

Devolving media regulation: The Smith Commission proposals



Telecommunications researcher Ewan Sutherland argues that the Smith Commission's proposed devolution solutions for media regulation are messy proposals that create redundant unaccountable positions and ignore important regulatory bodies.

The Smith Commission has **reported** on enhanced powers for the Scottish Parliament, though some are still being transferred under the **Scotland Act 2012**. The major UK political parties have accepted its recommendations and are committed to expeditious implementation, though the SNP complain they are inadequate.

In media and telecommunications the proposals are modest, if confused, concerning representation on the board of one of the regulatory authorities, and formalising its interaction with the Scottish Parliament, and formalising the role of the Scottish Government in the renewal of the BBC Charter. It duplicates roles and appoints unelected individuals to 'represent' one of four nations in independent institutions, suggesting opaque processes whose efficacy would be almost impossible to determine.

The Scottish Government and Scottish Parliament would have to duplicate functions already performed by the **Department of Culture, Media and Sport** (DCMS) and Westminster, at additional cost to UK taxpayers. The Scottish Government would not be a participant in the supra-national networked governance arrangements in which best practice is discussed and improved, notably the committees of EU member states, the OECD and UNESCO, leaving it struggling to keep up. This absence is already a problem in digital inclusion.

Representing Scotland

The Smith Commission proposed that the **Office of Communications** (Ofcom) have a Scottish board member, appointed by Scottish Ministers (para 38), in addition to the existing Scottish members of the Ofcom Content Board and the BBC Trust. What is remarkable is that it did not propose a Scottish board member for bodies such as: the **Bank of England** (or its Monetary Policy Committee), the **Competition and Markets Authority** (CMA), or the **Office of Gas and Electricity Markets** (OFGEM).

At present there are representatives of the four nations on the **Ofcom Content Board**, which regulates non-BBC broadcasters. There is also the tradition of a Scottish Governor of the BBC, now a member of the **BBC Trust** for Scotland.

The overall intention is to give the Scottish Government and Scottish Parliament some oversight of and input to the regulators. However, the proposals fail to address the issue of independence, not of Scotland, but of the regulators. There are strong EU legal obligations requiring that the regulator be independent: Article 3(2)2 of **2002/21/EC** and Article 3a of **2009/140/EC**. Indeed, the Court of Justice of the European Union held that a government cannot direct a regulatory authority to prioritise amongst the various objectives set out in the Framework Directive (see Case **C-424/07**).

Decisions by Ofcom are frequently – some claim too frequently – contested before the **Competition Appeal Tribunal** (CAT), where the views of a Scottish director may hold little sway. In reaching a decision, Ofcom must carefully interpret statutes, analyse the evidence, prepare an impact assessment and respond to the views and data provided through consultations, being reasoned and transparent in process and outcome. If businesses or consumers in Scotland want

something specific, then they would need to make a case that could be defended before the Tribunal.

Consequently, it is unclear whether there could be key performance indicators for a Scottish director of Ofcom, who could not be held accountable to the Scottish Parliament.

Ofcom currently regulates posts and telecommunications (both sector regulation and competition law), as well as non-BBC broadcasting. The Smith Report omits two closely related bodies:

- **Authority for Television on Demand (ATVOD)** and
- **British Board of Film Classification (BBFC)**.

A programme watched on demand (e.g., on Netflix) is almost indistinguishable from one broadcast or watched on the BBC iPlayer, though films are slightly different.

The implication would have to be that representatives would be also required for the Ofcom Board from England, Northern Ireland and Wales, which would necessitate its expansion and restructuring.

Annual reports

Smith recommends both the BBC and Ofcom, but not ATVOD or BBFC, lay their annual reports before the Scottish Parliament (paras 36 & 38). However, while the relevant committee of the Scottish Parliament can ask questions, any recommendations would have to be passed to Scottish ministers who are to be involved in setting Ofcom priorities in Scotland. The mechanism is unclear, but might be the rather secretive and largely unaccountable Joint Ministerial Committee (JMC).

The implication is that the BBC and Ofcom would lay reports before the Cardiff and Stormont Assemblies, in addition to Holyrood and Westminster. Conceivably Ofcom might be confronted by four different opinions!

Scots would get two opportunities to complain about a programme or its absence, to an MP or MSP. The BBC or Ofcom might be called to give evidence before various Westminster committees, as well as a committee of the Scottish Parliament. It is conceivable that Scottish MPs and MSPs might offer contrary opinions. This “double jeopardy” or “two bites at the cherry” approach is demonstrably unfair.

Messy proposal is not a solution

What the Smith Commission has proposed is surprisingly messy. It singles out Ofcom for no stated reason and then fixes an apparent problem by tokenism, with a ‘representative’ who cannot be accountable for legal reasons.

There is then the question of Boris Johnson. If these arrangements are good enough for Scotland, then why should the Mayor of London or of the “Northern Powerhouse” not also send a director and be consulted on reports and future priorities of regulators?

Cursory examination of the submissions to the Smith Commission, and their volume forces this, suggests the concerns were about content and its production, rather than (more or less) sex and violence, or a different watershed time. It is unclear that introducing additional Ofcom directors or subjecting the BBC to a “good kicking” before a Scottish Parliamentary committee is likely to achieve this.

What may be more important is to improve the engagement of Scots in responding to consultations by DCMS, Ofcom and ATVOD. This suggests the need for a forum on media, to help

develop expertise and to engage with world class policies and regulations.

The risk of regulatory arbitrage – that would push content to one medium rather than another because of different rules – has been ignored.

This article gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.

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