BBC; it is the sovereign authority of the Corporation. The Chair of the Trust also carries the title of Chair of the BBC. The Trust appoints the Director General

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<sup>5</sup> Patten and Hall (2013), *Review of BBC Internal Governance: A joint review by the BBC Trust and the BBC Executive Board* [Online]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/governance\\_review\\_2013.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/governance_review_2013.pdf)

(Chief Executive) and is responsible for the Corporation's Strategic Plan. It is part of the governance framework of the BBC and must speak for it.

18. The Trust also oversees all of the Corporation's activities, to ensure that it complies with its responsibilities under the Charter, the Agreement and Service Licences, and that it acts in the public interest, using mechanisms such as Public Value Tests. It is the principal regulatory body of the BBC.
19. The BBC Trust, therefore, brings together in the Trust Board both governance responsibilities for the BBC and regulatory responsibilities. They do not sit comfortably together. It is for this reason that some argue that the Trust is "both cheerleader and regulator".
20. Given that the BBC Trust is the sovereign body of the BBC, it would be difficult to re-draw the roles to achieve a clear separation, making the BBC Executive fully responsible for operational and strategic matters, and leaving the Trust in a purely regulatory role. Even if it were possible to re-draw the lines in the Charter in this manner, one would still be left with two organisations sitting in one legal entity. Not surprisingly, best practice requires regulator and regulatee to be in different legal entities.
21. Overall I conclude that the BBC Trust model is flawed. It conflates governance and regulatory functions within the Trust, which leads to confusion about the Trust's role. In its governance mode the BBC operates a two-tier board structure which leads to confused responsibilities.
22. I also conclude that the BBC should have a single unitary Board, clearly responsible for governing its activities; and that regulatory functions in respect of the BBC should be in a separate body from the BBC.

## **Section 2.**

### **The OfBeeb Option**

23. The Consultation Paper set out, as its second option, a model in which the primary regulator of the BBC would be a special regulator, tailor-made to regulate the Corporation. The arguments made in favour of this OfBeeb model are:
  - i. it helps to provide a clear split between BBC governance issues, which would remain with the unitary Board of the Corporation, and the regulatory

issues which would move to OfBeeb. There would thus be a clear organisational separation between regulator and regulated entity;

- ii. the BBC is a special category organisation, with a privileged funding model; and the level of public funding, separate from the commercial funding of other broadcasters, requires special scrutiny, best done by a separate regulator;
- iii. the public expects the BBC to operate to higher standards than other broadcasters, especially in the area of editorial content, and these standards are best overseen by a bespoke hands-on regulator; and
- iv. OfBeeb would be able to concentrate on the BBC, rather than be distracted by other broadcasters, permitting greater accountability through regular reports of its activities to Licence Fee payers, Parliament and other stakeholders.

24. In relation to 23(iii) above, the BBC publishes a handbook of its Editorial Guidelines. Whether or not the BBC's standards are 'higher' than the rest of the industry, it certainly operates with a different handbook than other broadcasters whose own internal codes tend to follow more closely the Ofcom Broadcasting Code. The BBC Guidelines are different in two main respects:

- i. the Guidelines are more prescriptive about how journalists and programme makers carry out their duties, i.e. they deal at some length with inputs, as well as what is actually broadcast; and
- ii. the Guidelines go much wider than the Code for other broadcasters, covering all of the BBC's activities including on-line material which Ofcom does not look at.

25. As the Consultation Paper made clear, the OfBeeb model was proposed in the Burns Report when it looked at the issue ten years ago, ahead of the 2006 Charter Review. More recently the CMS Select Committee Report of February 2015 also proposed a variant of this model.

26. The detailed powers of the regulator, however, were different in the models proposed by the Burns Report and by the CMS Select Committee Report of February 2015. The Burns Report proposed a PSBC which maintained direct control powers, for example, to reject or approve a strategic plan. The CMS Select

Committee Report proposed that the regulator should have oversight powers, investing the direct powers in the BBC Board.

27. The PSBC proposed in the CMS Select Committee Report was "not to have a formal role in approving the BBC's overall strategy: its duty in the first instance would be to scrutinise the BBC's strategy in a very public way, publishing its views on the BBC Board's performance and future priorities. Similarly, the PSBC would scrutinise individual services against their purpose remits, as has happened with service licence agreements under the Trust, holding the BBC to account for performance and making recommendations on spending priorities and for changes to service remits. The PSBC would not formally set individual budgets...."<sup>6</sup>
28. If the OfBeeb model were adopted, it should be said that the oversight powers proposed in the CMS Select Committee Report would be more appropriate for a regulator, maintaining the separation between governance and regulation.
29. The argument for a separate OfBeeb was made by one commentator and summarised in the sentence: "The BBC is big enough, important enough and different enough to have its own regulator."<sup>7</sup> This soundbite requires analysis:
  - 'Big enough': that size should be a factor in determining whether an organisation would merit a separate regulator is an unusual regulatory principle. If anything, the argument points the other way: that larger organisations should come under the same body as smaller organisations to ensure that all receive proportionate and even-handed treatment;
  - 'Important enough': this would generally dictate the level of attention and focus given to the organisation by the regulator, rather than the need for a separate regulator. In some regulatory systems, important organisations are subject to 'close and continuous' regulatory scrutiny, beyond the scrutiny of less important organisations; and
  - 'Different enough': this is a stronger argument, similar to the argument in 23(ii) and 23(iii) above. A number of responses to the Consultation Paper argued that the level of public funding and different editorial standards put the BBC into a special category. But difference does not in itself

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<sup>6</sup> House of Commons Culture, Media and Sport Committee (2015). 'Licence Fee Payers' Interests: Public Service Broadcasting Commission' (para.302), in *Future of the BBC: Fourth Report of Session 2014–15* [On-line]. Available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmcomeds/315/315.pdf>

<sup>7</sup> Starks, M (2015). 'The Ofcom Option', in *Regulating the BBC as a Public Service* [On-line]. Available at: <http://www.vlv.org.uk/broadcasting-files/VLV-final-Starks.pdf>

necessitate a separate regulator, unless the existing regulator has no capacity to flex its behaviour according to the broadcaster involved. Within a single industry ‘difference’ speaks more to the need for flexible regulation than separate regulation.

30. A number of respondents to the Consultation argued that an advantage of OfBeeb was that it could “represent the interests of licence fee payers and hold the BBC Board to account.”<sup>8</sup> The Regulator should hold the BBC to account in respect of the BBC’s regulatory obligations. But the primary responsibility for the interests of Licence Fee payers should lie with the unitary Board.
31. One of the characteristics of the current model is that the Trust represents the interests of the Licence Fee payers: it is a part of the BBC and charged with this responsibility under the Charter. But it implies that the BBC Executive is to a degree free from this responsibility. Whatever model is chosen, it is important that the members of the unitary Board recognise that the responsibility for the interests of Licence Fee payers rests with them. The link between Licence Fee payer and Licence Fee recipient should be direct, not via the regulator. The role of the regulator in this regard is a secondary one.
32. There are arguments made against the OfBeeb model:
  - i. as referred to in the Consultation Paper, a ‘single regulator–single regulatee’ relationship is hard to manage: it is difficult for a single regulator, with only one organisation to oversee, to retain an industry perspective, such that the relationship either becomes too close, or too adversarial. The point was also referred to in the Burns Report: “It is increasingly regarded a poor regulatory practice to institute regulators with only one “client”: this model has been tried and rejected in the energy sector, for example”;<sup>9</sup>
  - ii. it would leave the BBC with two public broadcasting regulators, one specifically focused on BBC issues, the other looking at the BBC alongside other Public Service Broadcasters, as well as alongside commercial broadcasters. This is likely to lead to some confusion of regulatory roles and accountability.

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<sup>8</sup> Voice of the Listener & Viewer (2015). *Response by Voice of the Listener & Viewer to the BBC Charter Review DCMS Green Paper Public Consultation* (s.207) [On-line]. Available at: <http://www.vlv.org.uk/broadcasting-files/VLV-Submission-to-DCMS-Charter-Review-Oct-2015-FINAL.pdf>

<sup>9</sup> Burns, T. (2004). *Independent panel on BBC Charter Review* (s.5.29) [On-line], Available at: [http://webarchive.nationalarchives.gov.uk/+/http://www.bbccharterreview.org.uk/pdf\\_documents/041130\\_emerging\\_themes.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.bbccharterreview.org.uk/pdf_documents/041130_emerging_themes.pdf)

33. The following paragraphs look at how, in the OfBeeb model, the relationship between OfBeeb and Ofcom might be structured.

#### Relationship between OfBeeb and Ofcom

34. There is at present a Memorandum of Understanding between the BBC Trust and Ofcom.<sup>10</sup> It refers to a large number of regulatory areas in which the two organisations must work together, but the most important are:
- i. programme quotas: Ofcom is responsible for overseeing a regime of targets and quotas in the areas of:
    - news and current affairs;
    - original productions;
    - programming for the Nations and the regions;
    - out of London production; and
    - programming from independent producers;
  - ii. editorial standards: the Trust is the sole regulator with regard to ‘accuracy and impartiality’ and commercial references in programmes for the BBC's public broadcast services and for its on-line services. However, Ofcom has powers to regulate the BBC's UK Licence Fee funded broadcasts and UK streamed services with regard to editorial standards in seven areas, chief of which concern protecting under 18s; harm and offence; product placement; fairness and privacy;
  - iii. complaints: whilst complaints in respect of editorial ‘accuracy and impartiality’ may only be made to the BBC, with appeals heard by the BBC Trust, complaints in respect of most other matters may be made direct to Ofcom; and
  - iv. competition issues: Ofcom has an important role to play in cases where the Trust is considering significant new service proposals or significant changes to existing services. The Trust is responsible for conducting Public Value Tests (PVTs) to determine whether it will permit such changes, and the related Market Impact Assessment conducted by Ofcom is a key input into that process. Ofcom is also involved at the beginning of

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<sup>10</sup> *Memorandum of Understanding Between The Office of Communications (Ofcom) and the BBC Trust* (2007) [On-line]. Available at: [http://www.ofcom.org.uk/content/about/how-ofcom-is-run/committees/ofcom-bbc/Memorandum\\_of\\_Understanding\\_between\\_The\\_Office\\_of\\_Communications\\_\(Ofcom\)\\_and\\_the\\_BBC\\_Trust.pdf](http://www.ofcom.org.uk/content/about/how-ofcom-is-run/committees/ofcom-bbc/Memorandum_of_Understanding_between_The_Office_of_Communications_(Ofcom)_and_the_BBC_Trust.pdf)  
Amendments to the Memorandum of Understanding are available on-line at: <http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/ofcom-bbc-joint-steering-group/?a=0>

the process to provide advice on whether the 'significant' threshold for a PVT has been crossed.<sup>11</sup>

35. One suggestion is that the existing MOU between the BBC Trust and Ofcom could be adapted from its present form, and that the regulatory responsibilities currently placed on the Trust could pass to OfBeeb. Recognising that this would still leave a significant level of responsibility with both OfBeeb and Ofcom, some commentators have sought to suggest a different split of responsibilities.
36. In the CMS Select Committee Report of February 2015 it was proposed that Ofcom, in addition to its existing responsibilities for programme quotas and competition issues, should also take responsibility for all content regulation, including overview of editorial standards and complaints. OfBeeb would be responsible for the issuance of the Operating Framework and Licences, oversight of the BBC's performance against these obligations and initiating and concluding on PVTs.
37. This 'OfBeeb Light' model, with the list of oversight duties split between OfBeeb and Ofcom as set out in the paragraph above, begs the question of who would be responsible for regulating the BBC? The answer would be that the BBC would be regulated by two public broadcasting regulators with split responsibilities. The primary responsibility for holding the BBC to account in respect of its Operating Licences would be OfBeeb; but it would have limited involvement in setting quotas for Licences, not be involved in the overview of editorial standards, not be involved with complaints mechanisms, and not be involved in the BBC's interface with market partners and competitors. Removed from direct line of sight of a number of core regulatory activities in respect of the BBC, it is not clear that OfBeeb would be able to carry out its responsibility effectively.
38. An alternative suggestion made is that some of the activities covered by the MOU should move in the opposite direction, from Ofcom to OfBeeb.<sup>12</sup> The 'OfBeeb Heavy' proposal, in its widest form, is that all content regulation carried out by Ofcom in respect of the BBC should move to OfBeeb. Even if moving activities out of Ofcom into OfBeeb were the right thing to do, it would still leave Ofcom involved in the quota system for all Public Service Broadcasters and with a responsibility for periodic reviews of the PSB market. Further, nobody suggests that Market Impact Assessments, or the market judgements in respect of other competition issues, could come from anyone other than Ofcom. So Ofcom would

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<sup>11</sup> Information on the 'significance' test is set out in Chapter 2, paragraph 23.

<sup>12</sup> Starks, M (2015). 'A BBC Specific External Regulator', in *Regulating the BBC as a Public Service* [On-line]. Available at: <http://www.vlv.org.uk/broadcasting-files/VLV-final-Starks.pdf>



continue to have an important role, and the BBC would be left with two public service regulators; both would take a keen interest in its affairs, but neither would have full responsibility for regulatory oversight.

### **Section 3.**

#### **The Ofcom Option**

39. The Consultation Paper set out as its third option a model in which all regulatory matters relating to the BBC would be consolidated within Ofcom.
40. Ofcom was established as a body corporate by the Office of Communications Act 2002. Ofcom is the regulator for the UK Communications industries with responsibility across television, radio, postal, telecommunications and wireless communications services.
41. Section 3(1) of the Communications Act 2003<sup>13</sup> states: “It shall be the principal duty of Ofcom, in carrying out their functions (a) to further the interests of citizens in relation to communications matters; and (b) to follow the interests of consumers in relevant markets, where appropriate by promoting competition.” Under Section 3(2)(a) Ofcom is required to secure: “the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a wide variety of tastes and interests.”<sup>14</sup>
42. Under Section 198 of the Communications Act 2003<sup>15</sup> Ofcom is authorised “to regulate the provision of the BBC's services and the carrying on by the BBC of other activities for purposes connected with the provision of those services”, to the extent that provision to do so is contained in the Charter, the Agreement, the Communications Act and Part 5 of the Broadcasting Act 1946.
43. It is clear that Ofcom, in addition to its role as the economic regulator of the broadcasting industry, is also a public service regulator. Its constitution requires it to consider the interests of citizens.<sup>16</sup> In a number of its regulatory judgements it

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<sup>13</sup> Communications Act (2003). ‘Part 1 Functions of OFCOM’ (s.3 (1)) [On-line]. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/3>

<sup>14</sup> Communications Act (2003). ‘Part 1 Functions of OFCOM’ (s.3 (2)(c)) [On-line]. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/3>

<sup>15</sup> Communications Act (2003). ‘Part 3 Television and Radio Services’ (s.198) [On-line]. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/198>

<sup>16</sup> Communications Act (2003). ‘Part 1 The Functions of OFCOM’ (s.3 (1)(c)) [On-line]. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/3>

has to consider public value issues, not least in its review of Public Service Broadcasting as set out under Section 264 of the Communications Act 2003.<sup>17</sup>

44. Ofcom does not treat all broadcasters alike. It does look separately at those broadcasters who carry public broadcasting obligations in exchange for certain privileges. In particular Ofcom oversees Channel 4's specific accountability arrangements comprised of the Statement of Media Content policy (SMCP); this is an annual report which details how Channel 4 has delivered against its public remit as outlined in legislation and how it intends to meet its duties in the year ahead. The SMCP is developed in consultation with Ofcom and the accountability process includes a formal annual scrutiny session with Ofcom and its Content Board. At the end of the regulatory review process Ofcom sends a public letter from the Chair and Chief Executive, which provides an assessment of Channel 4's delivery against its public remit. The Digital Economy Act 2010 also requires Ofcom to conduct a periodic and longer-term review of Channel 4's assessment of its remit delivery, the last of which was published in July 2015.
45. An important part of the regulatory work of Ofcom is carried out in its Content Board. Whilst all broadcasters are subject to the Ofcom Broadcasting Code which requires 'due impartiality and due accuracy', the Content Board does interpret this requirement according to the broadcaster under review. The context of any complaint, and the expectations of the audience, is taken into account. A complaint about due impartiality of a news item would be determined in a different light if the broadcaster were ITN as opposed to, say, a broadcaster backed by the Government of a foreign country. In short, Ofcom does have the flexibility to regulate different broadcasters differently, and has experience of doing so.
46. Against this background the strongest, and simplest, argument in favour of this third option is that Ofcom is already the public service regulator for the United Kingdom's broadcasting industry, and already has regulatory powers in respect of the BBC; and that in these circumstances there needs to be a very strong argument for setting up a second public services regulator.
47. The arguments made in favour of the Ofcom option are:
  - i. as with the OfBeeb model, it provides a clear split between governance and regulatory functions;

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<sup>17</sup> Communications Act (2003). 'Part 3 Television and Radio Services' (s. 264) [On-line]. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/264>

- ii. as commented above, Ofcom is already a public sector broadcasting regulator, with responsibility “to further the interests of citizens in relation to communications matters”.<sup>18</sup> It already has regulatory responsibilities for a number of BBC activities. It already has powers to regulate different broadcasters differently, and has experience of doing so;
- iii. Ofcom has the capacity to look at the BBC in the context of the market as a whole. Current trends will bring the BBC into greater contact/competition with commercial companies, ranging now beyond the traditional network broadcasters to include platform operators, on-line media players, broadband networks and others. The competitor landscape is further complicated by partnership arrangements between the BBC and external players. These trends argue for a regulator with a wide knowledge of the industry, rather than one with a narrow focus;
- iv. Ofcom has scale and credibility. It has considerable resources. It would be a strong regulator to match a strong BBC unitary Board;
- v. bringing all regulatory oversight of the BBC under one roof would obviate the need for a Memorandum of Understanding which would need to exist in the OfBeeb model between OfBeeb itself and Ofcom; and
- vi. there are sure to be operational efficiencies in seeking to maintain one outstanding regulator of public broadcasting services, rather than two with some shared responsibilities.

48. Arguments in favour of Ofcom have been made in a number of replies to the Consultation Paper, but were also referred to in the Burns Report: “Those who argue for Ofcom mention that it would be strange to set up a regulator for communications and broadcasting in general, and then to exclude the BBC from its remit indefinitely, and that it is vitally important for the future of the PSB that someone is able to look at the whole of the broadcasting ecosystem. In its recent publications on public service television Ofcom has demonstrated that it has already developed a good understanding of the issues. It has framed the BBC’s performance within the wider provision of PSB, thus providing for the first time an accurate measure of the BBC’s contribution as a whole.”<sup>19</sup> This argument had

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<sup>18</sup> Communications Act (2003). ‘Part 1 The Functions of OFCOM’ (s.3 (1)(a)) [On-line]. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/3>

<sup>19</sup> Burns, T (2004). *Independent Panel on BBC Charter Review* (para. 5.25) [On-line]. Available at: [http://webarchive.nationalarchives.gov.uk/+/http://www.bbccharterreview.org.uk/pdf\\_documents/041130\\_emerging\\_themes.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.bbccharterreview.org.uk/pdf_documents/041130_emerging_themes.pdf)

force when written in 2004; it has still more force today following a further ten years of Ofcom regulatory experience of public service broadcasting.

49. It would be important to ensure Ofcom's regulation of the BBC had a funding stream that was secure and separately identifiable from its wider funding arrangements. The regulation of the BBC is currently funded through the Licence Fee, with the BBC Trust receiving its funds from the BBC, and Ofcom receiving fees from the BBC in respect of its regulatory role. The same principle should apply in the future if all regulation passed to Ofcom. It would need to account for its expenditure in this area through its Annual Report and Accounts.
50. The arguments made against Ofcom are:
  - i. that Ofcom is already a powerful organisation. To give it full responsibility for the BBC invests it with too much power. Given the importance of the media sector, some plurality of broadcast regulators is to be welcomed. If it were given responsibility for regulating the BBC as well as the wider market, it would effectively be able to determine the relative size of different companies;
  - ii. that there would be a conflict of interest for Ofcom if it had responsibility both for the proper conduct of the commercial broadcasting market and for regulating the BBC in the public interest; and
  - iii. that Ofcom is ill-equipped with the necessary skills to carry out much of the specialised and focused regulatory work that is necessary to oversee the BBC. Further, Ofcom's scope of regulatory reach in editorial matters is insufficient for the work required in connection with the BBC. This work would be better done by OfBeeb.
51. In connection with 50(i) above, it is right to say that Ofcom is already a powerful regulator in determining what the competitive landscape looks like. Given the convergence of the broadcasting and telecommunications industries, and the size of some of the companies within this space, it is as well that Ofcom has considerable power. Further, as noted above, giving the BBC a unitary Board, with the ability to speak with one voice, will create a more powerful BBC. It will need a powerful regulator, with significant resources and wide experience across the market, to be able to match it.

52. In connection with 50(ii) above, Ofcom is not solely an economic regulator; it already has responsibility for oversight of all public service broadcasters and is already charged in its existing functions with responsibility for meeting the public interest. Public sector regulators generally have a number of statutory objectives, and often find that these objectives are not aligned in the actions called for in a particular set of circumstances. They have to move forward making difficult judgements in which the public interest should have primacy. Ofcom has the experience to make these types of judgements.
53. In connection with 50(iii) above, whether or not Ofcom has all the expertise and powers necessary to take full regulatory responsibility for the BBC, it has a headstart over OfBeeb on the grounds that the latter does not actually exist. In practice a good deal of the detailed regulatory expertise in respect of the BBC lies in the BBC Trust, particularly in the area of Service Licences. I would expect those with this expertise to transfer to whichever regulatory body took over the related role. The changes necessary to widen the scope of Ofcom's editorial oversight are discussed in Chapter 4.
54. Whatever additional resources Ofcom were to receive, it should be recognised that it already has significant expertise in most of the relevant areas:
- i. it is already deeply involved in Public Service Broadcasting issues such as the quota system and publishing PSB Reviews;
  - ii. it is already heavily involved in editorial issues, having to adjudicate 'accuracy and impartiality' issues for other parts of the broadcasting industry; and
  - iii. it is already heavily immersed in complaints for the rest of the industry, and specifically in complaints against the BBC in the area of 'harm and offence'.
55. For this analysis, the more relevant question is not whether Ofcom has at present all the expertise and powers necessary to carry out the regulatory duties that might be laid upon it, but whether further involvement with the BBC would prejudice its ability to carry out its important existing duties, or in other ways disrupt the institution. The possibility of this must exist but, if the decision were taken by Government to add to its responsibilities, it would be for the Ofcom Board to take steps to minimise the impact. Further involvement with the BBC would add to its responsibilities for issues around the interests of citizens and

public value, with an attendant increase in reputational risk to the organisation, but these changes come in the area of the broadcasting industry with which the Ofcom Board is already familiar.

#### The organisation of BBC regulatory activities within Ofcom

56. If the decision were taken to pass the full regulatory responsibility for the BBC to Ofcom, I recognise that this would raise a substantial number of issues for the Ofcom Board. Whilst they have experience in almost all areas that would pass to them, the increased responsibilities would be considerable. They would need to determine how the additional responsibilities were best discharged. I set out some thoughts below.
57. **Content issues.** Ofcom and its Content Board have responsibility for the editorial standards included within the Ofcom Broadcasting Code. The Content Board also has responsibility for handling complaints in respect of some aspects of the BBC's work and in respect of all complaints relating to other broadcasters. It seems likely that adding the full BBC work would more than double the number of appeals coming to the Board, and they would need to staff the organisation accordingly.
58. It should be noted that the Content Board is set up as a separate board within Ofcom by the Communications Act 2003. Its functions are set by the Ofcom Board but must include "functions in relation to matters that concern the contents of anything which is or may be broadcast ...."<sup>20</sup> The statute requires that the Content Board be chaired by a member of the main Ofcom Board and that one other member of the main Board must also be a member. The Ofcom Board appoints the Content Board, and it includes a number of external members with specific editorial backgrounds. The Broadcasting Code is published by Ofcom itself, with advice from the Content Board.
59. **Competition issues.** Ofcom already has significant responsibilities for competition issues. It would inherit responsibility from the BBC Trust for the regulatory elements of Fair Trading, Competition and Distribution activities. These are important issues which Ofcom already understands and has commented on in its wider role.

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<sup>20</sup> Communications Act (2003). 'Part 1 Functions of OFCOM', (s.13 (2)(a)) [On-line]. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/13>

60. Review of **performance against Operating Licences**, including ‘step-in’ rights and changes to Operating Licences (detailed in Chapter 2). Ofcom would want to consider where this body of work was done. The regulatory review work in respect of the Channel 4 Licence, referred to in paragraph 44 above, is done within the Content Board. It might be possible to expand that Board’s role to include oversight of the BBC Operating Framework and Licences, as well as oversight of changes to these Licences. On the other hand, this is a very considerable piece of work requiring a concentrated focus on the BBC’s performance; and it might be considered appropriate to establish a separate body within Ofcom, the ‘BBC Licence Board’, to carry out this detailed work.
61. As commented, the Content Board of Ofcom is established as a separate board. The idea of placing a specific responsibility within a separate board or committee of a related organisation also has a precedent in the decision to set up the Monetary Policy Committee of the Bank of England. It would have been possible when it was established in 1997 to have given decision-making responsibility over monetary policy (previously lying with Government) direct to the Bank of England. The decision to give the powers to a policy Committee of the Bank gave greater prominence and transparency to the activity, allowed for the presence of external members, whilst making it possible for the Committee to be supported by the Bank’s staff.
62. However the work done by Ofcom in respect of the BBC were organised (whether in the mainstream of Ofcom’s operations, in the Ofcom Content Board or in a separate Ofcom ‘BBC Licence Board’) it would be expected that Ofcom would bring these work streams together in an Annual Report, detailing how it had discharged its regulatory duties.
63. I would expect any arrangements in respect of a separate board to be along similar lines to the Ofcom Content Board. It would be important that a separate board had a clear link back to Ofcom (for example, by the Chair of the board also sitting on the main Ofcom Board) so that it came under the umbrella of Ofcom. As noted above, Ofcom would be required to prepare an Annual Report, providing an overview of how its BBC regulatory duties had been delivered. To set up a completely independent ring-fenced board, with no link back to the Ofcom Board, would in practice be to set up a second regulatory body, with the related concerns set out in this Chapter.

## **Section 4.**

### **The BBC Board**

64. There was a general consensus amongst respondents to the Consultation Paper that the BBC should have a unitary Board. Few elaborated on how this Board might work, or what its responsibilities would be; most commentators moved quickly on to their preferred regulatory model for holding the BBC to account. This Review places considerable emphasis on the responsibilities of the unitary Board. It will be the quality of the people on the Board, and their ability to deal with the significant obligations placed upon them, that will determine the future success of the BBC, to a greater extent than the issue of what regulatory structure is agreed upon.
65. There are high-level tests that such a re-design of the Board would be expected to meet:
- i. Does it provide an appropriate governance structure to ensure the BBC meets the obligations placed on it by the Charter and related documents?
  - ii. Does it protect the BBC's independence?
  - iii. Does it uphold the interest of Licence Fee payers, with responsibility for value for money?
  - iv. Does it deal fairly with external commercial and other counterparties?
  - v. Does it enable the BBC to remain distinctive and relevant in a fast-moving world?
66. It would be expected that the Board would follow, as far as is appropriate for a public sector body, the Combined Code of the Financial Reporting Council.<sup>21</sup> This Code has developed over a considerable period, with periodic reviews including those by Cadbury (1992), Hampel (1998) and Higgs (2003). The unitary Board would be established along the following lines:
- i. a Non-Executive Chair;
  - ii. a Non-Executive Deputy Chair, who would fulfil the role of Senior Independent Director as set out in the Combined Code;

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<sup>21</sup> Financial Reporting Council (2014). *The Corporate Governance Code* [On-line]. Available at: <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf>



- iii. a majority of Non-Executive Directors; and
  - iv. a small number of Executive Directors, to include the Director General.
67. Collectively the Board would have responsibility for ensuring that the Corporation's obligations under the Charter and related documents were met, and that the interests of Licence Fee payers were also properly met.
68. On this last point, a number of respondents to the Consultation Paper argued that the Regulator should have responsibility for representing the interests of Licence Fee payers. The Regulator would have an important responsibility in this area, but the responsibility would be one of oversight, that the job were being done properly. As argued already in this Review, the primary responsibility for the interests of Licence Fee payers should lie squarely with the BBC Board.
69. The Board would also be accountable to Parliament. It would be required to lay its Report and Accounts before Parliament, and the Report would need to give a full analysis of how the Board had met its obligations. It must be expected that the Chair and Director General of the BBC, and other members of the Board as necessary, would be answerable to Parliamentary Committees.
70. As noted above, the BBC Report and Accounts would need to give a full analysis of how the Board had met its obligations. I would expect it to include the following reports:
- i. a Report from the **Audit Committee**, responsible for ensuring that the financial information was accurate and that financial control and risk systems were robust. In addition to financial information and control systems, the Committee should keep under review some of the wider value for money issues that have been dealt with recently by the BBC Trust;
  - ii. a Report from the **Remuneration Committee**, responsible for determining appropriate levels of remuneration of Executive Directors and other senior executives of the Corporation;
  - iii. a Report from the **Nominations Committee**, responsible for making senior appointments to the Corporation and for oversight of succession planning.

The Annual Report and Accounts would have a report from each of the above Committees, setting out the work that had been done during the year. There are other areas of activity which, whether the work is done in a committee or in the full Board, would need to be covered in the Annual Accounts through a written report.

- iv. A Report on **Operating Framework and Licences** performance. The Annual Report should include a review by the BBC of its performance against the agreed Operating Framework and Licences, as detailed in Chapter 2. It needs to be agreed by the Board, as a transparent record of what has gone well, and what has gone less well and needs improvement. It needs to be balanced. Awarding itself full marks on each occasion would increase, rather than reduce, the pressure on the Corporation;
- v. a Report on **Editorial and Complaints** issues. This report should cover the work the Board has done in reviewing Editorial Standards, and in particular any changes it has made to the BBC Editorial Guidelines. The report should also deal with complaints against the BBC, covering:
  - the number of complaints, by broad heading;
  - the speed with which they had been dealt with, against pre-agreed targets; and
  - the number of complaints appealed to the Regulator.

The Report should also cover a commentary on what the Board had learnt from the complaints experience and any proposed changes to the system. As discussed further in Chapter 4, the Regulator would take a keen interest in editorial matters, but the primary responsibility for upholding editorial independence and the high editorial standards of the BBC would rest with the unitary Board;

- vi. a Report on the BBC's **Distribution** activities. An increasingly important part of the BBC's activities is the manner in which the BBC makes its content available through the internet and through other parties' distribution platforms (for example, a Sky platform). The BBC Trust's paper of October 2015<sup>22</sup> sets out a distribution framework for the BBC. It requires the BBC to publish on a regular basis its compliance with the Framework and detail relevant expenditures. Even if the Framework were

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<sup>22</sup> BBC Trust (2015). *Distribution Framework for BBC Services* [On-line]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our\\_work/distribution\\_framework/2015/distribution\\_framework.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/distribution_framework/2015/distribution_framework.pdf)

amended as part of Charter Renewal, the obligation on the BBC Board to report on its performance in this area should remain;

- vii. a Report on **Competition and Fair Trading** issues. This report should cover the work done by the Board in ensuring that it maintains a proper structural separation between its commercial and public service activities and its dealings with the commercial sector. The BBC carries out most of its commercial business within BBC Worldwide, and it should report transparently on these activities. A Fair Trading Committee already exists as part of the BBC Executive arrangements and needs to be continued. The BBC is under special obligations in relation to its conduct in the markets in which it operates. The BBC's funding means it must comply with European State Aid Law; and the BBC is also subject to UK and European Competition Law; and
- viii. a Report on the BBC's **Consultation and Out-reach** programme. The Charter should place on the Board responsibilities to communicate and take into account the views of the BBC's audience, both generally and in respect of the regions and Nations of the UK. These obligations are discussed in Chapter 3. The Board's Report should cover its work in this area.

- 71. As noted, it is for the Board to consider which of the work streams set out in (iv) to (viii) above should be done in Committee and which in the full Board. Even if done in the full Board, it is proposed that one Non-Executive Director should be identified with each work stream and should sign the related Report that appears as part of the BBC's Annual Report and Accounts.
- 72. It is clear that the responsibilities placed upon the Non-Executives of the BBC would be considerable. They need to be selected with care, ensuring that those chosen have the range of skills, including knowledge of the creative industries, necessary for the specialist review work, but also the experience to contribute to the unitary Board as a whole. In certain specialist areas, for example Editorial and Complaint issues, the Non-Executive identified to lead the work would need to have recognised skills in the subject.
- 73. I would expect the time commitment for Non-Executive Directors to be considerable, far greater than the time spent by the existing Non-Executives on the BBC Executive Board, and similar to the time being spent by a number of the BBC Trustees.

## Appointments to the Board

74. A considerable amount of attention will be paid to where responsibility lies for appointments to the Board.
75. The majority of respondents to the Consultation Paper who covered governance issues stressed the importance of the BBC being independent of the Government, and seen as such both in the UK and overseas.
76. A number of respondents argued that appointment of the Chair should be made by the Regulator, since this would signal clearly that the candidate selected was independent of Government. In general, notwithstanding the Channel 4 precedent<sup>23</sup>, it would be considered unusual practice for a Regulator to have the lead role in selecting a candidate to lead the Board of a regulated entity, because of the conflict that arises when regulators are required to make a judgement about the quality of the regulatee's management and its capacity to carry out its responsibilities. On the other hand it is quite usual for the Regulator to have an involvement with the selection process. In the financial services sector, the Board of a major company, having made its choice, is required to submit the name to the regulator who would confirm or not the candidate's suitability.
77. For the reasons set out above, I do not recommend appointment of the Chair by the Regulator. Nor do I recommend appointment by the Board. An appointment by the Board, even with the assistance of an outside assessor, would be likely to attract criticism that the Board had appointed 'one of their own'.
78. If appointment by the Regulator and appointment by the Board are both rejected, the choice lies between: (i) a specially devised system which is independent in all respects; and (ii) appointment by the Government, subject to certain safeguards.
79. A number of respondents argued the case for the appointment to be entirely independent of Government, and drew my attention to the appointment of the Chair of the Recognition Panel for self-regulation of the Press. On this model a small independent appointments committee would be established by the Commissioner of Public Appointments. The Committee would be expected to follow a transparent process to determine a short list and, following interview, to agree on one candidate. The final decision would rest with this independent Committee.

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<sup>23</sup> The Chair of Channel 4 is appointed by Ofcom, subject to approval by the Secretary of State.

80. If this process were followed, the individual chosen would still be subject to a confirmatory hearing by the CMS Parliamentary Committee to determine suitability. Whilst the appointment would be independent of Government, the candidate would have, and should recognise, a responsibility to Parliament.
81. If the Government decided it wished to retain the right to appoint the Chair, then it would follow the process that has become established and which includes a number of safeguards. It would, with the assistance of the Commissioner of Public Appointments, appoint a committee to review candidates. This Committee would advertise and, following consultation with appropriate parties and interview, put forward a very short list of appointable candidates to Ministers, with whom the final decision would rest. The proposed candidate would appear before the CMS Parliamentary Committee who would consider suitability.
82. I would propose that the process chosen for appointing the Chair should also apply to the Deputy Chair.
83. Turning to the appointment of Non-Executives, the BBC Trust is required by the current Charter to have one member designated for each of the constituent Nations of the United Kingdom: England, Scotland, Wales and Northern Ireland. Each person so designated is required to be suitably qualified by virtue of their “knowledge of the culture, characteristics and affairs of the people in the nation” and their “close touch with opinion in that nation”.<sup>24</sup> The current practice is for those who apply to be shortlisted and interviewed. The interview panel is chaired by a senior civil servant from DCMS and also includes an independent assessor, an assessor from the Nation itself and the BBC Chair. The recommendation is then passed to Ministers.
84. A number of commentators argued that, whilst the Non-Executive Directors of the BBC needed to be chosen so as to achieve an appropriately diverse Board, there should not be specific representatives for Nations, or indeed for any demographic such as age or ethnic background. They argued that it should be the duty of Directors to represent all Licence Fee payers, not some, and to act collectively in the public interest. It is a legitimate argument but the precedent of having representatives on the sovereign board of the BBC for Scotland, Wales and Northern Ireland has been in place since 1952 and has provided an important link between the BBC and the Nations it serves.

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<sup>24</sup> Department for Culture, Media and Sport (2006). *The Royal Charter for the Continuance of the British Broadcasting Corporation* (s.14 (3)) [On-line]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/charter.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf)

85. I propose that the current practice of having members for the constituent Nations of the UK should remain in place, alongside the existing process for their selection. Those chosen will need to be able to balance their representative role with their legal duty under the Charter to serve the BBC as a whole; and given the need to limit the size of the Board they will need to bring specific skills to complement the skills of others. For this reason the Chair of the BBC, who would carry the primary responsibility for ensuring that the balance of skills on the Board was appropriate, needs to have a direct involvement in the selection process.
86. I propose that the other Non-Executives be appointed by the BBC Board, the appointments to be led by the Nominations Committee. It will be particularly important that these appointments are of suitable candidates with the balance of skills to deal with the significant responsibilities placed upon them.
87. I propose that the appointment of the Director General, and any other Executives appointed to the Board, be made by the Board, led by the Nominations Committee.

#### Size of the Board

88. The Board needs to represent as best it can the diversity of the public it serves. As noted, it also needs to include the necessary skills to carry out the specialist Board functions referred to above. I think it unlikely that these objectives could be met in a Board of fewer than 12; and I counsel against a Board larger than 14, on the grounds that above this number it is hard to operate as an effective group in which all members feel engaged and responsible.
89. I propose that some latitude be granted in the Charter to the Chair to determine the final size of the Board, but I would expect it to look broadly as follows:
- Chair;
  - Deputy Chair;
  - 4–5 Independent Non-Executive Directors with relevant skills
  - 4 Non-Executive Directors for the constituent Nations of the UK, who would also contribute with other relevant skills; and
  - 2–3 Executive Directors.
90. If Government chose to continue the right to appoint the Chair, Deputy Chair and the Non-Executive Directors for the Nations, with other Directors being appointed

by the Nominations Committee of the Board, half the Board or slightly above half would be appointed independently. Once appointed, all Directors must act in the best interests of the BBC to meet the Public Purposes set for the Corporation in the Charter and to uphold the BBC's editorial independence.

### Term of Appointment

91. There is a lot of literature about the optimum term for Non-Executives. At present BBC Trust members are appointed under the Charter for five years, with the possibility of renewal for a further term. There is a move towards shorter terms for Directors, and the Combined Code comments that “any term beyond six years (e.g. two three-year terms) for a Non-Executive Director should be subject to particularly rigorous review.”<sup>25</sup> My view is that it may take time for new Non-Executive Directors to understand how the BBC functions and, therefore, I would be against very short terms. My proposal would be a period of four years, with the ability to renew for a further four.
92. The initial appointments of the Chair, Deputy Chair and Non-Executive Directors in respect of their term needs to be phased to ensure that not all will come up for renewal or retirement at the same stage.

### Remuneration

93. I propose that the remuneration of the Chair, Deputy Chair and all Non-Executives should be set by the Secretary of State at the DCMS. The remuneration of Executive Directors would be set by the Remuneration Committee of the Board.

## **Section 5.**

### **Conclusions on Governance and Regulatory Models**

#### In respect of the Trust

94. I conclude that the current BBC Trust model is flawed:
- i. it conflates governance and regulatory functions within the Trust, which leads to confusion about the Trust's role; and

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<sup>25</sup> Financial Reporting Council, (2008). *Section 1 Companies (A7.2)* in *The Combined Code on Corporate Governance* [On-line]. Available at: <https://www.frc.org.uk/getattachment/1a875db9-b06e-4453-8f65-358809084331/The-Combined-Code-on-Corporate-Governance.aspx>

- ii. in its governance mode, the BBC operates a two-tier Board structure which leads to confused responsibilities.

95. I conclude that regulatory functions should be in a body that is independent of the BBC. A clear distinction between the Corporation, which needs to comply with the regulatory obligations placed upon it, and the regulator itself, would provide greater transparency about roles and would be in the public interest.

#### In respect of the OfBeeb model

96. OfBeeb would provide the necessary split between governance and regulatory functions.

97. It would ensure a separate regulator, able to focus on the specialised activities of the BBC. The different expectations of BBC audiences, and the differences compared with other broadcasters in areas such as Service Licences and editorial standards, could be overseen by the bespoke regulator.

98. There are different views about the precise regulatory powers OfBeeb should have and its exact relationship with Ofcom. In particular there are issues about whether oversight of editorial matters, and the hearing of editorial appeals, should move to Ofcom, which has considerable experience in these areas, or be given to OfBeeb. In whatever manner this issue was settled, it is clear that regulatory oversight of the market issues around partnerships and competition would need to remain with Ofcom.

99. I conclude that OfBeeb, as a bespoke regulator for the BBC, is to be preferred to the current BBC Trust arrangements.

#### In respect of the Ofcom model

100. Ofcom is already the public service regulator for the United Kingdom's communications industry and already has regulatory powers in respect of the BBC. There needs to be a very strong argument for setting up a second public service regulator.

101. There are other arguments in favour of the Ofcom model:



- i. Ofcom has considerable experience in all the areas that are important in the regulation of the BBC. They include, in addition to competition issues, programme content, editorial standards and complaints;
- ii. Ofcom is a flexible regulator: it does not treat all broadcasters alike. In its editorial and complaints function, it has the capacity to take into account audience expectations;
- iii. Ofcom has scale and credibility. It has considerable resources. It would be a strong regulator to match a strong BBC unitary Board;
- iv. Ofcom has the capacity to look at the BBC in the context of the market as a whole. Current trends will bring the BBC into greater contact/competition with commercial players, and this argues for a regulator with a wide knowledge of the broadcasting industry; and
- v. bringing the regulatory oversight of the BBC under one roof obviates the need for an MOU in respect of regulatory functions, and would have operational efficiencies.

In respect of the choice between the OfBeeb model and the Ofcom model

102. The Consultation Paper suggested that the choice of models, if the Trust model were not retained, lay between regulation by OfBeeb and regulation by Ofcom. In fact the choice lies between regulation by OfBeeb and Ofcom, and regulation by Ofcom alone. Nobody argues that the market and competition issues should be dealt with by anyone other than Ofcom.
103. A number of commentators referred to the uncertainty that would follow if regulation of the BBC passed to Ofcom. There must be some uncertainty, although the manner in which Ofcom has conducted itself, and the respect it has engendered from a wide community, suggests the concern should not be overstated. There must also be uncertainty about how OfBeeb would operate.
104. An assumption made by some advocates of the OfBeeb model is that the BBC Trust could morph into OfBeeb: the existing signage around its office might change, it might find house room with some other organisation, but the team could continue to work as before. This over-simplifies the transition that would be involved. In the first place the Trust's governance work, looking at the BBC budgets and strategic direction, would pass to the BBC unitary Board. Much of

its out-reach work to engage audiences would also transfer to the BBC. Further, as a new public sector regulator, a new Board would be appointed and, whilst it would hopefully have some continuity with the current Trust Board, this cannot be guaranteed. The precise size of OfBeeb would depend on what regulatory functions were left with it. At present the Trust employs a little over 60 in number. The majority of the work is regulatory, but some of the team are involved in governance issues which would not remain. If, as the CMS Select Committee Report of February 2015 suggested, content regulation were passed to Ofcom, the number of staff left would be very small indeed. Even if OfBeeb retained more regulatory work, there must be doubt as to whether it would have the necessary scale. It would have the ability to supplement its resources from outside, but no regulator should be over-dependent on external consultants.

105. The current MOU between the Trust and Ofcom, which would need to be replicated in some manner in the OfBeeb model, serves as a reminder of the significant number of areas in which there are overlapping responsibilities. The overlaps in the complaints area between the Trust and Ofcom, discussed further in Chapter 4, are confusing. There would be considerable merit in consolidating the complaints appeal system within one body, Ofcom.
106. The benefits of having the regulation of the BBC within one regulator, rather than split between two, is that it avoids these issues of overlaps and gaps. Just as there is a strong argument for a single BBC Board, making clear where governance responsibilities lie, so there is a strong argument for a single regulator, making clear where regulatory responsibilities rest.
107. Clear responsibilities are necessary for clear accountability. As noted earlier in this Chapter, accountability should be thought of not as a function separate from governance and regulation, but as an inherent part of a good governance and regulatory system. The Board of the BBC must act to meet the obligations placed on it by the new Charter and Agreement; beyond its accountability to the Regulator, it is accountable to Parliament and to the Licence Fee payer. Ofcom must act in accordance with its statutory duties, which include the duty to “further the interests of citizens”<sup>26</sup>; it too is accountable to Parliament. Introducing a second public service regulator, OfBeeb, would create a new three-way relationship, to replace the existing one between the BBC Executive, the BBC Trust and Ofcom. As three-way relationships often do, this is likely to confuse rather than clarify where responsibilities lie.

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<sup>26</sup> Communications Act (2003). ‘Part 1 The Functions of OFCOM’ (s.3 (1)(a)) [On-line]. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/3>

108. I conclude that the arguments for consolidating regulation of the BBC within Ofcom heavily outweigh the benefits of any OfBeeb model.
109. If the recommendation of the Review to adopt the Ofcom model were accepted, there would need to be a further discussion about how the transferred responsibilities should be dealt with: which activities could be done in existing Ofcom teams and which might best be done in a separate board within Ofcom. Any new board would need to have a clear link to the Ofcom Board, similar to the Ofcom Content Board

#### In respect of the BBC Board

110. I conclude that the BBC, responsible for its own governance but not for regulatory functions, should have a unitary Board. It would consist of a Non-Executive Chair and Deputy Chair, a majority of Non-Executive Directors and a small number of Executive Directors.
111. The primary responsibility for the interests of Licence Fee payers must lie with the unitary Board. The Board would need to demonstrate how it had met these responsibilities. The Regulator would have oversight of the BBC in this respect, but it is a key principle of this Review that the responsibility to the Licence Fee payer should rest with the BBC direct, not via whatever regulatory system is decided upon.
112. As part of the transparent reporting on its activities, the Annual Report and Accounts of the BBC must give a full account of its activities and how it had met its regulatory obligations. It should include:
- i. a report on Audit and Risk matters;
  - ii. a report on Remuneration issues;
  - iii. a report on Nomination issues;
  - iv. a report on Operating Framework and Licences performance;
  - v. a report on Editorial and Complaints issues;
  - vi. a report on Distribution activities;
  - vii. a report on Competition issues and Fair Trading activities; and
  - viii. a report on the BBC's Consultation and Out-reach programme.
113. I propose that the existing system within the BBC Trust of a designated Director for England, Scotland, Wales and Northern Ireland should be continued within the unitary Board.

114. I set out proposals for the size of the Board and how appointments should be made. I propose a Board which would be in part appointed by Government and in part appointed independently via the Nominations Committee.

In respect of the overall governance and regulatory model

115. The model proposed in this Chapter in respect of governance and regulation meets the criteria set out in paragraph 8. It achieves a clear split between governance and regulatory functions. The proposal that all regulation of the BBC should be consolidated within Ofcom makes clear where these regulatory duties lie. Ofcom's oversight of the BBC places it in the right position to provide protection to those outside the Corporation in respect of competition issues. The unitary Board distinguishes between Executive and Non-Executive roles; and the obligations on the unitary Board, and requirements in particular in respect of reporting obligations, are clearly laid out. The model allows a direct line of accountability between the BBC and the Licence Fee payer who funds it.

## **CHAPTER 2: MECHANISMS OF GOVERNANCE AND REGULATION**

### **Introduction**

1. The mechanisms that any governing or regulatory body has at its disposal are crucial to that body's effectiveness. The 2007 Charter and Agreement set out a number of these mechanisms specific to the BBC, notably Service Licences and Public Value Tests, which sit within the context of existing mechanisms such as content quotas.
2. This Chapter looks at these mechanisms of governance and regulation in relation to the delivery of the Public Purposes of the BBC: the way in which the public interest is balanced against its market impact and the manner in which the overarching public value is maximised. Section 1 describes the current structure; Section 2 makes suggestions for reform of the current structure of documents; Section 3 sets out proposals of reform to the current process for making changes; and Section 4 sets out conclusions.
3. Most consider the current regime to be an improvement upon the position before 2007 under the Governors that included the Secretary of State approving major changes to services. The Trust has increased the independence of regulation of the BBC. The Service Licence regime has increased the transparency of decision-making around changes to services, held the BBC to account for its delivery against Public Purposes and limited the potential negative market impact through Market Impact Assessments. But the model has also been criticised for, on occasion, failing to be sufficiently rigorous in holding the BBC to account; and, on other occasions, being too inflexible and stymying the BBC's ability to move quickly.
4. Many criticisms of the current Service Licence regime stem from the current Trust model. The fact that many of the regulatory functions sit within the BBC Trust, which is part of the BBC, leads to the perception of the BBC Trust being conflicted. The clarity of a unitary Board and single independent regulator, as set out in Chapter 1, will make the roles and responsibilities more straightforward.

5. Improving the mechanisms of governance and regulation should aim to deliver a number of outcomes. The success of any changes should be measured against the following objectives for the regime:
  - i. **support the output of the BBC:** it should support the BBC in continuing to deliver creative and distinctive content;
  - ii. **support the Public Purposes:** it should support the BBC in delivering against its Public Purposes;
  - iii. **citizens and consumers:** it should make sure that the public, and particularly those who pay for and use the BBC's services, understand what they can expect and have their interests effectively represented;
  - iv. **industry, competitors and partners:** it should give sufficient certainty to industry about the scope of the BBC's activities and protect them against undue adverse market impact; and
  - v. **transparency and accountability:** the BBC should be duly open and accountable with appropriate consultation and transparency of decision-making, particularly in relation to managing change which should take due account of the interests of audiences, Licence Fee payers, citizens and the market impact.

## **Section 1.**

### **Current Structures**

6. The current system of obligations and requirements for the BBC is complicated. There are three key parties involved: the BBC Executive, the BBC Trust and Ofcom. Their roles in relation to these obligations are set out variously in the Charter and Agreement, in legislation and in related documents.
7. The Service Licence regime is part of a wider system of obligations and responsibilities set out in statute, regulations, through the Charter and by the BBC itself. The key elements are:
  - i. Public Purposes (paragraph 9);
  - ii. Purpose Remits (paragraph 10);
  - iii. Statutory Quotas (paragraph 11);
  - iv. Service Licences (paragraphs 12-16);

- v. Statements of Programme Policy (paragraph 17);
  - vi. BBC Workplan (paragraph 18); and
  - vii. Frameworks and other documents (paragraphs 19-20).
8. In accordance with the Terms of Reference, this Review looks at the way in which these different obligations are set, measured, reported and regulated. It does not comment on what the specific content of these regulations should be, nor the level at which any given obligation should be set.
9. **Public Purposes.** The current Charter sets out the high-level objectives of the BBC through the ‘Public Purposes’. The Charter states that “The BBC’s main object is the promotion of its Public Purposes.”<sup>27</sup> The BBC Trust has both governance and regulatory functions in relation to these purposes. Options for reforming the Public Purposes are being considered by the Government and therefore may change as part of Charter Review. The current Purposes are:
- i. sustaining citizenship and civil society;
  - ii. promoting education and learning;
  - iii. stimulating creativity and cultural excellence;
  - iv. representing the UK, its Nations, regions and communities;
  - v. bringing the UK to the world and the world to the UK; and
  - vi. in promoting its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services and, in addition, taking a leading role in the switchover to digital television.
10. **Purpose Remits.** The BBC Trust sets purpose remits and performance criteria, based on the Public Purposes, that go into more detail about what the BBC should be doing to deliver them. It is the responsibility of the BBC Executive to deliver to these purpose remits, with the BBC Trust holding the Executive to account for its delivery. For example, under the purpose ‘sustaining citizenship and civil society’, the remit includes requirements for the BBC to: provide independent journalism; engage a wide audience in news, current affairs and other topical issues; encourage and enable conversation and debate about news, current affairs and topical issues; build greater understanding of the parliamentary process and political institutions governing the UK; and enable audiences to access, understand and interact with different types of media.<sup>28</sup>

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<sup>27</sup> Department for Culture, Media and Sport (2006). *Royal Charter for the Continuance of the British Broadcasting Corporation* (s. 3(2)). [On-line]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/charter.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf)

<sup>28</sup> BBC Trust (2013), *Purpose Remits* [On-line]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/purpose\\_remits/2013/purpose\\_remits.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/purpose_remits/2013/purpose_remits.pdf)

11. **Statutory Quotas.** The statutory quotas, also referred to as ‘tier 2’ regulations, set the minimum level of output for certain programmes such as news and types of production, for example ‘out of London’ production.<sup>29</sup> The quotas are set out in the Communications Act 2003<sup>30</sup> and are the regulatory responsibility of Ofcom. As statutory obligations these quotas can only be changed by Parliament, or as specified in the legislation. The BBC reports its performance against these quotas in its Annual Report. Ofcom reviews and reports on compliance with these obligations annually.
12. **Service Licences.** Service Licences are set by the BBC Trust, and provide the framework for each of the BBC’s services. They were introduced in the 2007 Charter and the BBC Trust last reviewed the approach in 2012.<sup>31</sup>
13. There are currently 26 Service Licences in total, comprising 9 BBC television services and 16 BBC radio services, as well as a Licence for the ‘online and red button service’ which includes the iPlayer. Each Service Licence is bespoke, but has the same framework and characteristics. The latest Service Licences, issued in 2014, include:
  - remit: the kind of service being provided and target audience, setting the parameters for activity;
  - scope: practical information about distribution;
  - budget: an annual budget for the service;
  - aims and objectives: a high-level qualitative direction given to the service;
  - contribution to public value: a breakdown of objectives by public purpose. These are primarily qualitative but contain some quantitative elements;
  - performance measurement framework: a short statement, consistent for all services, that says assessment metrics will be based on quality, reach, impact and value for money; and
  - statutory commitments: where applicable, the Service Licence sets out any statutory quotas the service is required to meet.
14. As the list above shows, the Service Licences currently fulfil a number of different functions which could be either a function of governance or of regulation. This reflects the BBC Trust’s combined role to provide both governance and regulatory

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<sup>29</sup> Tier 1 regulations are those relating to the Ofcom Broadcasting Code, setting standards in relation to harm and offence and impartiality.

<sup>30</sup> Communications Act (2003). ‘Part 3 Television and Radio Services’ (s. 277–278) [On-line]. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/part/3>

<sup>31</sup> BBC Trust (2012), *BBC Trust Review of Service Licences*. [On-line]. Available from: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our\\_work/review\\_service\\_licences/final\\_conclusions.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/review_service_licences/final_conclusions.pdf)



functions, and the fact that these Licences are one of the central connections between the BBC Trust and Executive. In setting the high level strategic objectives and the budget for each of the BBC's services, the Licences can be seen as a tool of governance. In defining the activities of a service, and in setting out the metrics against which the BBC is held to account for its performance, they can be seen as a tool of regulation. Both of these elements are important and contribute to the increased transparency and clarity with which the current arrangements have been credited.

15. As a regulatory function the BBC Trust monitors compliance and performance against the Service Licences, based in part on data provided by the BBC Executive. In addition to listing the statutory quotas, the Service Licences include quantitative quotas which are not statutory. The BBC Trust has a range of sanctions at its disposal, from public comment to a full-scale review of the service. The Trust can also require the Executive Board to look at management of a given service.
16. The BBC Trust is also required to undertake a full review of services at least once every five years. These reviews provide an opportunity to look at the service in the round and include consultation with the public and industry, the consideration of evidence, and market impact. The BBC Trust can instigate a review at any time it considers necessary.
17. **Statements of Programme Policy.** The BBC Executive is required to prepare annual Statements of Programme Policy (SoPPs) that set out the way in which the objectives in the Service Licences will be delivered. These are then approved by the Trust. These SoPPs provide a greater level of detail than in Service Licences, setting out how the BBC Executive will deliver its objectives.
18. **BBC Workplan.** In addition to these public documents required by the Charter and Agreement there are a range of other documents that contribute to the overall framework of transparency and accountability. The BBC Executive publishes a range of information through its Annual Report, and more recently in its annual corporate Workplan, which now includes the SoPPs.
19. **Frameworks and other documents.** The BBC Trust also publishes and maintains a range of other documents that provide the overall framework of governance, regulation and accountability for the BBC across its different activities. As with the BBC Executive, it publishes a Workplan that sets out its

forward plan for the coming year. It also publishes the protocols for how it delivers its functions.

20. The Trust also publishes important documents about how the BBC will operate; some of these are required under the Charter and Agreement, others are published on its own initiative. This includes the Commercial Framework which sets out how the Trust oversees and assesses the BBC's commercial activities; and a Fair Trading Framework which sets the policies on fair trading and competitive impact that the BBC is required to comply with. A Distribution Framework was introduced in 2015 that sets out the principles for the BBC in issues of content distribution.
21. This system has a number of benefits, providing a set of public statements about what the BBC provides, what it should be trying to achieve at a service level, and how taken together these deliver the Public Purposes overall. It also provides a framework for assessment of performance. However, there have been concerns raised that suggest reforms would be helpful to improve the system and to make sure it remains appropriate in the future. These are set out in the rest of this Chapter.

#### Current Process for Changes to Service Licences

22. Changes to Service Licences are the responsibility of the BBC Trust. The BBC Executive is able to make proposals to the BBC Trust, but it is for the Trust to determine whether a change is permitted. The current Agreement sets out in great detail the process by which such changes are assessed and the basis on which they are approved.
23. The judgement of whether a change to a service requires a full Public Value Test (PVT) is the responsibility of the BBC Trust. The framework for this is set out in Section 25 of the current Agreement and is known as the 'significance test'. The test is required to take into account the impact, financial implications, novelty and duration of the change. There are other additional 'significance' requirements set out in the Service Licences.
24. The Trust is required under the Agreement to undertake such investigations as it considers necessary in the consideration of the 'significance' of any change. In practice this is an internal desk-based activity undertaken by the Trust. Whilst there is no formal requirement to do so, in recent years the Trust has also asked

Ofcom for advice on the potential impact of changes. The outcome of a 'significance' test is published by the Trust.

25. Where a change is considered 'significant', a full PVT is triggered. This is made up of two parts: a Public Value Assessment (PVA), conducted by the Trust, and a Market Impact Assessment (MIA), conducted by Ofcom. The BBC has concluded a number of PVTs over the last Charter period looking at On-demand TV, HD TV, Gaelic Digital Service, Local Video, moving BBC3 on-line and the creation of a new BBC One +1 service.
26. The PVA, conducted by the Trust, looks to establish the value that is added by the proposed change in terms of the benefit to individual consumers and society, as well as assessing the value for money of the proposal. In support of this activity the Trust consults with audiences and stakeholders and has often chosen to undertake additional research to support its analysis.
27. The MIA is conducted through a joint steering group. The members of this group are taken from the Trust and Ofcom in equal numbers. The time limit for the MIA is set at three months. Ofcom has the final judgement in the recommendation in relation to the Market Impact, which it is uniquely qualified to provide as the converged regulator for the broadcasting and telecoms industries.
28. The PVT takes into account both the PVA and MIA, and the Trust makes the determination of whether a proposal should be permitted, taking into account both elements. The Trust is required to publish its provisional conclusions for consultation before concluding whether a proposed change is permitted.
29. The current Agreement sets out in Section 27 a time limit of six months for the conduct of a PVT, permitting a longer process at the discretion of the Trust. In practice the time it has taken from the initial announcement of a new service from the BBC to a final decision from the Trust has often been far in excess of six months. One recent example is the move of BBC Three from linear to on-line. This was first announced in March 2014, with a PVT application submitted in December 2014, and the final decision made in November 2015.
30. Under the existing Agreement the BBC is also able to run pilots and trials for new services. These are divided into two categories. Category 1 trials are those deemed to be strategically significant, which are designed to produce evidence for a PVT. These require approval from the BBC Trust. Category 2 trials are lower level and are authorised by the BBC Executive.

31. This process for approving changes is generally considered a significant step forward. Prior to the 2007 Charter the responsibility for approving proposals for new services fell to the Government and there was no formal process. In the context of expanding digital services, the PVT mechanism provides clarity and independence from Government. The requirements for consultation, transparency, and independent assessment of market impact have been broadly welcomed. However, there are some elements of the process that cause concern in terms of flexibility and the impact of a lengthy process, and reform is required to resolve these.

## **Section 2.**

### **Reforms to the Structure of Documents**

32. The Service Licences are one of the key tools for holding the BBC to account. In a new model there must remain a structure, similar to the Service Licences currently issued by the Trust, which sets the scope for the BBC's activities and their key delivery objectives in a transparent and accessible way. The success of any new model will be measured in part by the extent to which it increases the accountability of the BBC.
33. Service Licences have broadly reflected the operation of the BBC, and the fact that the majority of BBC content remains based around linear services. It is not clear that this regime has the flexibility to keep pace with the way that the organisation of the BBC is changing. Both the governance and regulatory tools will need to have the flexibility to adapt to changing technologies and audience expectations.
34. As part of the current structure there are also a range of documents such as frameworks, protocols and policies that set out at various levels what is required and being delivered by the BBC. It would be helpful to consolidate these into a smaller set of documents to provide greater clarity for audiences and the market alike. I set out in Box A a proposed documentary framework, distinguishing between those documents which would be the prime responsibility of Ofcom, and those which would be the prime responsibility of the unitary Board, alongside those that Government is responsible for.
35. The current Service Licences contain a range of both qualitative and quantitative information. While both of these elements would be needed in any future regime,

the more they could include clear metrics and quantitative information, the more objective would be the measures against which performance and compliance could be assessed.

36. The current system also suffers from having three organisations with some degree of overlap in their responsibilities, an issue set out in Chapter 1 of this Review. Looking solely at these issues, the advantages of a single regulator, rather than two, is considerable. Under a model that had a unitary Board with responsibility in the first instance for delivering public value, and a single regulator with responsibility for oversight and scrutiny in the public interest, the way in which these responsibilities were shared could be simplified and streamlined.

Box A: Key Elements of Proposed Regime

	Government	Ofcom	BBC
Forward Looking	<p><b>Charter and Agreement:</b> set the Public Purposes and the structures of governance and regulation.</p> <p><b>Legislation:</b> relevant Acts that set statutory obligations such as quotas.</p>	<p><b>Operating Framework:</b> the overall framework within which the BBC operates, issued by Ofcom. Includes frameworks for competition.</p> <p><b>Operating Licences:</b> part of the Operating Framework, issued by Ofcom, set out in detail the obligations placed on the BBC’s activities.</p>	<p><b>Workplan and Creative Remits:</b> the unitary Board sets out in advance how it will deliver its Operating Licences and associated budgets.</p>
Reporting		<p><b>Annual Report:</b> provides an annual overview of how the regulatory duties have been delivered, including review of BBC delivery against metrics in Operating Licences.</p> <p><b>Performance Reviews:</b> Ofcom to review BBC performance, Framework and Licences in detail at least once every four years, able to focus on any issues that it believes requires attention.</p>	<p><b>Annual Report and Accounts:</b> provides a review of performance by the unitary Board, including metrics for how they have delivered against their objectives.</p>

Regulatory Documents

37. Ofcom should have responsibility for a new document, the BBC’s **Operating Framework**. This document would set out the regulatory framework for the

BBC's operational delivery, covering all its activities. This would include the relevant regulatory elements within existing documentation, such as the 'Fair Trading Policies and Framework', 'Purpose Remits', and 'Distribution Framework' that the Trust has developed over the past decade.

38. There are a number of significant regulatory issues, particularly in the area of competition, which will be increasingly important over the next Charter period. These include issues around the BBC's commercial activities, such as transfer pricing arrangements and distribution. The Operating Framework would be expected to set out the obligations for the BBC in regard to state aid and competition policy, as well as the principles for how appropriate separation of the BBC's commercial activities from the core of the Corporation is to be achieved.
39. Flowing from the Operating Framework, and associated with it, there must be **Operating Licences** for the BBC services. These Operating Licences must set out at a reasonably high level the framework of objectives and obligations for the BBC's output and the quotas and metrics against which the performance would be measured.
40. In setting the Operating Licences there is a trade-off that needs to be struck in terms of the level of detail they include. They must give the BBC the flexibility that a creative organisation requires to be able to continue to surprise and delight audiences, whilst holding it to account for its output and the way it spends the Licence Fee. Ofcom currently provides licences for the Channel 3 licensees and Channel 4. These licences do not contain as much information as the current BBC Service Licences. Given its unique funding model, the high standards the public expects, and the obligations placed upon it by the Charter and Agreement, the BBC's Operating Licences would need to look considerably different, including more detail and some of the key metrics that have been introduced through the current regime. They would need to set out the measurable objectives of the BBC's output within a particular area of BBC activity and any requirements about such content set out in the Charter (such as quality or distinctiveness). They would also need to explain how the BBC's output contributes to the Public Purposes, as well as including any relevant statutory commitments and quotas.
41. Operating Licences would differ from the existing Service Licences in two key ways. First, in moving the scope away from licences based on channels and stations, Operating Licences could cover areas in a way that was designed to support accountability and effective regulation. Instead of needing 26 Service Licences, as at present, Operating Licences could group services (e.g. grouping

TV with obligations for BBC1 and BBC2 included within one document) or they could cover genres such as children's programmes, drama or news which have particular public interest. It would also allow the Licences to change to reflect the structures within the BBC, making it easier to identify how decisions were made in the interests of delivering against the Licences. Such an approach would be likely to lead to a smaller number of Licences that give a clearer statement of the obligations placed on the BBC's activities.

42. This approach could also allow a Licence for each of the Nations of the UK. Setting out in a single Licence the combination of obligations the BBC has for a given area would make it easier to hold the BBC to account for its delivery in that area in an open and transparent way. This may require a 'matrix' approach, with obligations present in other Operating Licences being repeated in those for the Nations. This would contribute to an overall package of measures that increase accountability to the constituent Nations of the UK, as also noted in paragraph 34 of Chapter 3.
43. This proposal would also have the benefit of Operating Licences being able to reflect technological changes more easily. It is quite possible that in the future distinguishing output largely by linear channel or station will become less useful for regulatory purposes. Operating Licences would be able to have their scope set in the way most appropriate for achieving accountability, rather than being tied to the structure of specific services.
44. The second way in which the Operating Licences would be different from the Service Licences is in moving towards a more clearly regulatory document. This means that they should have a greater focus on measurable quantitative obligations that specify the desired outputs and outcomes, rather than the more qualitative approach of the existing Service Licences. The Operating Licences would need to include the statutory quotas the BBC must meet, and would be expected to include other metrics about the BBC's output that are based around the key objectives set in the Charter and Agreement. This could include objectives for performance measures such as distinctiveness. As part of this move towards a regulatory document, the Operating Licences would not include budgets or those other elements currently contained in the Service Licences which perform a function of governance. These other elements would be the responsibility of the BBC.
45. Ofcom would need to check compliance against the Operating Framework and Licences on an annual basis. It would also need to provide, in an Annual Report, a

full account of how it had discharged its duties. This Report would follow the BBC's Annual Report. It would need to be provided in a way that is appropriate to the high degree of public interest in the effective regulation of the BBC. As such Ofcom might well choose to provide this as a report distinct from its other annual reporting duties.

46. In addition to its duty to assess compliance on an annual basis, Ofcom would also need to make an in-depth assessment of the BBC's delivery against its regulatory obligations, as set out in the Charter and Agreement and the Operating Framework and Licences. Ofcom should have a duty to do this, looking across all activities, every four years. In doing so it should use the data provided by the BBC as well as independent research. Ofcom should be given flexibility in how it chose to conduct such a review so as to ensure it focused on those areas of greatest concern. As a result of these reviews Ofcom would be in a position to recommend amending the Operating Framework or Licences through the process for change discussed below.
47. Operating Licences require clearly documented 'step-in' rights for investigation and potential intervention. As such, alongside the Operating Framework and Licences described above, Ofcom would have broad 'step-in' rights, as currently exist for the Trust.<sup>32</sup> These 'step-in' rights would be necessary to ensure Ofcom could act appropriately to address any issue where the BBC might be failing to deliver its remit, or behaving in a way which had a negative impact on the market not justified by the public interest. Ofcom would be able to undertake a review of a given area at any time it deemed necessary to react to changes in the market or emerging issues.

### BBC Governance Documents

48. The following section looks at how the governance functions should be captured in key documents. Some of these are existing functions of the BBC Executive, but there are other responsibilities that currently reside within the BBC Trust, such as for key elements of the Service Licences, which are not. These elements, such as setting the budget of a given service, should be replicated in the new system, with the BBC itself setting out the organisation's ambition. This is needed to provide the market and audiences with a view of the BBC's plans and proposals. These plans should be used to scrutinise the BBC's proposals in advance, and subsequently for their delivery.

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<sup>32</sup> Department for Culture, Media and Sport (2006). *Royal Charter for the Continuance of the British Broadcasting Corporation* (s. 24(2)(h)) [On-line]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/charter.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf)



49. The BBC should publish both forward looking and 'after the event' reporting documents. Forward looking, the BBC should set out in the Creative Remits and Corporate Workplan its ambitions for the coming year, in line with the requirements of the Operating Framework and Licences. Reporting 'after the event' the BBC should publish an Annual Report and Accounts, with an analysis of how it had performed against its stated plans.
50. The **Creative Remits and Corporate Workplan** would be annual forward looking statements. It would be expected that the Creative Remits and Corporate Workplan would be published together, as is the case with SoPPs and the Corporate Workplan currently. Together they would provide transparency of plans for the year ahead. The BBC should report on performance against these statements in its Annual Report.
51. The Creative Remits would set out what the unitary Board intended the BBC to deliver, with particular reference to how this would meet its Public Purposes within the scope of the Operating Licences. This would provide an opportunity for audiences and the market to see the BBC's plans for its services for the year ahead, replacing the current SoPPs. This would also provide an opportunity for the BBC Board to set stretching objectives that it wanted different services to meet. It would be expected that this should include metrics, where possible, that could be reported against in the assessment of performance.
52. The Corporate Workplan would set out the intentions of the BBC in relation to the operation of the Corporation. This is a document that the BBC has begun publishing in recent years. It would be important that this continues in the new model, particularly as a place for the BBC to set out funding of services and corporate strategy including its budgets for the year ahead, highlighting any changes.
53. The **Annual Report and Accounts** would be expected to perform a number of functions, as set out in paragraph 70 in Chapter 1. This includes accounting for the BBC's delivery of its remit and performance against the Charter and Agreement, Operating Framework and Licences, and its own plans in the Creative Remits and Corporate Workplan. In doing this it should provide, insofar as it is possible, metrics that allow both Ofcom to scrutinise delivery against the Operating Framework, and the public to understand performance against the Creative Remits. In determining these metrics the BBC should consult with Ofcom

to ensure the data provided an appropriate level of information. The importance of this is discussed further in Chapter 3.

### **Section 3.**

#### **Reforming the Process for Changes**

54. Assessing changes and new services is currently a rigid process. The lack of flexibility in the system has been commented upon by the BBC Trust Chair, noting that “it is either full PVT, very expensive or very small pieces of work. There is not the flexibility to do something in the middle.”<sup>33</sup> As set out in paragraphs 22–31 of this Chapter, the current system is heavily prescriptive. A less rigid system with appropriate checks and balances, including appropriate powers for the Regulator, would help to ensure a proportionate and transparent approach in a more streamlined way.
55. The length of time that it takes for a proposed new service or change to be either approved or rejected is problematic because it leads to uncertainty for industry and audiences, and can be costly, with work stretching out for years in support of a project that has not received approval. This is in part the result of the burdensome process, but is also the result of the BBC Executive being able to make proposals in public without providing a timetable for coming forward with the detailed proposal. The change to BBC3 took a long time to conclude, as set out in paragraph 29.
56. Any new system should seek to ensure that decisions could be reached in the minimum amount of time, whilst allowing for transparency and due consultation. This would be to the benefit of the BBC, industry and audiences. The Charter currently states that PVTs should be concluded within six months but allows for longer if the BBC Trust considers it necessary. As illustrated above, this has not always effectively limited the period of uncertainty. As such, the six month limit should remain; but Ofcom, in line with taking a proportionate approach, should seek to adhere to it more strictly.
57. The BBC Board would have the primary responsibility for determining if a proposed change were ‘significant’ and warranted an application to Ofcom to proceed with a PVT or not. The Board should undertake a test of ‘significance’ for

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<sup>33</sup> House of Commons Culture, Media and Sport Committee (2014). Q744, *Oral Evidence: Future of the BBC, HC315 Tuesday 21 October 2014* [On-line] Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-%20media-and-sport-committee/future-of-the-bbc/oral/14707.pdf>

any proposed change, with public consultation as appropriate. It should notify Ofcom of its plans, and of the results of any public and industry consultation, permitting Ofcom to scrutinise the evidence supporting the Board's analysis. The responsibility to call for a PVT presently sits with the BBC Trust; and it is proposed that it should transfer to the BBC Board. It would place the responsibility on the Board to think with particular care about where the public interest lay in connection with a proposed change. The regulatory 'check and balance' to this proposal rests in Ofcom's 'step-in' rights, allowing Ofcom (where it felt that there were public interest issues that had not been fully considered) to carry out its own investigations and to determine the appropriate action, as discussed in paragraph 64 below.

58. Determining the threshold for whether a change is 'significant' and requires a PVT is a difficult issue. Because of the nature of the BBC and the markets in which it operates, what might be a major change for the BBC that crossed the threshold might have very little impact on the market or public interest. Conversely, a seemingly small change for the BBC which might not reach the threshold, for example in radio broadcasting, might have considerable effects. Under Clause 25 of the current Agreement there are some 'automatic triggers'. These trigger levels might remain, and might be broadened to apply to different areas such as funding changes or significant changes in editorial mix or audience targeting. The threshold should be considered carefully by the BBC Board in reaching its decision under paragraph 57; but given the changing nature of the market, trigger levels should be seen as giving guidance and not as prescriptive.
59. It is right that the BBC should be able to make changes to its services below the 'significance' threshold without the need for an expensive and time-consuming process in the manner of a PVT. This flexibility is particularly important in the context of the pace of change in the wider market and technological developments; piloting new digital services is increasingly useful in gathering relevant data about audiences and impact in real-time. Where the BBC wished to make such a change it should be transparent about its intentions, give competitors the chance to make representations and take this into account alongside the public interest. The Creative Remits and Corporate Workplan would provide one way in which the BBC could notify the market of its intentions, but changes could happen at any time. The BBC Board should publish public protocols for how it would set out proposals transparently, and how any concerns raised by others in the market in this regard would be considered.

60. Where a decision to proceed with a PVT were made, there would need to be a formal process for assessing both the market impact and the public interest in the change. Currently the BBC Trust undertakes the Public Value Assessment. Under a revised system, where the BBC Board proposed a 'significant' change, the Board would provide the justification for that change in terms of the public interest and the delivery of the Public Purposes, and provide a transparent account of the evidence it had used to reach such a decision. Much of this work would already have been done by the BBC in determining whether a PVT were required or not, as set out in paragraph 57. If the PVA were not satisfactorily evidenced, Ofcom would have the right to call for further work.
61. In addition to the role of the BBC in preparing the PVA, Ofcom would be responsible for the Market Impact Assessment. The process should be open, providing the opportunity for consultation and discussion with the BBC, the market and the public. At the conclusion of the PVT, in making the final decision about the balance of the public interest in a proposed change, Ofcom and the BBC should work closely together. Ofcom should have an obligation to engage with the BBC and provide appropriate opportunity for the modification of proposals in the interests of maximising public value and minimising market impact, for which purpose a joint committee would be helpful. The ultimate determination of the PVT process, made in the public interest and with due regard to the interest of all parties, would rest with Ofcom.
62. There is a difficult question of how the process for changes might operate for the closure of services, or moving on-line, as was the case for BBC Three. Under the new model this would be subject to the same thresholds and processes as any new service or major change. Whilst there is likely to be limited or even positive market impact in withdrawing or reducing a service, there would still be a legitimate role for Ofcom in scrutinising the impact on the BBC's ability to deliver against its Operating Licences and the public value of such a change.
63. The full PVT process as described would improve upon the current system, but remains quite burdensome. As such, greater flexibility for the regulator could allow for a more informed and proportionate process of assessment.
64. In line with the right of a regulator to 'step-in' referred to in paragraphs 47 and 57, Ofcom should have the right to carry out a 'mini-review' if it felt that there was the potential for a change to have a 'significant' impact on the market or public interest that the BBC had not duly considered. This would be less rigorous than a full PVT but could involve some limited market and public consultation at the

discretion of the Regulator, and should be conducted within a limited timeframe, for example two months. Following this ‘mini-review’ Ofcom could decide that no further action was required, could make recommendations as to what steps would negate further action, and ultimately would have the ability to call for a full PVT. In addition, where a new service had been initiated and threatened the existence of other market participants before appropriate analysis had been concluded, Ofcom should have the power to direct the BBC, in respect of a new service, to suspend activity.

65. Taken together this proposal for a ‘mini-review’ process, and the discretion around the ‘significance’ test suggested in paragraph 58, should add considerable flexibility to the current PVT regime, whilst ensuring clarity for the BBC, the public and the market.
66. For Ofcom to be able to scrutinise and enforce its decisions on both Licence changes and performance effectively, it must have at its disposal sanctions to address continued non-compliance. There should be a wide range of options available, including financial sanctions, so that Ofcom could demonstrate publicly the severity of a transgression and effect appropriate remedies.

#### **Section 4.**

#### **Conclusion**

67. The proposed Operating Framework and Licences, and the reformed PVTs, take forward the benefits that flow from the reformed model of governance and regulation set out in Chapter 1. They go further than this, streamlining and simplifying the responsibilities and processes for the BBC and Ofcom.
68. Ofcom would have responsibility for the publication and maintenance of the Operating Framework and Licences. It would hold the BBC to account against the Framework and Licences annually, as well as through detailed performance reviews on a four yearly cycle. It would have significant flexibility both in what it chose to look at and the way it chose to conduct such reviews. In addition it would have ‘step-in’ rights to be able to investigate and address issues as they arose.
69. As set out in Chapter 1, the BBC Board has the primary responsibility for the delivery of its activities and accounting for them. This Chapter sets out in greater detail how the BBC would do this. The BBC would publish its plans through

Creative Remits and a Corporate Workplan, and report on its performance through its Annual Report and Accounts. It would continue to determine its own strategy, and as such would be the body that proposed changes to Operating Licences, where it wanted to make such a change in the public interest.

70. This Chapter includes recommendations to increase the flexibility in respect of both the threshold for a full PVT, and also a recommendation for a 'mini-review' to give the regulator a more flexible tool. The primary responsibility for determining whether a full PVT exercise were required would rest with the Board of the BBC. This responsibility would be balanced by the right of Ofcom to 'step-in' to investigate where it felt that the public interest or market impact issues had not been fully considered. Where a full PVT were carried out, Ofcom would be the final arbiter, determining whether a significant change were ultimately in the public interest, taking into account the impact on the market.
71. This model meets the five criteria set out in paragraph 5. It supports the creative output of the BBC by giving the BBC itself greater responsibility for both the setting of its strategy and reporting on its performance. It supports the delivery of Public Purposes by providing a clear forward looking cascade from the Purposes set by Government, through the Operating Framework and Licences issued by Ofcom, to the Creative Remits and Workplan published by the BBC. It sets out the way in which citizens, consumers and industry are to be informed about what they can expect and how they will be consulted. It also creates a framework that ensures that the impact both on the market and in relation to public interest are considered. In the first instance this is the responsibility of the BBC, but ultimately it is balanced by Ofcom's broad 'step-in' rights and its right to make a final determination in respect of PVTs. It also makes clear the way in which both the BBC and Ofcom are expected to operate with transparency and accountability, in reporting performance and in making decisions about changes.

## **CHAPTER 3: ENGAGEMENT WITH THE PUBLIC**

### **Introduction**

1. Effective engagement with customers and stakeholders is essential to the success of any organisation. In the case of the BBC this engagement is even more important. Almost everyone in the UK is a consumer of BBC content, and because of the BBC's public service obligations we are all effectively stakeholders.
2. This Chapter looks at the way that the BBC should meet this obligation to engage with the public. Section 1 looks at how the BBC Executive and BBC Trust currently engage with the public; Section 2 looks at how this might be revised under new governance arrangements; Section 3 looks specifically at Audience Councils; and Section 4 sets out the conclusions of the Chapter.

### **Section 1.**

#### **Current Arrangements**

3. The BBC Executive carries out a significant amount of audience research in relation to its programming. It has detailed knowledge of its viewing levels, and a great deal of more qualitative and quantitative research on what its audiences think of its programmes. This is not a requirement in the Charter, but is done by the BBC Executive to inform its operations.
4. The BBC Trust is given by the Charter the specific duty to engage with Licence Fee payers in a broader sense: to know the views of the audiences both in regard to issues around individual programmes and services, and also in regard to wider BBC issues such as value for money. To that end, the existing Charter places two general duties on the BBC Trust: to "represent the interests of Licence Fee payers" and to "carefully and appropriately assess the views of Licence Fee payers".<sup>34</sup> The Charter also states that the Trust must establish a specific protocol

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<sup>34</sup> Department for Culture, Media and Sport (2006). *The Royal Charter for the Continuance of the British Broadcasting Corporation* (s.23). [On-line]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/charter.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf)

on "engaging with Licence Fee payers". This is set out in the Trust's document: 'Our Promise to You'.<sup>35</sup>

5. The Charter also requires the BBC Trust to establish and support Audience Councils for each of the Nations of the UK.<sup>36</sup> The main function of the Councils, as outlined in the Charter, is "to bring the diverse perspectives of Licence Fee payers to bear on the work of the Trust, through the Councils' links with diverse communities, including geographical based communities and other communities of interest within the UK". These are discussed further in paragraphs 24–33.
6. There is also a requirement in the Agreement for the Trust to consult publicly at key moments in the delivery of its functions. These moments include: developing purpose remits, issuing Service Licences, reviewing Service Licences and at specific points in the Public Value Test process.
7. In addition to those areas specified under the Charter, the Trust also uses a variety of other methods to meet its overarching obligation to assess the views of and represent Licence Fee payers:
  - i. it carries out quantitative research to understand the strength of certain views amongst the whole population. The annual Purpose Remit Survey (PRS) is a key tool to measure people's views on the delivery of the Public Purposes. The survey was started in 2007 and provides important trend data. The results from the PRS have contributed to strategies in areas where there are gaps in performance, such as portrayal and distinctiveness;
  - ii. the Trust has recently set up a 10,000 strong panel that enables it to monitor regularly strategic audience issues. The first piece of work undertaken via the panel was a survey in late 2014 on Licence Fee payers' views on future priorities for the BBC. It has more recently been used for the PVT in respect of the BBC Three proposals and for the Speech Radio service review;
  - iii. another recent addition to these methods is branded 'trails', which the Trust uses to stimulate responses to a consultation. These use the wide

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<sup>35</sup> BBC Trust (2007). *Our Promise to You: How the Trust will engage with audiences* [On-line]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory\\_framework/protocols/e1\\_audience\\_engagement.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/protocols/e1_audience_engagement.pdf)

<sup>36</sup> Department for Culture, Media and Sport (2006). *The Royal Charter for the Continuance of the British Broadcasting Corporation* (s.39). [On-line]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/charter.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf)



reach of the BBC to engage audiences in the Trust’s research by advertising consultations in between programmes; and

- iv. the Trust also commissions a significant amount of audience research to understand views in more detail. This research uses a mix of qualitative methods such as focus groups, workshops, interviews and deliberative sessions.

8. In this context it is important to understand that the term ‘Licence Fee payer’ is understood in a rather broad sense. The current Charter defines a Licence Fee payer in Section 57:

“In this Charter, a reference to a “licence fee payer” is not to be taken literally but includes, not only a person to whom a TV licence is issued under section 364 of the Communications Act 2003, but also (so far as is sensible in the context) any other person in the UK who watches, listens to or uses any BBC service, or may do so or wish to do so in the future.”<sup>37</sup>

9. This arrangement defines the term ‘Licence Fee payer’ in broad terms, bringing it close to the public interest. It would be helpful if the new Charter could be clearer about the BBC’s responsibilities in respect of the public interest and the Licence Fee payer.
10. The Trust also has transparency obligations under the Charter to “ensure that the BBC observes high standards of openness and transparency”.<sup>38</sup> In delivering this the Trust is required to publish protocols setting out how it will discharge the duty.

## **Section 2.**

### **Revised Arrangements**

11. This Review argues that the responsibility to the Licence Fee payer should rest primarily with the Board of the BBC. It must be expected, therefore, that the new Charter would replicate most of the obligations towards audiences and Licence Fee payers and place those obligations on to the unitary Board.

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<sup>37</sup> Department for Culture, Media and Sport (2006). *The Royal Charter for the Continuance of the British Broadcasting Corporation* (s.57) [On-line]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/charter.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf)

<sup>38</sup> Department for Culture, Media and Sport (2006). *The Royal Charter for the Continuance of the British Broadcasting Corporation* (s.23 (f)) [On-line]. Available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/charter.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf)

12. The BBC will need to do more to engage Licence Fee payers, and be accountable to them, in the next Charter period. It needs to engage the public as citizens as well as consumers of BBC content.
13. Specifically, there should be a requirement for the BBC to involve audiences in setting strategy in much the same way as the responsibility currently sits with the BBC Trust:
  - i. when proposing significant changes in the BBC's overall strategy or direction, including the launch of a new BBC service or a significant change to an existing one; and
  - ii. in the co-design of new service ideas such as those proposed in the BBC document 'British, Bold, Creative', including the 'Ideas Service' and 'iPlay'.<sup>39</sup>
14. There should also be a requirement for the BBC to involve audiences in performance assessment as follows:
  - i. as part of its regular, in-depth reviews of the performance and value for money of all BBC services; and
  - ii. in assessing how to resolve remit, audience or creative challenges, such as diversity, portrayal, younger audiences, and news services for the Devolved Nations.
15. There are good reasons to think that bringing together the obligation to engage the Licence Fee payer with the responsibility for setting the strategy and delivering new services would bring significant benefits. This could make use of the BBC's reach and expertise in digital services to connect with more people and understand their views. By the end of 2016, the existing Charter period, the BBC estimates that 10 million people will have signed on to the BBC's digital platform. Within a further period of ten years it is likely that a very high percentage of the BBC's audience, and therefore of the country, will be connected digitally with the BBC.
16. The BBC should seek to identify ways to harness this relationship to inform its output, activities, and the shape of its organisation. The Charter should be framed

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<sup>39</sup> iPlay is an on-line children's portal. The Ideas Service is a platform for cultural and science content from both the BBC and selected third parties. Cited in: '*BRITISH, BOLD, CREATIVE: The BBC's Programmes and services in the next Charter*' (page 6) [Online]. Available at: <https://downloads.bbc.co.uk/aboutthebbc/reports/pdf/futureofthebbc2015.pdf>

in such a way that allows the BBC to use these new digital tools alongside others in the most effective way, delivering value for money.

17. There should be a requirement for the BBC Board to include in its Annual Report and Accounts a section setting out how the Charter out-reach obligations had been met. This Report, already referred to in Chapter 1, would set out the work done during the year, and how the views of Licence Fee payers had shaped the BBC's decisions.
18. The BBC Board should also inherit the obligation to ensure the BBC is open and transparent. The Annual Report and Accounts is an important part of this, but being open with the Licence Fee payer is an on-going obligation, not something that can be discharged in a single document. This was reflected in a recent speech by the BBC's Director General, who called for an 'Open BBC for the internet age'.<sup>40</sup>
19. In relation to public engagement, research and consultation, this requirement for transparency is particularly important. There should be an assumption in favour of transparency of findings, and where possible results should be provided in a way that allows the public to access, interrogate and understand them properly. This might include, for example, providing comparable data in a time-series so that change over time could be easily understood.
20. One of the main challenges in engaging with the Licence Fee payer, understood in the broadest sense, is how to understand the views of the hardest to reach. This includes those who may not find it easy to contribute their views because of accessibility, age or other factors. It also includes the small numbers who do not use BBC services of any kind. Whilst these groups may represent only a fraction of the total population, their views would also need to be understood by the BBC.
21. Reaching out to engage with the public in a way that understands their interests as citizens as well as consumers would be a significant change in focus for the way the BBC undertakes its consultation and research. As such the Board might wish to bring in appropriate external advice and challenge to ensure this important work were being done as effectively and transparently as possible.
22. Consultation and research would also be important for the BBC's Regulator. Ofcom already undertakes a wide range of research, consultation and

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<sup>40</sup> Hall, T. (2015), speech made at the Science Museum on the future vision of the BBC Transcript [On-line]. Available at: <http://www.bbc.co.uk/mediacentre/speeches/2015/tony-hall-distinctive-bbc>

engagement in respect of its wider obligations and publishes a range of well-respected industry data. Given the proposed additional responsibilities in relation to the BBC, further research in this area might be required.

23. In relation to assessment and approval of BBC services, Ofcom would need to consult to ensure it had an appropriate evidence base to make its judgements. It might choose to use research and evidence provided by the BBC, but should also be free to commission its own.

### **Section 3.**

#### **Audience Councils**

24. The Audience Councils serve an advisory role, and do not have any formal decision-making functions. They have three key roles, which are set out in the Trust protocols, based on the Charter:
  - i. to provide an annual assessment of the BBC's performance in their Nation; providing their assessment to the BBC Trust, at least once per year, on how well the BBC serves audiences in their Nation, from the perspective of Licence Fee payers. This informs the Trust's assessment of the BBC's performance and each Council's own annual review;
  - ii. to identify emerging issues of importance to audiences; advising the Trust on issues that concern BBC audiences across the UK and in their Nation, with a particular focus on matters the Trust can address. This advice informs the development of the Trust's annual Workplan; and
  - iii. to provide input into the Trust's decision-making; providing some advice to the Trust, from the perspective of Licence Fee payers, on significant matters the Trust is considering. This primarily informs the Trust's five-yearly reviews of each BBC service as well as proposed major changes to the BBC's services.
25. Each Audience Council is chaired by the Trust member for that Nation and has around 11 'lay' members who have an informed interest in the work of the BBC and an understanding of the needs, interests, concerns and diversity of the audience in their area.

26. In England a network of 12 audience panels supports the Audience Council. There is one panel for each of the BBC's broadcasting regions, which is led by the Audience Council member for that region.
27. With the exception of the Trust member, the BBC Trust appoints Audience Council members on the recommendation of local selection panels. This follows an open recruitment process. The 'lay' members are unpaid, though they receive out-of-pocket expenses.
28. Each Audience Council meets around seven to nine times a year, usually at a BBC office in the relevant Nation. Minutes from these meetings are published on the BBC Trust's website. In addition to the formal meetings, the Councils also undertake a programme of audience engagement activities, in order to help them in their assessment of the BBC's performance, and to identify issues of importance.
29. Representatives from each Audience Council meet annually with the full Trust to report on how well they consider that the BBC is serving audiences in each Nation, to advise on any issues raised, and to suggest priorities for the coming year.
30. There have been a number of issues raised about the way the Audience Councils are arranged. This is both in respect of how they operate practically, as well as the efficacy of the 'council' model in public engagement:
  - i. in feeding into the BBC Trust, rather than the BBC Executive, the distance between Licence Fee payer and service provider is long. The formal line of accountability through the BBC Trust can leave members feeling that their views are not reaching the decision-makers as effectively as they might;
  - ii. there is a lack of clarity about the feedback loop and accountability of the BBC to the Audience Councils. In performing their duties as specified under the Charter, the Councils provide significant input into the BBC Trust, and by extension the BBC. However, there is no clear mechanism by which the BBC Executive or Trust explains the way in which this input is considered and used; and
  - iii. Audience Councils do not have an effective method of contributing their views on the assessment of performance and in the formation of

strategy, particularly in respect of the services and issues specific to their Nation.

31. Many of these issues would be addressed by the benefits to the Audience Councils of a unitary Board. Even without further reform, having Councils connected direct to the unitary Board, with the Chair of the Council sitting on the BBC Board, would reduce the distance between the Council and the responsible decision-making body, thereby increasing accountability. It would also make the feedback loop much easier for the Chair to manage.
32. Even with the benefits referred to in the paragraph above, there would remain some concern about the extent to which an Audience Council is, or could ever be, fully representative. The fact that members are unpaid and that attendance on the Council does not qualify for time off work for public duties (and may not qualify for voluntary leave) can make it difficult to attract membership, particularly from those on lower pay. The small number of members on each of the current Audience Councils is a challenge for the effective representation of the diversity of the UK. In addition, by its nature members of each Council 'self-select' by volunteering. The ability of any individual member to engage widely outside committee meetings will be variable. As such any council model could represent only a partial picture.
33. The BBC should seek to address these concerns, in particular by seeking to increase the diversity of the Councils, and by looking for ways to link their feedback to the information gained from digital platforms discussed above in paragraphs 15 and 16. The current Charter is highly prescriptive with regard to the operation of Audience Councils. To allow the BBC to adapt and improve, there should be greater flexibility in the new Charter, permitting the BBC Board to determine the most effective way of meeting its public engagement obligations.

#### Devolved Nations

34. Audience Councils would also benefit from the introduction of National Operating Licences, which would be possible under the proposals in Chapter 2. These would provide a document against which the Councils could assess performance more clearly. There is a question about whether such a Licence would be appropriate for England in the same way as it might for any of the Devolved Nations. This would need to be addressed by the BBC in a way that ensured it remained accountable to each of the constituent Nations of the UK.

35. For the Devolved Nations, the proposals in this Chapter, together with other proposals in this Review, would amount to an important change in the relationship the BBC might have during the next Charter period with its audiences in Scotland, Wales and Northern Ireland. Chapter 1 recommended that Non-Executive Directors for the Devolved Nations should be on the unitary Board of the BBC, bringing these Directors into the central decision-making body of the BBC; Chapter 2 set out how Operating Licences could be created in respect of the Devolved Nations, describing more clearly than before the BBC's obligations to those Nations. This Chapter makes recommendations that would build engagement with audiences, connecting the BBC more effectively with the public across the UK. If the BBC were also to organise itself so as to give more responsibility to National/regional boards, subject to oversight by the main Board, this would further support the BBC's commitment to the Devolved Nations.
36. Taken together these reforms should significantly strengthen the relationship the BBC has with the Nations of the UK, putting the BBC in a strong position to fulfil its Charter responsibilities as the public sector broadcaster for the entire Nation.

#### **Section 4.**

#### **Conclusion**

37. I propose that the new Charter should place on the BBC Board clear obligations to engage with the public, similar to those currently placed on the BBC Trust. The BBC Board will need to engage the public as citizens as well as consumers of BBC content. The Board must involve the public in major changes in strategy and services provided.
38. The BBC needs to ensure that it makes full use of the new digital tools it is developing to capture the views of Licence Fee payers. New technologies and techniques should mean that during the next Charter period the BBC will be able to engage more effectively with a significant percentage of the public. Given the speed of change in technology, it is proposed that the new Charter be less prescriptive about how the BBC meets its broad engagement obligations, and about the precise constitution of Audience Councils.
39. The Non-Executive Directors for the Devolved Nations would chair the Audience Councils, and their membership of the BBC unitary Board would bring the Councils' advisory role and the Board's decision-making role closer together. The existence of National Operating Licences would give greater substance to the

work of the Councils. Further thought needs to be given to achieving greater diversity within their membership.

40. There would be a requirement on the BBC to set out in detail in its Annual Report and Accounts the work it had done to meet its Charter obligations, and the lessons it had learnt in doing so.



## **CHAPTER 4: EDITORIAL STANDARDS AND COMPLAINTS SYSTEMS**

### **Introduction**

1. The BBC has a dual complaints system involving both the BBC Trust and Ofcom. The Trust and Ofcom have sought to deal with potential overlaps through a detailed Memorandum of Understanding, but the arrangements can still make the complaints process complicated for the public and lead to inefficiencies.
2. The respective roles in the current system of the BBC Executive, the BBC Trust and Ofcom are set out in the paragraphs below. The greatest number of complaints relate to editorial issues. The BBC Trust has an important role in approving editorial standards, set out in the BBC Editorial Guidelines, and hears complaints against these guidelines. Ofcom also has powers to hear complaints against the BBC in certain areas so, in practice, there is a significant overlap. These complaints are heard against the Ofcom Broadcasting Code.
3. The complexity of the current system was recognised by the BBC Executive who, in its response to the Consultation Paper, argued that it was difficult to see how the current system is "helpful to the complainant or a proportionate use of resources".<sup>41</sup>
4. This Chapter is set out in the following order:
  - Section 1 describes the current system with particular regard to editorial complaints;
  - Section 2 sets out proposals for reforming the system; and
  - Section 3 sets out conclusions.

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<sup>41</sup> BBC Executive, (2015). 'We can simplify and streamline the way we handle editorial complaints without reducing accountability to audiences', in *BRITISH, BOLD, CREATIVE: The BBC's submission to the Department for Culture, Media and Sport's Charter Review public consultation* (s.3 17.2) [On-line]. Available at: [http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/reports/pdf/bbc\\_charter\\_review\\_dcmsreview\\_october2015.pdf](http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/reports/pdf/bbc_charter_review_dcmsreview_october2015.pdf)

## **Section 1.**

### **The Current System**

#### Types of Complaint

5. Complaints to the BBC can cover all BBC output (e.g. television and radio, website, tweets and BBC iPlayer). The BBC Executive has established and maintains an internal system within the BBC for handling complaints. This is laid out in the BBC Complaints Framework set by the BBC Trust.<sup>42</sup>
6. Within this Framework there are six distinct areas about which members of the public can complain. These reflect the range of activities for which the BBC is responsible and the issues that are raised.<sup>43</sup> These are:
  - Editorial complaints;
  - Fair Trading complaints;
  - Television Licensing complaints;
  - General complaints<sup>44</sup>;
  - complaints about the allocation to party political broadcasters, party election broadcasters and referendum campaign broadcasts; and
  - complaints about complaints handling, and the BBC Trust itself.
7. The current regulatory oversight of the BBC's output is carried out by the BBC Trust and Ofcom, as summarised in Appendix 4. The roles of these two bodies are discussed in detail in the paragraphs that follow.

#### Current System: the BBC Executive and the BBC Trust

8. The current system of complaints was last updated by the BBC Trust following public consultation and audience research in 2012. The process for dealing with complaints within the six sections detailed in paragraph 6 are set out clearly on the BBC Trust's complaints web page. Each section ranges from a two-stage complaints procedure up to four stages.
9. Editorial complaints to the BBC Executive can cover all types of content whether broadcast, on demand, or written on-line. The great majority of complaints come

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<sup>42</sup> BBC Trust (2012), 'Complaints Framework' [On-line]. Available at: [http://www.bbc.co.uk/bbctrust/governance/complaints\\_framework](http://www.bbc.co.uk/bbctrust/governance/complaints_framework)

<sup>43</sup> Digital switchover help scheme complaints and appeals procedures are now redundant.

<sup>44</sup> 'General Complaints' cover all complaints that do not fall into one of the other categories, e.g. coverage and interference.

direct to the BBC Executive; appeals against decisions made by the Executive are handled by the BBC Trust. Complainants can make an editorial complaint if the BBC has failed to follow the Editorial Guidelines. The BBC complaints procedure<sup>45</sup>, in relation to editorial issues, is set out below:

- i. Stage 1a: the complainant complains to the BBC Executive. It aims to provide an initial response within 10 days;
  - ii. Stage 1b: if the complainant is dissatisfied with the reply from the BBC Executive at Stage 1a, they can write again to the BBC Executive. It aims to provide a response within 20 days;
  - iii. Stage 2: if the complainant is still not happy, they can write to the Editorial Complaints Unit (ECU) in relation to editorial complaints or, for general content complaints, the BBC Division responsible for the area they are complaining about. The BBC Division will deal with anything that does not fall into the remit of the ECU. The complainant should expect a response within 20 days for straightforward complaints or 30 days for more complex cases; and
  - iv. Stage 3: if the complainant is still not happy, they can appeal to the BBC Trust. Complaints escalated to the BBC Trust's Editorial Standards Committee at Stage 3 numbered 326 in 2014–15, as shown in Box B.<sup>46</sup>
10. The complaints procedure is currently driven by the complainant wishing to take the complaint further. However, the BBC Trust is able to look into a case further if there has been a potentially serious editorial breach, or if it believes the Editorial Guidelines may have been applied incorrectly. The BBC Trust has also, in very rare cases, considered pre-broadcast matters in its obligation to uphold the standards set out in the Editorial Guidelines.
11. The Trust, upon finding that the Editorial Guidelines had been breached, may ask the BBC Executive to take appropriate action, such as an on-air or published correction or apology. They are unable to impose fines or penalties.
12. Editorial complaints account for the majority of all complaints received by the BBC. Box B shows the numbers of complaints received by the BBC at each stage of the complaints process, as stated in the BBC's Annual Report for 2014–15.

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<sup>45</sup> BBC Trust, 'Editorial and general complaints - the process', in *Making a complaint* [On-line]. Available at: [http://www.bbc.co.uk/bbctrust/contact\\_us/making\\_a\\_complaint.html](http://www.bbc.co.uk/bbctrust/contact_us/making_a_complaint.html)

<sup>46</sup> If a complaint is closed by the BBC Executive at Stage 1b, the complainant may appeal direct to the BBC Trust under Stage 3.

Box B: Number of Complaints Received by the BBC

Stage	Number of Complaints Received
Initial complaints received by the BBC at Stage 1 <sup>47</sup>	259,886
Editorial Complaints escalated to the Editorial Complaints Unit at Stage 2	583
Editorial Complaints escalated to the BBC Trust's Editorial Standards Committee on appeal at Stage 3	326

Current System: Ofcom

13. Ofcom's remit in relation to editorial issues is set out in the Communications Act 2003. The remit includes:

- editorial accuracy and impartiality;
- protection of under 18s;
- harm and offence issues;
- avoidance of inciting crime or disorder;
- responsible approach to religious content;
- prohibition of use of images of a very brief duration; and
- fairness and privacy.

14. Ofcom regulates editorial standards for the whole of the broadcasting sector. It is able to handle complaints, but there are two main areas from which it is currently excluded:

- i. Ofcom cannot hear complaints or appeals against the BBC in respect of 'accuracy and impartiality'. Under the Charter and Agreement these areas are reserved exclusively for the BBC Trust; and
- ii. Ofcom, in respect of other broadcasters, cannot look at 'accuracy' beyond news programming, and 'impartiality' beyond news and current affairs.

This issue of Ofcom's restricted scope is discussed further under paragraph 43 since it would be expected that Ofcom should be able, as the BBC Trust is currently, to look at all of the BBC's output.

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<sup>47</sup> The combined number of Editorial, General and Fair Trading complaints. The complaints received at this stage are not broken down into respective areas.

15. Ofcom regulates the BBC against the Ofcom Broadcasting Code. This Broadcasting Code derives from the Broadcasting Act 1996 and the Communications Act 2003, which set the criteria for television and radio, covering standards in programmes, sponsorship, product placement in television programmes and fairness and privacy.
16. Whilst in most cases Ofcom will wait for the broadcaster to respond to a complaint first, there is not an official 'Broadcaster First' rule, meaning that both the Broadcaster and Ofcom could be dealing with the same complaint simultaneously. The Memorandum of Understanding between the BBC and Ofcom was drawn up to try to resolve this problem.
17. The Ofcom process for complaints handling follows three steps:
  - i. Stage 1: initial assessment and investigation. Ofcom considers whether there may have been a breach of the Broadcasting Code that requires a response from the broadcaster;
  - ii. Stage 2: preparation of preliminary view. Ofcom prepares a preliminary view on the investigation based on the substance of the complaint and a representation from the broadcaster. This preliminary view is then given to the broadcaster and further representations are then sought; and
  - iii. Stage 3: decision. After Ofcom has received further representations from the broadcaster, Ofcom will finalise its decision.

The most serious issues go to full investigation by the Ofcom Content Board who have the delegated responsibility of the main Ofcom Board to deal with these issues. An explanation of the role of the Ofcom Content Board can be found in Chapter 1, paragraph 57.

18. All decisions, including the decision not to proceed with a complaint beyond initial assessment, are published in a regular 'Broadcast Bulletin' on the Ofcom website.<sup>48</sup>
19. Where Ofcom finds that the BBC has breached its Broadcasting Code, it is able to issue a direction, like the BBC Trust, to broadcast a correction or a statement of Ofcom's findings. In addition the 2003 Communications Act gives Ofcom the

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<sup>48</sup> Ofcom, 'Broadcast and On Demand Bulletins', in *Stakeholders* [On-line]. Available at: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins>

power to fine the BBC for any breaches of editorial standards: “The maximum penalty that may be imposed on the BBC on any occasion by Ofcom in exercise of a power conferred by virtue of the BBC Charter and Agreement is £250,000.”<sup>49</sup>

20. Complaints about the BBC account for approximately 9% of all Content Standards complaints received by Ofcom. Box C sets out the number of complaints received by Ofcom for the year 2014–15 and the corresponding ones that relate to the BBC.

Box C: Number of Editorial Complaints Received by Ofcom

	Total number of complaints received	Number that relate to the BBC
Complaints received by Ofcom	28,551	2,487
Full investigations completed by Ofcom	217	19

#### The interaction of the BBC Trust and Ofcom

21. The dual system means that the interaction between the BBC Trust and Ofcom can be complicated. If a complaint is submitted to Ofcom regarding an issue of ‘accuracy and impartiality’, then Ofcom will pass it directly on to the BBC as being beyond its scope. Complainants are unable to take up such issues with Ofcom, even if they are dissatisfied with their response from the BBC.
22. Within areas of editorial complaint (other than ‘accuracy and impartiality’), if a response from the BBC Trust does not satisfy the complainant, Ofcom is able to investigate. This investigation is not classed as an appeal by Ofcom, but is regarded as a completely new complaint. The complaints process must start again from the beginning, this time following Ofcom’s complaints procedure.
23. The BBC Trust can investigate any complaint, even if it is within Ofcom’s remit, outlined in paragraph 13. This can lead to simultaneous investigations. For example, two episodes of a Jonathan Ross and Russell Brand Radio 2 broadcast, which resulted in a significant number of complaints to both the BBC and Ofcom, were investigated by both parties. Both the BBC Trust and Ofcom investigated the alleged breach of their respective standards. The BBC Trust Editorial Standards Committee concluded that the material was “so grossly offensive that there was

<sup>49</sup> Communications Act (2003). Part 3 Television and Radio Services (s.198 (5)) [On-line]. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/198>

no justification for its broadcast”<sup>50</sup> and directed the BBC to broadcast apologies on Radio 2. The Ofcom Content Board reached a similar conclusion and Ofcom fined the BBC a total of £150,000 (£80,000 for infringement of privacy and £70,000 for harm and offence).<sup>51</sup>

24. The current process for identifying whether a complaint has been submitted simultaneously to both regulators is unclear. Ofcom’s own guidance suggests that it is up to the complainant to inform Ofcom as to whether they have simultaneously submitted two complaints.

## **Section 2.**

### **Reforming the Dual Regulatory System**

25. Any reviewer would be bound to conclude that the existing system is complicated and confusing. What is clear is that the remits of the BBC Trust and Ofcom overlap. Ofcom can hear any complaint in respect of the BBC, subject to the exclusions set out in paragraph 14 above. The BBC Trust can investigate any complaint, even if it is within Ofcom’s remit.
26. Any revised Standards and Complaints handling system needs to meet the following criteria:
  - i. a simpler, clearer and proportionate complaints system for the BBC, which offers value for money and removes the current dual regulatory system;
  - ii. an appeals system that is independent of the BBC;
  - iii. a complaints system that is able to prioritise and resolve the most serious matters, with appropriate ‘step-in’ rights for the regulator;
  - iv. a complaints system that maintains the confidence of complainants, is easily accessible by them, and deals with them fairly in a way that holds the BBC publicly accountable; and
  - v. a complaints system that continues to inform programme makers.

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<sup>50</sup> BBC Trust (2008). *Editorial Standards Findings: Appeals and editorial issues considered by the Trust’s Editorial Standards Committee* (s. 2.1) [On-line]. Available at: [http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/21\\_11\\_08\\_brand\\_ross\\_moyles.pdf](http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/21_11_08_brand_ross_moyles.pdf)

<sup>51</sup> Ofcom (2009). ‘BBC Brand/Ross Fine’, in *Ofcom for Consumers* [On-line]. Available at: <http://consumers.ofcom.org.uk/news/bbc-brandross-fine/>

27. Almost all who commented during the Consultation process argued that the dual complaints system needed to be simplified: that there should be only one point for appeal above the Broadcaster itself; and this final Appeal stage needed to be entirely independent of the BBC.
28. If the final Appeal stage needs to be independent of the BBC, it could be achieved by either: (i) all BBC related appeals (both those currently dealt with by the Trust and by Ofcom) moving to OfBeeb, a bespoke regulator for the BBC; or (ii) all Appeals being consolidated within Ofcom.
29. This Review argued in Chapter 1 that the balance of advantage lay in favour of consolidating regulatory functions within Ofcom: that Ofcom should become responsible for all regulatory matters including complaints, and be granted oversight powers of a BBC unitary Board. This change, together with other proposals set out below, would lead to a simplified and independent complaints system.
30. If regulatory oversight moved to Ofcom, it is the BBC unitary Board which would have the primary responsibility for maintaining the high editorial standards that audiences expect of BBC content. This would be a central responsibility of the Board, to be delivered in an open and transparent way, as set out in paragraph 70 in Chapter 1.

#### 'Broadcaster First' Rule

31. A 'Broadcaster First' rule has many advantages. It ensures that the Broadcaster stays close to its audiences and to what is concerning them; it recognises the accountability of the Broadcaster, if an error has been made, to put matters right; and it should provide value for money as issues may be dealt with quickly, keeping regulatory involvement to a minimum.
32. In practice this is how the majority of the BBC's editorial complaints are currently handled. This Review recommends a formal 'Broadcaster First' system for the BBC. Complainants would be made aware that they were required to take their complaint first to the BBC itself, with the right of Appeal to an independent body if they were dissatisfied with the outcome.<sup>52</sup>

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<sup>52</sup> Complaints about unfair treatment or unwarranted infringements of privacy in relation to BBC programming would not be able to follow this model as Ofcom has a duty under section 110 of the Broadcasting Act 1996 to consider and adjudicate upon such complaints.



33. If the complaints process were to follow a 'Broadcaster First' model, as proposed, Ofcom should have appropriate 'step-in' rights. This would enable Ofcom to intervene at an earlier stage in the process if it considered that exceptional circumstances warranted such an early intervention, and should ensure that any harm could be dealt with expeditiously. In other areas, for example complaints regarding impartiality in General Elections and high-profile cases with significant reputational issues, a protocol should be developed for reducing the length of time before Ofcom could begin an investigation.
34. Additionally, Ofcom should have appropriate rights to initiate an investigation, absent any complaint, if it appeared to it that there were evidence of a potentially significant failure to comply with the standards set out in the Ofcom Broadcasting Code.
35. This model would be consistent with how Ofcom currently operates. Ofcom already has powers to 'step-in', enabling it to intervene early or to initiate an investigation into a breach of standards without first receiving a complaint. This Review recommends that Ofcom should continue to be able to 'step-in' in relation to the BBC, if it considered that there were exceptional circumstances.
36. Where the issue at hand did not warrant 'step-in' action, which will be in the great majority of cases, there should be a requirement placed on the BBC to deal with the complaint in hand with reasonable haste. The BBC Board would need to agree with Ofcom a time obligation in respect of a complaint which, if breached, would allow the complainant to dispense with the 'Broadcaster First' rule, and have direct access to the regulatory Appeal process.
37. If a 'Broadcaster First' process were applied to the complaints procedure for the BBC, as above, the BBC would remain responsible for all initial complaints and Ofcom would only receive complaints on appeal. In this case, based on the number of appeals received by the BBC Trust in 2014–15, Ofcom would have dealt with an additional 326 cases. This compares with the 217 cases that were taken to full investigation in the same year by the Ofcom Content Board.

#### Simplifying the BBC's complaints system

38. The unitary Board of the BBC would be responsible for setting out the procedures for dealing with complaints. These complaints would be judged against the BBC's Editorial Guidelines. The procedure would need to be set out clearly on the BBC

website. The process would be subject to review by the Regulator. To simplify the current system it is proposed it should follow three stages:

- i. Stage 1: initial contact with the BBC call centre or programme makers by the complainant. It would be hoped that the great majority of complaints could be dealt with at this stage, either through appropriate explanation or apology;
- ii. Stage 2: if the complainant remained dissatisfied, there would be an internal review, independent of the programme teams/ editorial divisions.

It is proposed that the internal review process would be overseen by someone with significant editorial experience, appointed by and accountable to the Editor-in-Chief, and likely to involve a small team of staff that sit centrally (outside the editorial divisions).

On the basis of existing volumes of BBC complaints, the team would be likely to consider around 1,500 requests for review each year. The vast majority of these requests for a review are likely to be easily responded to, referred back down the chain, or rejected.

For those requests where the internal review team believed that there were sufficient reasons to review the original response, the team would either resolve the issue themselves, or undertake an investigation into the matter.

The outcome of this review would represent the BBC's final editorial position and, therefore, would be the final stage of consideration by the BBC against the BBC's own Editorial Guidelines; and

- iii. Stage 3: an appeal to Ofcom, as the independent regulator.

#### The Code against which Appeals are held

39. The BBC has its own set of standards, set out in the BBC Editorial Guidelines. This is currently the responsibility of the BBC Trust and incorporates the requirements of the Ofcom Broadcasting Code. If the proposed new arrangements were put in place, responsibility for the Guidelines would rest with the Board of the BBC. BBC management would be responsible for its drafting and for its implementation, but the Board would have oversight and accountability for this function. Given the importance of maintaining high standards in all its work,

and most particularly in relation to 'accuracy and impartiality' in its editorial functions, this oversight function cannot be delegated. As part of this oversight the Board would need to look regularly at how the complaints system worked, and receive details of any failures against its own Guidelines. As recommended in Chapter 1, paragraph 70, the Board would report annually on how it had carried out this function and about any changes in respect of the Guidelines.

40. Any appeal against the BBC to Ofcom would be against Ofcom's own Broadcasting Code, which applies to all broadcasters. Some have questioned whether this would lead to a diminution of standards within the BBC. It does not follow that this would happen. The characteristic of the BBC Guidelines which most distinguishes them from Ofcom's Broadcasting Code, other than that they cover all of the BBC's output, is that they are more prescriptive: they not only set out what the standards are, but how they should be complied with. The BBC's own Guidelines in the key areas of 'accuracy and impartiality' are not significantly different from the Ofcom Broadcasting Code. Both sets of guidelines<sup>53 54</sup> make reference to 'due' accuracy and 'due' impartiality and define the term 'due' as meaning "adequate or appropriate to the subject and nature of the programme." Ofcom and its Content Board have a high reputation in editorial matters. Whilst there is evidence that when the BBC Trust and Ofcom have considered complaints about the same item of content the findings have on occasion been different, I see no reason why Ofcom, as a respected regulator, would not meet Licence Fee payers' expectations with regard to standards they expect from the BBC.
41. It is of note that the CMS Select Committee Report of February 2015 also proposed that editorial appeals should go to Ofcom. The Committee commented:

"We recommend that Ofcom become the final arbiter of complaints over BBC content including matters concerning impartiality and accuracy, but that complaints should be considered by the BBC in the first instance. Ofcom should be given additional resources for taking on this role which are commensurate with the responsibility and estimated workload. We believe this transfer of responsibility will, if anything, strengthen the

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<sup>53</sup> BBC, 'Section 4: Impartiality', in the *BBC Editorial Guidelines*, [On-line]. Available at:

[http://downloads.bbc.co.uk/guidelines/editorialguidelines/pdfs/Editorial\\_Guidelines\\_in\\_full.pdf](http://downloads.bbc.co.uk/guidelines/editorialguidelines/pdfs/Editorial_Guidelines_in_full.pdf)

<sup>54</sup> Ofcom (2015). 'Section 5: Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions', in *The Ofcom Broadcasting Code* [On-line]. Available at: [http://stakeholders.ofcom.org.uk/binaries/broadcast/code-july-15/Ofcom\\_Broadcast\\_Code\\_July\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/code-july-15/Ofcom_Broadcast_Code_July_2015.pdf)

independence of the BBC, and also make the complaints process simpler, and appear more transparent and fair.”<sup>55</sup>

42. Whatever regulatory appeals framework is put in place in respect of the BBC's editorial standards, it should be recognised that the issue of standards is first and foremost one for the unitary Board. The BBC has a huge interest in maintaining the high standards to which it currently works; its reputation in the UK and overseas depends upon it. It seems likely that the Board would from time to time wish to commission, as the Trust has hitherto, external reviews of particular editorial issues, for example impartiality in relation to economic reporting.<sup>56</sup> The Directors collectively form the first line of defence in guarding the BBC's reputation for high editorial standards and independent broadcasting. The Regulator is the second line of defence and could itself commission independent studies.

#### Ofcom's Scope of Content Oversight

43. As noted in paragraph 14, the scope of Ofcom's oversight is limited when compared with the BBC Trust's regulation of all BBC output. It is proposed that Ofcom's scope should be widened to enable it to have oversight of editorial complaints, including for 'accuracy and impartiality', in respect of all the BBC's linear broadcasting and video on demand output. There would remain three areas of complaints that would still need to be dealt with:
- i. complaints in respect of the BBC's written on-line material;
  - ii. complaints in respect of the TV Licence Fee; and
  - iii. general complaints about the BBC.
44. In respect of 43(i), in the United Kingdom currently no written on-line material falls within the auspices of a Government appointed regulator. It does fall within the remit of the BBC Trust, but legally it does so as a self-regulatory activity, since the BBC Trust is part of the BBC itself. The transfer of regulation to an independent body outside the BBC gives rise to a policy choice for Government: that either written on-line activity should remain a self-regulatory activity, with responsibility resting with the BBC Board; or that the oversight work should move to the independent Regulator. If the latter option is chosen, it should be possible to draft

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<sup>55</sup> House of Commons Culture, Media and Sport Committee (2015). 'Regulation of BBC Content' (s.337) in *Future of the BBC: Fourth Report of Session 2014-15* [On-line]. Available at:

<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmcmmeds/315/315.pdf>

<sup>56</sup> A list of external reviews commissioned by the BBC Trust in relation to impartiality in Editorial Standards is available at: [http://www.bbc.co.uk/bbctrust/our\\_work/editorial\\_standards/impartiality.html](http://www.bbc.co.uk/bbctrust/our_work/editorial_standards/impartiality.html)

the amendment to the Broadcasting Code to make clear that Ofcom's additional duties do not stretch beyond the BBC's output.

45. The area of TV Licence complaints, under 43(ii), has the second largest volume of complaints. Although the number of complaints taken through to appeal in this area is small, it would not fit naturally into any regulatory body. The BBC Executive has proposed that the Charter requires the Board to establish, and fund, an independent Ombudsman to hear appeals on TV licensing matters.<sup>57</sup> The Ombudsman would have the power to determine findings in this area, with no referral to the BBC required, and should have the power to require the Board to take the necessary remedial action. However appointed, the Ombudsman should meet the requirements of the Ombudsman Association.<sup>58</sup>
46. General complaints about the BBC, under 43(iii), are concerned with the operation of the BBC. It is for the BBC itself to account for its operational decisions and as such no appeal would be expected, except in those areas where Ofcom has a regulatory role.
47. The current and proposed regulatory oversight of the BBC's output is summarised in Appendix 4.

### Sanctions

48. The BBC Trust, in cases where it has found against the BBC Executive for a breach of the Editorial Guidelines, does not have the power to levy fines. Indeed, it would be perverse if it had such a power since the BBC Trust and the BBC Executive are within one legal organisation. By contrast Ofcom does have the power to levy fines against the BBC, and has done so on a number of occasions. It is proposed that this right to impose fines be maintained.

## **Section 3.**

### **Conclusions**

49. In respect of editorial standards and complaints systems:
  - i. I conclude that the current complaints system, with responsibilities divided between the BBC Executive, the BBC Trust and Ofcom, is confusing;

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<sup>57</sup> A letter from the BBC proposing the establishment of an independent Ombudsman is available on-line at: [http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/policiesandguidelines/pdf/bbc\\_letter\\_clementireview\\_tv\\_l\\_febuary2016.pdf](http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/policiesandguidelines/pdf/bbc_letter_clementireview_tv_l_febuary2016.pdf)

<sup>58</sup> The requirements can be found on-line at: <http://www.ombudsmanassociation.org/about.php>

- ii. the BBC should have a 'Broadcaster First' complaints system, with 'step-in' rights for the Regulator, Ofcom, in exceptional circumstances;
- iii. the BBC unitary Board should have the primary responsibility for maintaining the high editorial standards of the BBC's output;
- iv. there should be a single complaints appeal process above the BBC, operated by Ofcom to ensure its independence; and
- v. appeals would be against the Ofcom Broadcasting Code, and it would be expected that Ofcom would hold the BBC to the high standards of 'accuracy and impartiality' expected by its audience.

50. The proposals meet the criteria set out in paragraph 26 above. They simplify the complaints system within the BBC, which should provide clarity for complainants and help inform BBC programme makers. More widely, the proposal to adopt a 'Broadcaster First' system and to remove the duality of regulation between the BBC Trust and Ofcom would streamline the system. Ofcom would have oversight of the BBC's complaints system, with the right of 'step-in' to prioritise exceptional cases. Ofcom's independence of the BBC would help strengthen consumer confidence and would help to hold the BBC publicly to account.

## **Appendix 1: Terms of Reference**

### **Independent review of the governance and regulation of the BBC**

The *BBC Charter Review Public Consultation* covers a range of areas that need to be looked at through the current Charter Review. A number of these relate to the governance and regulation of the BBC.

#### “Objectives

1. *To conduct a review into the governance and regulation of the BBC and to make proposals in the context of the 2015-16 Charter Review in relation to:*
  - a. *the model of governance and regulation of the BBC,*
  - b. *the specific mechanisms of governance and regulation including but not limited to the Public Value Tests and Service Licences,*
  - c. *the way in which the BBC and the bodies that govern and regulate it engage with licence fee payers and industry, including but not limited to complaints handling procedures and transparency.*

#### Key considerations:

2. *In assessing the objectives above the review will have regard to:*
  - a. *the responses to the consultation paper in respect of questions 15-17,*
  - b. *principles of good governance, BBC specific principles and other issues set out in the consultation paper.*

#### Process:

3. *The review should consult with the BBC Executives, the BBC Trust, Ofcom and other relevant parties.*

#### Output:

4. *A report setting out proposals for an appropriate regulatory and governance model for the BBC in the context of the 2015-16 Charter Review including key findings, conclusions and any other supporting information to be submitted to the Secretary of State for Culture, Media and Sport in the New Year.”*

## **Appendix 2: List of Parties Consulted**

### **Parties Named in the Review Terms of Reference**

In addition to officials of the DCMS and Cabinet Office, the Review engaged with the following organisations as required under the Terms of Reference:

BBC Executive

BBC Trust

Ofcom

### **Devolved Administrations**

Given the formal role of the Devolved Administrations in the Charter Review, set out in the Memoranda of Understanding between the UK Government and the respective Governments, the Review also engaged with the Scottish Government, the Welsh Government and the Northern Ireland Executive.

### **Organisations**

This is a list of organisations that Sir David Clementi engaged with during this Review:

The Authority for Television on Demand (ATVOD)

BT

Channel 4 Corporation

The Commercial Broadcasters Association (CoBA)

Guardian Media Group

ITN

ITV

MG Alba

National Audit Office (NAO)

Radiocentre

Producers Alliance for Cinema and Television (PACT)

S4C



Sky PLC  
Teledwyr Annibynnol Cymru (TAC)  
VIACOM (Channel 5)  
Virgin Media Group  
Voice of the Listener & Viewer (VLV)

## **Others**

This is a list of individuals Sir David Clementi met with during this Review:

Marcus Agius  
Lord Best, Baroness Jay and Lord Goodlad, Chair and members of the House of Lords  
Select Committee on Communications  
Steven Barnett\*  
Patrick Barwise\*  
Robert Beveridge\*  
Lord Carter of Barnes  
Sir William Cash MP, Chair of the European Scrutiny Committee  
Ruth Evans  
Michael Flood-Page\*  
Richard Hooper\*  
Dom Leonis  
David Liddiment\*  
Stephen Lovegrove  
Brian McBride  
Kip Meek\*  
Jesse Norman MP, Chair of the Culture, Media and Sport Select Committee  
Angela Phillips\*  
Stewart Purvis\*  
Michael Starks\*  
Jeanette Steemers\*  
Dame Sue Street

Tim Suter\*

Richard Tait\*

David Wolfe QC, Press Recognition Panel Chair

\*These individuals attended the Review's evidence gathering roundtable conducted on 27 November 2015.

## Events

Sir David Clementi and the Review team also attended conferences, workshops and other events hosted by a range of parties:

1. BBC Trust: 'The BBC: Who Governs?' 1 October 2015<sup>59</sup>
2. LSE Media Policy Project: 'BBC Governance: Independence, Innovation and Accountability.' 13 November 2015<sup>60</sup>
3. Voice of the Listener & Viewer: 'Public Service Broadcasting – Future Uncertain?' 1 December 2015<sup>61</sup>

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<sup>59</sup> Further information about the event can be found at: <http://www.bbc.co.uk/blogs/bbctrust/entries/84768e8f-c15f-4caa-b79e-2b47cec3b2e4>

<sup>60</sup> Further information about the event can be found at: <http://blogs.lse.ac.uk/mediapolicyproject/files/2011/07/BBC-Governance-workshop-note.pdf>

<sup>61</sup> Further information about the event can be found at: <http://www.vlv.org.uk/charterreview/conference-autumn2105.html>

### **Appendix 3: Table of Recommendations**

The proposals of this Review are set out in the Summary of Main Recommendations in pages 7-11. The table below shows how the recommendations of this Review fit within the framework set out in Annex A of the Culture, Media and Sport Select Committee 'Report on the Future of the BBC' of February 2015.

	<b>Trust model:</b>	<b>Burns panel's proposal:</b>	<b>CMS Committee proposal February 2015:</b>	<b>Clementi Review proposal:</b>
Constitution	Oversight body inside BBC.	External to BBC.	Same as Burns' recommendation.	Same as Burns' and CMS Committee recommendations.
	BBC Trust is the BBC's sovereign body.	Unitary BBC Board with non-executive Chair – separate external public-interest oversight and regulation i.e. by a new Public Service Broadcasting Commission (PSBC) and Ofcom.	Same as Burns' recommendation.	Unitary BBC Board with non-executive Chair. Separate external public service regulation by Ofcom.
Appointments	Chairman of the Trust appointed by the Government following Cabinet Office public appointment process and now subject to a pre-appointment hearing by Culture, Media and Sport Committee	Government would have appointed Chair of PSBC and other commissioners following best practice public appointment rules.	Same as Burns' recommendation. The Government's preferred candidate for Chair of PSBC subject to a parliamentary pre-appointment hearing.	Ofcom appointments continue as per the current arrangement of public appointment by Government with pre-appointment hearing for the Chair.
	Chair of the Executive Board appointed by the Trust.	Chair of BBC Board would have been appointed by Government following accepted best practice.	Same as Burns' recommendation. The Government's preferred candidate subject to a parliamentary pre-appointment hearing.	Chair of BBC Board appointed by Government or through an independent process. Subject to a parliamentary pre-appointment hearing.
	Chair of the Executive Board can be appointed in an executive or a non-executive capacity (but so far always the former and the director general).	Non-executive Chair of unitary BBC Board would have been known as BBC Chairman.	Same as Burns' recommendation.	Same as Burns' and CMS Committee recommendations.
Board	BBC Executive has majority of executive members.	Non-executives would have been in majority on unitary BBC Board.	Same as Burns' recommendation.	Same as Burns' and CMS Committee recommendations.
Governance/ accountability	Trust sets the overall strategic direction for the BBC within the framework set by the Charter and Framework Agreement following proposals made by the BBC Executive.	PSBC would have subjected the BBC's strategic plan, prepared by the BBC Board, to open and transparent scrutiny. Plan would have included broad objectives of	The PSBC would neither formulate nor have to approve the overall strategy for the BBC, but would scrutinise and make recommendations.	Ofcom would neither formulate nor have to approve the overall strategy for the BBC, but would have a role in approving changes to Licences.

		television and radio channels, online and other services, broad allocation of expenditure by service, audiences and genre.		
	Trust approves high-level strategy and budgets in respect of the BBC's services.	PSBC would have approved or rejected high level strategic plan and budgets in respect of the BBC's services.	PSBC would scrutinise and make recommendations about BBC Board's proposals.	Ofcom would neither formulate nor have to approve the BBC Board's proposals, but would scrutinise.
	Trust defines suitable performance criteria and measures against which the effective promotion of the Public Purposes are judged.	PSBC would have defined suitable performance criteria and measures against which the effective promotion of the Public Purposes would be judged.	Same as Burns.	Ofcom would have defined suitable performance criteria and measures against which the effective promotion of the Public Purposes would be judged.
	Trust assesses the performance of the Executive Board in delivering the BBC's services and activities and holds the Executive to account for its performance.	PSBC would have assessed performance of unitary board and held it to account.	Same as Burns. PSBC to possess power to recommend ultimate funding sanctions.	Ofcom to assess performance of the unitary Board and hold it to account. It would possess a range of sanctions including ultimately financial sanctions.
Purpose Remits	Trust sets multi-year purpose remits, and approves strategies which include high-level budgetary allocations.	PSBC would have had a similar role to the Trust.	BBC Board would set remits and budgets, PSBC would scrutinise them and make recommendations.	BBC Board would set the remit and budgets, published through the Workplan and Creative Remits. Ofcom would scrutinise.
Service Licences/ service reviews	Trust issues service licences for BBC services and monitors compliance with them	PSBC would have adopted the Trust's routine of service licence and periodic service reviews.	PSBC to review and report on BBC service licences, but final approval made by BBC Board. PSBC to possess threat of recommending funding sanctions.	Ofcom to issue, review and report on Operating Licences. BBC to propose changes but Ofcom has 'step-in' rights.
Public Value Tests	Trust carries out public value tests and decides on whether the BBC may introduce new services or close existing ones. Ofcom carries out market impact assessments.	PSBC same as Trust. Ofcom's role unchanged.	PSBC to carry out public value tests of BBC services and review proposals for new services and closures. Also able to initiate PVTs on existing services. Expectation on BBC Board to adhere to PSBC's findings, backed up by threat of recommending funding sanctions.	Ofcom to carry out Public Value Tests for new proposals from the BBC. Also able to undertake investigations which ultimately may lead to PVTs.
	Trust approves individual strategic or financial proposals where they stand to have significant implications for the fulfilment of the purpose remits.	Not specified.	Scrutiny role but no formal approval role	Ofcom to have scrutiny role, and able to undertake review or PVT if required.

	Trust, where appropriate, conducts investigations into any activity of the BBC which it has grounds to suspect does not comply with requirements supervised by the Trust.	Broadly PSBC same as Trust.	Conduct investigations into any activity of the BBC which causes concern.	Ofcom can conduct investigations into any activity of the BBC which causes concern.
Value for money	Commissions value-for-money investigations into specific areas of BBC activity. NAO conducts value for money investigations by agreement with the BBC Trust.	Broadly PSBC same as Trust.	In conjunction with an NAO having unfettered access to the BBC (but not commenting on editorial decision-making), PSBC assesses value-for-money of the BBC and its services.	NAO role is out of scope for the Review. The BBC unitary Board will have the primary role. Ofcom can scrutinise.
	Trust acts as guardian of the licence fee and the public interest in the BBC and delivers ongoing programme of public consultations and engagement.	PSBC would have represented the public interest on all BBC activities and public funding in broadcasting and delivered ongoing programme of public consultation and engagement.	Same as Burns' recommendation.	BBC unitary Board has primary responsibility for the interests of Licence Fee payers, and must meet the obligations placed on it by the Charter and related documents. Ofcom regulates in the public interest as a safeguard of this.
Regulation	Ofcom responsible for regulation of competition, economic, spectrum and pan-broadcasting issues.	Same as existing arrangement.	Same as existing arrangement.	Same as existing arrangement.
	Final arbiter of complaints regarding content over matters of impartiality and accuracy.	PSBC final arbiter of complaints regarding content over matters of impartiality and accuracy.	Ofcom final arbiter of complaints regarding BBC content including over matters of impartiality and accuracy.	Same as CMS Committee.
Independence	Trust secures the independence of the BBC.	PSBC same as Trust.	PSBC would help secure the BBC's independence but it would principally fall to the Chair of the BBC to defend and champion the BBC's position.	BBC unitary Board has primary role. Ofcom has secondary role.
Level of Licence Fee	No role.	PSBC would have recommended to Government and Parliament the overall level of the licence fee and any other funding needed to support the BBC.	Same as Burns' recommendation.	Out of scope for the Review. Ofcom may be able to perform a function in relation to the Licence Fee if needed.
Contestable funding	No role.	PSBC would have judged the allocation of the licence fee between the BBC and other broadcasters and ensured a degree of	Same as Burns' recommendation.	Out of scope for the Review.

		plurality in supply of certain areas of PSB content		
Financial sanction	Not applicable	PSBC to possess potential backstop power to withhold some of the licence fee from the BBC	Same as Burns' recommendation.	Ofcom to possess a range of sanctions including an ultimate financial sanction.

## **Appendix 4: Oversight of BBC Output**

The table below sets out the current and proposed regulatory oversight of the BBC's output.

<b>Service</b>	<b>Oversight of Output (Current)</b>	<b>Oversight of Output (Proposed)</b>
Linear Broadcasting (TV and Radio) - Accuracy and Impartiality	BBC Trust	Ofcom
Linear Broadcasting (TV and Radio) - Protection of under 18s - Harm and Offence Issues - Avoidance of inciting Crime or Disorder - Responsible approach to religious content - Prohibition of use of images of a very brief duration - Fairness and privacy	BBC Trust/ Ofcom	Ofcom
Video on Demand service (eg. iPlayer, 4OD) <sup>62</sup>	BBC Trust/ Ofcom	Ofcom
Written on-line content	BBC Trust	BBC/Ofcom <sup>63</sup>
Commercial Broadcast Services <sup>64</sup>	BBC Trust/ Ofcom	Ofcom
Elections and referendums and commercial references (editorial integrity) in the BBC's UK public services	BBC Trust	Ofcom
General Complaints	BBC Trust	BBC
TV Licensing Complaints	BBC Trust	Independent Ombudsman
Fair Trading Complaints	BBC Trust	Ofcom

<sup>62</sup> This function was carried out by The Authority for Television On Demand (ATVOD) up until the 31 December 2015.

<sup>63</sup> As noted in Chapter 4, paragraph 44, the Government should determine whether on-line content should be self-regulated by the BBC, or passed to Ofcom.

<sup>64</sup> Ofcom fully regulates all BBC commercial broadcast services licensed in the UK (such as BBC World News).







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