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Broadcasting Regulation in Wales: Part 1





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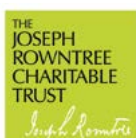
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Note

This short paper forms the first of a three-part piece of research that will be published in full in early 2023.

Part 1 aims to provide an overview of the current legislative and regulatory frameworks governing broadcasting in Wales.

Part 2 will provide an analysis of regulatory and oversight models for broadcast media and journalism in a selection of other countries with devolved governance frameworks in order to provide comparison with Wales.

Part 3 will apply the findings of the above to give an assessment of the issues currently facing Wales in the area of broadcasting and make recommendations for potential regulatory and non-regulatory solutions to these.

Introduction

In March 2021, the Culture, Welsh Language and Communications Committee of the Fifth Senedd published a report titled ‘Exploring the devolution of broadcasting: How can Wales get the media it needs?’ The report noted the global context – ‘a period of seismic shift, as the traditional roles of public service broadcasting are re-evaluated in light of the growth of online streaming platforms’ and concluded that ‘Wales needs powers in this area, as the needs of Welsh audiences are unique.’

The committee ‘agree[d] that the Senedd should gain powers over broadcasting’ but noted the variation in views as to the extent of potential changes to the legislative and regulatory landscape around broadcasting, which remains an area reserved to the UK Parliament.

The committee suggests that: ‘devolution of broadcasting to Wales could be viewed as a process rather than an event’ and that ‘the most germane question to ask is not “should broadcasting be devolved?”, but “how much of broadcasting should be devolved?”, and “how can Wales’s voice in the broadcasting landscape be strengthened?”’

The Institute of Welsh Affairs endorses this cautious, evidence-based approach, as set out in our previous report ‘[IWA Media Priorities for the Next Senedd](#)’, which recommends ‘Welsh Government should work with the UK Government to improve accountability of Public Service Media organisations (PSMs) to the Senedd, through devolution of specific broadcasting powers’.

We welcome the establishment of an Expert Panel as part of The Co-operation Agreement between the Welsh Government and Plaid Cymru, which ‘will provide recommendations and options to help strengthen Wales’ media, and support the development of plans for an effective and fit for purpose regulatory framework for Wales’, and this research is intended to support the work of the Panel, as well as that of the Independent Commission on the Constitutional Future of Wales, which has a remit ‘to consider and develop all progressive principal options to strengthen Welsh democracy and deliver improvements for the people of Wales’.

As a key part of the fourth estate, we believe public service broadcasting must be considered as part of delivering these improvements for Welsh democracy and the people of Wales. We also recognise the complexity of the current legislative and regulatory landscape governing broadcasting. This research aims to unpick some of the complexity, to make clear where powers currently lie, what potential levers are available at a devolved level, and where potential changes might be made to achieve positive results for audiences in Wales.

First, it is important to understand what we mean by broadcasting regulation: by this we refer to the ‘political decisions and legal and economic instruments by which broadcasting activities, mainly radio and television services directed at a mass audience, are governed.’

We would also stress that within European legislation, which is also adapted by the UK, audiovisual media service is defined as a service which is ‘under the editorial responsibility of a media service provider and the principal purpose of providing programmes, to inform, entertain or educate, to the general public by electronic communications network’.

Within the EU, audiovisual media services (including broadcasting and on-demand services) are to a broad extent regulated under the Audiovisual Media Services Directive 2010/13/EC (the AVMS Directive). AVMS Directive 2.0 applies to broadcasts over terrestrial, cable, satellite and mobile networks as well as over the internet. It distinguishes between ‘linear’ services (which ‘push’ content to viewers, for example by broadcasting via traditional television, internet or mobile phones) and ‘non-linear’ services (which ‘pull’ content from a network, for example video-on-demand services), as well as video-sharing platforms (which, without bearing editorial responsibility, provide programmes and user-generated videos, or both). Under AVMS Directive 2.0, all three services are subject to tight regulations.

Broadcasting or media services to an extent can also include film, but only in the very limited sense of films provided through broadcast. Cinema and the film industry more widely is not included under broadcast regulation because it is not for our purposes defined as being meant for ‘mass distribution’.

Who regulates broadcasting in Wales and how?

This report aims to underline that regulators and policy makers have a large toolbox and different means available to them in seeking to shape the nature of broadcasting. Rather than thinking in the often politically-charged binary terms of ‘devolution’ or ‘no devolution’, we suggest one or more of the following approaches be used in combination: devolution of reserved matters; building on existing devolved matters; altering the powers of existing structures, bodies, agencies and regulators.

Our aim in creating the *IWA Regulatory Map* is to lay out as clearly as possible the legislative and regulatory structures currently governing broadcasting in Wales in order that policymakers can identify priority areas for potential changes in the sector through the identification of key ‘touchpoints’ where intervention might be (a) possible and (b) useful.

The Map has three layers which relate to our three main lines of inquiry:

1. who regulates broadcasting in Wales, and how;
2. what can be regulated in order to impact broadcasting, and how;
3. and what influence does Wales already have on these existing legal and regulatory frameworks?

Government and regulation

The *IWA Regulatory Map* begins at the highest possible level by acknowledging the importance of the separation of powers in state governance, and the role played by each of the executive, legislature and judiciary in governing broadcasting.

Although the judiciary plays an important role in sanctions, decisions and appeals related to broadcasters, we are clear that the conversations around ‘devolving broadcasting’ and ‘devolving justice’ are largely separate conversations and we are not concerned with the role of the judiciary here.

The primary distinction we make on our *IWA Regulatory Map* is between the roles of the executive (UK Government, through the Department for Digital, Culture, Media and Sport [DCMS]) and the independent regulators, chiefly but not exclusively Ofcom, which also derives its duties from the legislature, the UK Parliament.

Westminster therefore sets the framework for the regulation of broadcasting across the United Kingdom, with the most relevant legislation being the Broadcasting Act 1996 and the Communications Act 2003, in addition to the proposed Media Bill, Up Next: the government's vision for the broadcasting sector (2022).

Broadly, DCMS are responsible for setting strategy and policy for the sector, while Ofcom, along with the Competitions and Markets Authority (CMA) and the Advertising Standards Agency (ASA) are responsible for the execution of those regulations and policies, the aim of which is supporting and maintaining competition and plurality across the broadcast media.

Relevant policy tools

While it remains unlikely in the current context that the functions of either DCMS or Ofcom would be devolved in their entirety to Wales, beneath them sit a range of frameworks, codes, licences, charters, agreements and official appointments that we have grouped together as 'Relevant policy tools' in order to demonstrate the breadth of 'touchpoints' that might be said to lie 'between "devolution" and "no devolution"'.

The Map thus enables policymakers to differentiate between policy tools currently in the gift of a department of the UK government and those in the remit of the regulators. For example, the BBC Charter governs both the broadcaster's funding and its regulatory duties, whereas the licence fee settlement is decided upon directly by the Secretary of State for Digital, Culture, Media and Sport. Meanwhile, the BBC Operating Licence sets the regulatory conditions that Ofcom considers appropriate for requiring the BBC to fulfil its Mission and promote the Public Purposes (as set out in the Charter).

Broadcasting in Wales

In the third and final part of the *IWA Regulatory Map*, we set out the shape of the broadcasting sector in Wales by setting out both the varied and often complex ways in which media organisations are accountable to the various frameworks, codes, licences, charters, agreements and official appointments set out in the second layer of the *Map*.

We include here all broadcasters active in Wales, including both the public service media organisations (PSMs) and the independent sector, across both television and radio, as well as taking into account video on demand (VOD) services such as Netflix, Amazon Prime and Disney+ which are currently not subject to legal and regulatory requirements as are the PSMs, who themselves run VOD services such as BBC iPlayer and Clic.

It is particularly important to note here the dominance of the BBC in Wales, in terms of the size of the organisation, its range of channels and its audience share. It is important to note also that S4C is directly funded by the licence fee and has its content regulated by Ofcom.

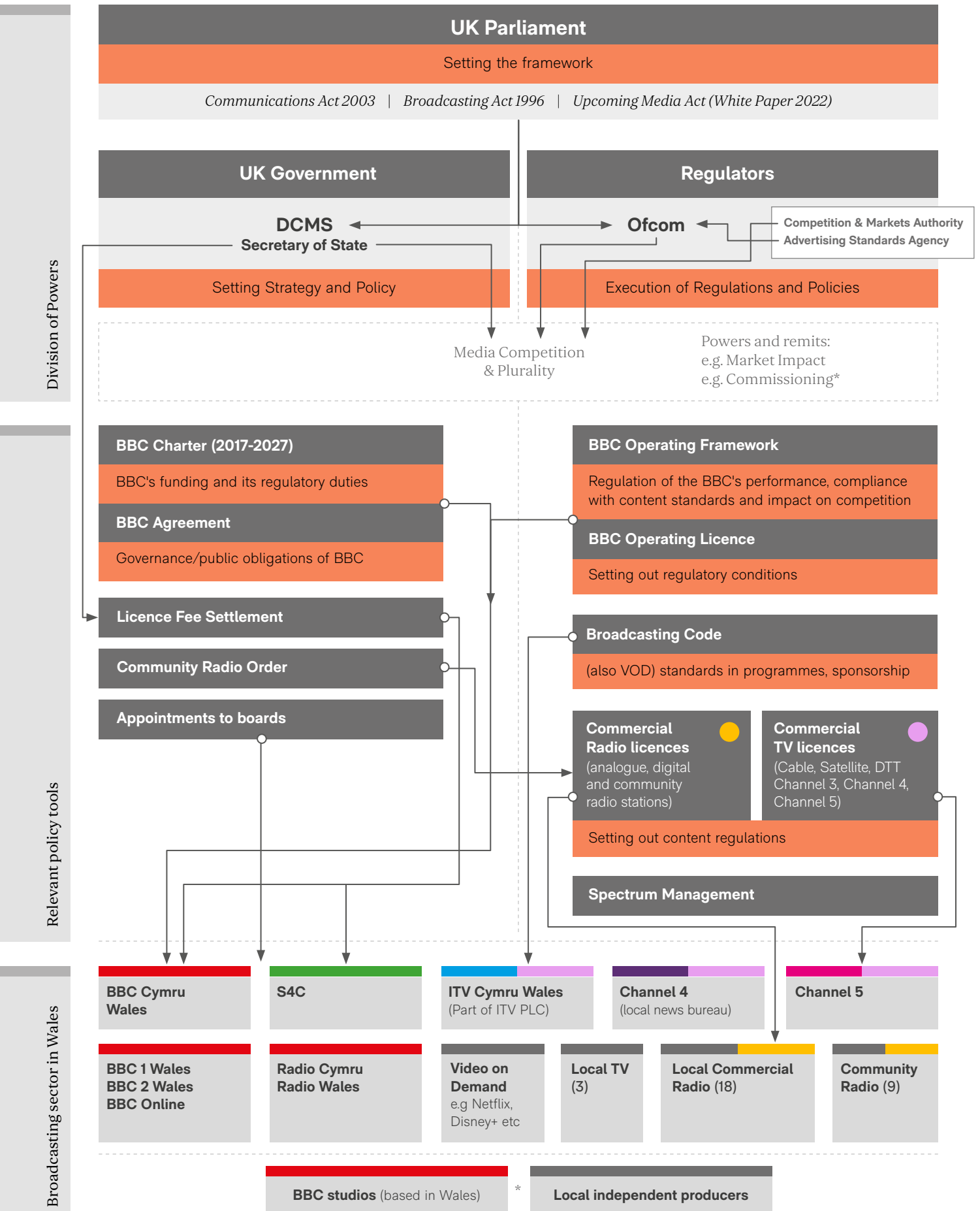
S4C's statutory remit is to provide a broad range of high quality and diverse programming in a service in which a substantial proportion of the programmes consists of programmes in Welsh (Paragraph 3(3), Part 2 of Schedule 12 to the Communications Act 2003). S4C does not have a broadcasting licence, but it is subject to quotas set by Ofcom, including quotas regarding news and current affairs, original productions, and independent productions (Paragraphs 7-9 of Schedule 12 to the Communications Act 2003)

Commercial television licences in Wales are held by ITV plc (ITV Cymru Wales came into existence on 1 January 2014 following a split in the Channel 3 licence previously franchised via HTV for the Wales and West region), Channel 4 (whose only permanent presence in Wales is through a local news bureau) and Channel 5 (who operate on a pan-UK basis).

The Commercial PSB providers and S4C are required to publish an annual statement of programme policy, setting out how in the coming year their PSB channel will satisfy its statutory public service remit and its specific quotas and other requirements. Statements of programme policy must be prepared with regard to guidance drawn up by Ofcom. Broadcasters must monitor their performance against these statements and must report on their performance for each year in the following year's annual statement of programme policy. The licensed PSB providers and the provider of S4C are subject to statutory licence conditions which prohibit them from imposing charges on persons in respect of their reception of PSB services

Wales is also home to a thriving creative industries hub, particularly in the south-east, with programmes made by both BBC Studios (separate from the BBC) and a range of independent producers. There are also a small number of small, local television stations and a larger number of local commercial and community radio stations whose output is also subject to the legal and regulatory frameworks described above.

IWA Regulatory Map



What can be regulated?

Following on from the *IWA Regulatory Map*, it is important to recognise that in seeking to influence specific policy levers to impact broadcasting in Wales it is not necessary to ‘devolve’ every possible aspect of regulation.

The following lists demonstrate the range of areas currently regulated in the UK, arranged under the headings ‘Economic regulation’ and ‘Content regulation’. Our intention in setting out the various areas in this way is that this will assist policymakers in identifying areas where Wales might want or need to seek influence over levers to benefit audiences and citizens in Wales.

Content regulation

Positive content regulations

- Domestic production quotas
- Independent producers
- Local versus National news services (news, language etc.)
- Listed events
- Prominence, accessibility, electronic programme guide
- Children’s content

Negative content regulations

- Protection of minors
- News
- Protection against crime and disorder
- Protection against racial or ethnic hatred
- General moral or ethical norms
- Right of reply
- Advertising
- Elections

Economic regulations

- Economic regulations
- Television and radio licensing
- Ownership (also newspapers)
- Competition
- Spectrum management
- Intellectual property rights

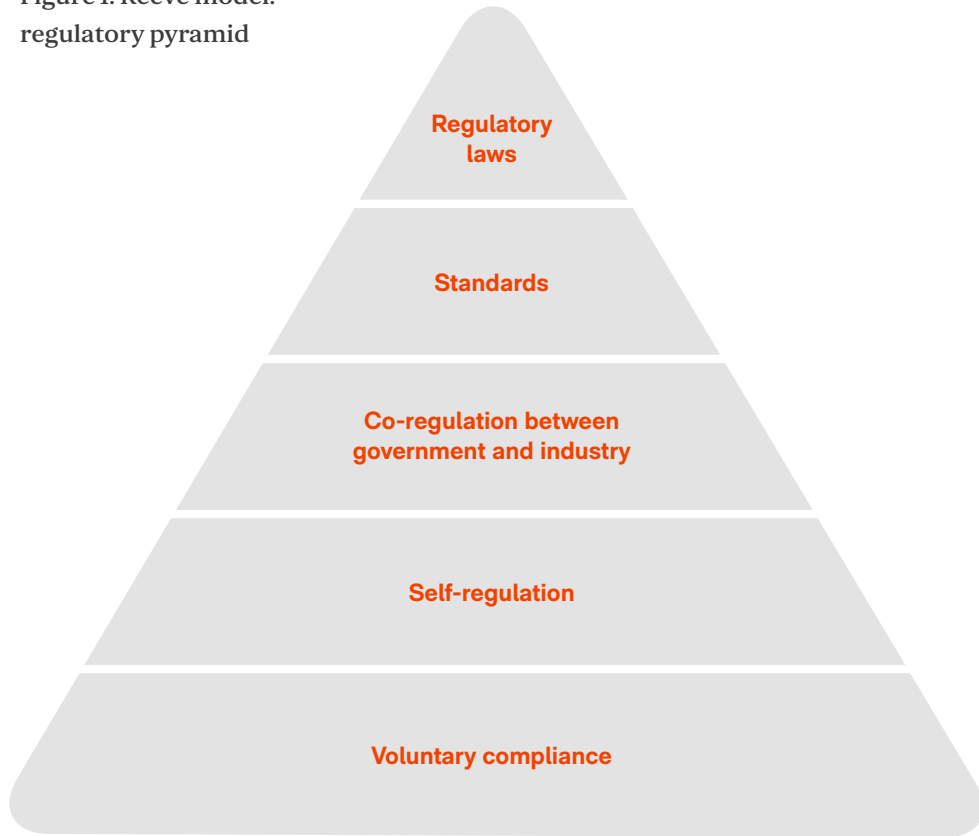
Other regulations

- Funding
- Licence fee
- BBC Charter
- Complaint system

When considering the various 'touchpoints' contained within the *IWA Regulatory Map* and the overview lists of content and economic regulation above, it is also important to bear in mind the various distinctions inherent within different modes of regulation.

These can be encapsulated in the Reeve pyramid (Figure 1, below) which outlines the spectrum between regulation that is strengthened by force of legislation (classical 'top down' statutory regulation) and voluntary compliance (a form of which is already evident in the memoranda of understanding that Welsh Government has in place with at least some of the PSMs active in Wales; see below for more on this).

Figure 1: Reeve model:
regulatory pyramid



Between these 'extremes' lies scope for degrees of self-regulation, co-regulation (with responsibility shared between public bodies and broadcasters) and/or the introduction of standards agreed between government, regulatory bodies and the industry to which broadcasters adhere.

Further, it may be argued that Wales has opportunities to exercise 'indirect regulatory impact' or encourage 'self-regulation with public interest' through, for example, the use of (national) representatives on advisory or decision making bodies.

What levers does Wales already have and what impact do these have?

Given the complexity and plurality of the broadcasting landscape in Wales, the *IWA Regulatory Map* uses arrows to indicate relationships between relevant legislative and regulatory frameworks and specific broadcasters. We hope this is useful for policymakers seeking to identify the potential effects of specific interventions.

As identified in the [report](#) by the Culture, Welsh Language and Communications Committee of the Fifth Senedd, and following on from the above, the Welsh Government and Senedd do already have some limited oversight and public appointment roles in broadcasting: from appointing members of the Ofcom and BBC boards to scrutinising public service broadcasters via arrangements codified in specific memoranda of understanding.

In paragraph 92 of that report, the Committee usefully set out some of the ‘number of bodies [that] seek to speak for Wales on broadcasting matters’ within the current framework, and this list can be utilised in conjunction with the *IWA Regulatory Map* to consider where the powers of specific bodies, teams, individual appointments or scrutiny and reporting mechanisms might be altered or enhanced.

Standards

These include the following *advisory roles*, which have no decision making power, but nevertheless influence and impact indirectly BBC regulation and content standards, the Broadcasting Code and a variety of broadcasting licences:

- The Ofcom Wales team, based in Cardiff, represents Ofcom in Wales and Wales within Ofcom – managing relationships and communications with the general public and a wide range of industry stakeholders, including politicians, industry and the media. The decision-making authority within Ofcom resides with a range of decision makers, two of which, the Content Board and main Board, comprises representatives from Wales, Scotland, Northern Ireland and England.
- The Advisory Committee for Wales, composed of independent industry experts, advises Ofcom about the interests and opinions, in relation to communications matters, of people living in Wales.
- The Ofcom Board Member for Wales. The Board is Ofcom’s main decision-making body and provides strategic direction for the organisation.
- The Content Board Member for Wales. The Content Board is a committee of the main Board and it sets and enforces quality and standards for television and radio.

Co-regulation

Second, there are a number of opportunities for *co-regulation* through existing memoranda of understanding:

- The Senedd Memorandum of Understanding with Ofcom which commits the regulator to consulting the ‘appropriate committees’ of the Senedd on its Annual Plan, appearing before Senedd committees and laying its annual report and accounts before the Senedd.
- The Senedd Memorandum of Understanding with the BBC, which commits the broadcaster to laying its annual reports and accounts before the Senedd and appearing before Senedd committees.
- The Welsh Government is a signatory to the Memorandum of Understanding with Ofcom, which commits the regulator to meet with Welsh Ministers, consult the Welsh Government on its Annual Plan and gives the Welsh Government power to appoint the Welsh members of the Ofcom board.
- The Welsh Government Memorandum of Understanding with the BBC and UK Government which commits the UK Government to consulting the Welsh Government on the BBC Charter review, and requires the Welsh Government to lay the draft charter and framework agreement before the Senedd.

In addition:

- The Culture, Communications, Welsh Language, International Relations and Sport Committee of the Sixth Senedd, the previous incarnation of which carried out inquiries into radio, S4C, film and major television production, news journalism and broadcasting, also holding regular scrutiny sessions with the BBC, ITV and S4C.
- The House of Commons Welsh Affairs Committee, which conducts pre-appointment hearings for the Chair of the S4C board and scrutinises relevant bodies, such as the BBC, and the UK Government on broadcasting matters.
- Other partnerships to support delivery of the PSBs in Wales include memoranda of understanding between Creative Wales and S4C and between Creative Wales and BBC Wales.

Next steps

We see this document as a starting point, through which policymakers seeking to influence the development of the frameworks governing broadcasting regulation as it pertains to Wales can identify power holders for the interest areas of Welsh Government and the Senedd.

Part 2 of this research will be published early in 2023, and will be focused on providing examples of regulatory models in different countries, particularly in states where power is shared asymmetrically between sub-state nations and/or regions. We anticipate that such models may be of interest to wider conversations in Wales about ‘the devolution of broadcasting’, and might even begin to form an ‘options menu’ for a way forward.

In Part 3, to be published simultaneously with Part 2, the IWA will explicitly recommend ways forward based on independent and impartial analysis of the findings from Part 1 and Part 2, and we hope that policymakers in Wales will find our recommendations useful in determining a path forward that foregrounds the needs of all of Wales’ citizens.

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