Key areas for increased powers

- To have the right to establish public service broadcasting institutions;
- To be involved in future licence fee setting arrangements;
- To have responsibility for approving licensing decisions made by the UK Government for local televisions which will broadcast within Scotland;
- To have the ability to intervene in local cross-media mergers that affect Scotland; and
- To have the power to add or remove events from the list of those that must be shown live on free-to-air television.

Context and overview

At present the Scottish Government and the Scottish Parliament have virtually no powers in relation to broadcasting. The major public service broadcasters – the BBC, the channel 3 licence holders (including ITV and STV), channel 4 and Channel 5 – are all established within a statutory framework or (in the case of the BBC) a Royal Charter at a UK level.

The only significant exception to this relates to the funding of the Gaelic broadcasting organisation MG ALBA. A transfer of powers from Westminster to Scotland on devolution means that that body is funded by the Scottish Government, as part of the budget approved by the Scottish Parliament.

There is some capacity within existing broadcasting structures to cater for Scottish needs. The BBC’s Royal Charter provides for a specific Scotland representative on the BBC Trust, and an Audience Council for Scotland. BBC Scotland provides news and opt-out programming specifically for Scottish viewers, although it has no distinct legal status within the BBC, and is not referred to in the BBC’s Royal Charter.

The overall volume of nations/regions programmes (opt-outs) on BBC Scotland is currently 807 hours, comprising 515 hours on BBC1 and 292 hours on BBC2. This is down from 959 hours in 2004 and 869 hours in 2008.

The channel 3 licence structure means that STV can broadcast opt-out programming and news to most viewers in Scotland, although viewers in the south of Scotland, who belong to the ITV Border region, receive ITV programming with minimal opt-outs. Viewers in the south of Scotland do not receive a national Scottish news bulletin on channel 3, and instead receive regional news which is transmitted from Gateshead, with a minimum requirement of a 6 minute opt-out for specifically Scottish news.

Ofcom, the regulator for broadcasting in Scotland, is a UK body established by the UK-wide Communications Act 2003. It has a specific Advisory Committee for Scotland and Content Board and Communications Consumer Panel members for Scotland. Ofcom grants the licences which allow broadcasters and mobile phone operators to operate. It also has statutory duties to protect audiences from offensive or harmful material, and to protect the public from unfairness or infringements of their privacy from broadcasters. All of these key functions are handled at a UK-level, although Ofcom’s office in Glasgow will in practice often make a significant contribution to complaints relating to “Scottish” content.

The Scottish Broadcasting Commission recommended that “there should be specific representation for Scotland on the main Ofcom Board (at UK level).” This proposal has not been put into effect, although Ofcom does have a Nations Committee, and one of its board members has a specific responsibility for the devolved nations. Pursuant to the Public Bodies Bill going through the UK Parliament, changes to Ofcom’s board structure are likely in future to be for Ofcom to decide upon, rather than requiring amendments to the Communications Act 2003.
Previous proposals for devolving more responsibilities over broadcasting

The final report of the independent Scottish Broadcasting Commission, chaired by Blair Jenkins, was published in September 2008. It recommended that “Scottish Ministers should have greater responsibility, within the UK framework, for those operational functions of broadcasting directly affecting Scotland.” As will be described later, two changes of this kind – relating to the BBC Trust and MG ALBA - are included within the Scotland Bill.

The Calman Commission in 2009 recommended that “The responsibility for the appointment of the Scottish member of the BBC Trust should be exercised by Scottish Ministers, subject to the normal public appointments process.”

The Scotland Bill Committee in its final report in 2011 endorsed the UK Government’s provision in the Scotland Bill that the Scottish Government has the right to approve or veto the appointment of the Scotland member of the BBC Trust. It also recommended that Scottish Ministers should approve the appointment of MG Alba’s board members.

The Scotland Bill, as amended following its House of Commons stages, will ensure that the appointment of the BBC Trust member for Scotland must be approved by Scottish Ministers. In addition, pursuant to an amendment lodged by the UK Government, board appointments to MG ALBA, having been made by Ofcom, must be jointly approved by Scottish Ministers and the UK Government. We welcome both of these measures in the Scotland Bill, versions of which were proposed by the Scottish Government, and which demonstrate that it can be appropriate to provide new executive competences for the Scottish Ministers on broadcasting matters of relevance to Scotland

“Opportunities for broadcasting”

During the previous Parliament, the Scottish Government published “Opportunities for Broadcasting” in September 2009. This document, published as part of the National Conversation on Scotland’s constitutional future, explored the different structures for broadcasting that might evolve with enhanced devolution, or with full independence for Scotland. It also provided a detailed analysis of broadcasting in Scotland at that time.

“Opportunities for Broadcasting” highlighted several areas where greater powers might be devolved to Scotland. They included:

- Responsibility for MG ALBA to be devolved to the Scottish Government.
- Greater power for Ofcom’s office within Scotland, including a recognition that licensing decisions for Scottish networks/channels and MG ALBA should be taken by Ofcom in Scotland. It was also proposed that Ofcom in Scotland could assume greater responsibility and develop greater capacity for handling complaints for “Scottish” content.
- Appointment of a specific Scottish member of the Ofcom Board, as recommended by the Scottish Broadcasting Commission.
- Immediate move to a Scotland-wide Channel 3 licence, to be regulated in future by Ofcom Scotland.
- The Scottish Government to be granted the power to establish public service broadcasting bodies, such as a Scottish Digital Network, and to set the remit for those bodies.
- Creation of a separate legal "personality" for BBC Scotland.
- Assigning Scotland a share of broadcasting revenues (i.e. from spectrum sales and licence fee), with the ability to vary the licence fee.
- Chapter 4 of the paper highlighted that greater autonomy over broadcasting could allow Scotland to decide its own priorities in relation to those national events which must be shown on free to air television. This could, for example, allow the Parliament...
to choose to protect qualifying matches for major international tournaments played by the men’s national football team. Events on this list can already be categorised for different nations within the UK – the Scottish Cup Final, for example, only needs to be shown live on free to air television within Scotland (the FA Cup Final, by contrast, as was the case this year, often is not broadcast live on free to air television in Scotland).

**Developments in broadcasting since September 2009**

Since “Opportunities for Broadcasting” was published in 2009, there have been further developments in relation to broadcasting. Developments of particular note include:

- As noted previously, the Scotland Bill is likely to give greater powers to Scottish Ministers in relation to the appointment of the BBC trust member for Scotland and the board of MG ALBA.
- The UK Government’s Public Bodies Bill is likely to lead to changes to the governance of Ofcom. UK Government policy is for Ofcom to determine the composition of its own board. Thus, some key issues would be for Ofcom to determine rather than primary legislation.
- The UK Government, following its election in May 2010, has made the development of local television a major policy priority.
- The Scottish Government established the Scottish Digital Network Panel in September 2010 to produce recommendations on how a Scottish Digital Network could be established and funded. The panel’s final report was published in January 2011. The Scottish Government subsequently used the panel’s report as the basis for its submission to the UK Government’s Local Media Action Plan.
- The BBC Trust and the UK Government agreed a new licence fee settlement in October 2010. In a major break with recent precedent, the settlement was agreed over a very truncated timetable, with no external consultation. Under the new agreement, from 2013-14 the licence fee will not solely be used to fund BBC services. It will also fund the World Service, S4C and the BBC monitoring service, in addition to providing some support for the roll-out of local television.
- Finally, it is worth noting that despite the unanimous support of the previous Parliament, and the recommendations of the Scottish Digital Network Panel, there has not so far been any significant progress on establishing a Scottish Digital Network. Although a commercial network could be set up without increased devolved powers, the public service broadcasting network that is important for the continued separation between government and editorial content would require further devolved powers.

**Priority areas for further devolution of powers over broadcasting**

Since *Opportunities for Broadcasting* was published, the recommendation relating to MG ALBA is likely to be addressed to a considerable extent by the Scotland Bill. In addition, some of the recommendations relating to Ofcom are now less suited to legislative measures than was the case in 2009.

However many of the recommendations in *Opportunities for Broadcasting* remain valid, and the case for some of them has strengthened significantly with the passage of time. In particular, the importance of granting the Scottish Government the right to establish public service broadcasting institutions has increased during the last three years. The UK Government has taken no steps to establish a Scottish Digital Network, despite the unanimous support for the network in the Scottish Parliament, and consistent attempts by the Scottish Government to initiate a meaningful dialogue on this issue. Granting this key power to the Scottish Parliament would allow it to legislate on an issue which has not so far been a focus of attention for the UK Parliament, despite the legislative opportunity provided by the Digital Economy Act in 2010. Any new network would of course be independent from Government in its editorial policy and day-to-day operation – legislation would provide statutory safeguards to that effect.
The importance of establishing a network also emphasises the importance of specific financing issues. In January 2011 the final report of the Scottish Digital Network Panel, chaired again by Blair Jenkins, was published. The report recommended that a top-sliced allocation of licence fee revenue would be the most important method of funding a Scottish Digital Network. In 2009-10 the total revenue from the licence fee across the UK was £3,579m, of which approximately £315m was raised in Scotland.

The Scottish Digital Network Panel argued that if the current licence fee settlement, which runs until 2016-17, could not be reopened, an appropriate interim funding mechanism might be a ring-fenced allocation of revenue from the UK-wide auction of spectrum which will follow the completion of digital television switchover in 2012. We will discuss with the UK Government options for ensuring that Scotland receives a ring-fenced allocation from the sale of spectrum following digital television switchover in 2012.

The handling of the recent television licence fee negotiations by the UK Government and the BBC Trust has highlighted the significance of this agreement to public service broadcasting across the UK, and also to the UK’s communications infrastructure. From 2013-14 the licence fee will be used to meet the costs of S4C in Wales (approximately £95m of support for this will be provided from the licence fee from 2013-14); the World Service; the cost of BBC Monitoring; the roll-out of broadband infrastructure across the UK; and some of the costs of delivering local television. As the Scottish Digital Network Panel’s final report noted "It is clear from recent developments that the television licence fee is now regarded across the political spectrum as the best source of funding for public service broadcasting in general and not just the BBC."

This makes it even more important for licence fee agreements to be subject to extensive consultation, rather than being conducted behind closed doors over a matter of days. This is not simply the Scottish Government’s view. The House of Commons Culture, Media and Sport committee noted earlier this year that “it is vitally important that both licence fee payers and Parliament should have some involvement when far-reaching decisions about funding and responsibilities (relating to the licence fee) are taken.” The Scottish Government strongly agrees with this, and further believes that the devolved administrations should be involved in future licence fee settlements. Requiring the approval of the devolved administrations in relation to the licence fee settlement would prevent the situation arising whereby decisions with far-reaching consequences for Wales, Scotland and Northern Ireland are negotiated privately.

The current BBC Royal Charter expires at the end of 2016. The Steel Commission in 2006 argued that there should be a formal role for the Scottish Parliament in the Charter renewal process. The Scottish Government agrees that Charter renewal has a major impact on the devolved administrations, and it is therefore fitting that devolved institutions should have a formal role in it.

The UK Government’s chief priority in broadcasting at present is the development of local television services. Under the current legislative framework, the UK Government is empowered to establish a regime for licensing local television stations which will broadcast solely within Scotland, without any prior consultation with the Scottish Government and the Scottish Parliament. The Scottish Government is strongly supportive of local television, as it made clear in February of this year in its response to the UK Government’s Local Media Action Plan. However it believes that Scottish Ministers should approve any local television orders which relate to Scotland. This is particularly important given the possible impact of local television on other media organisations in Scotland. One way of achieving this would be to include a provision in section 244 of the Communications Act setting out an obligation for the Secretary of State to obtain the consent of Scottish Ministers before making an order relating to local television stations which would broadcast within Scotland.

Draft amendments which would help to achieve the required change in those three areas are attached as an Annex. In addition to the three proposals set out above, there are other areas where specific powers could be devolved to the Scottish Parliament or the Scottish Government.
Local cross-media mergers are one such area. Although rules limiting local cross-media mergers have been removed under the current UK Government, UK Ministers still have the power to intervene if they believe that a public interest consideration means that the merger requires further investigation. In 2009 Ofcom’s Advisory Committee for Scotland expressed concern that “Inappropriately, under current legislation, if a public interest test were to be applied to growing concentration (of media ownership) in Scotland, this would (be) in the hands of a London-based government minister and a London-based regulator”, and stated that “the formal involvement of the devolved institutions is required for decision-making sensitive to the political diversity of the UK.” The Scottish Government agrees with this statement, which takes proper account of the importance of a healthy media scene to democracy within Scotland.

The list of events which must be shown live on free-to-air television is another issue where devolution of powers could make a difference. The previous UK government launched a review of this list, chaired by David Davies, in 2009. The Scottish Government’s response to this review, issued in July 2009, argued that the review “should consider allowing the Governments of the devolved administrations to have powers to add or remove events for their nation. This would allow Scotland to maintain a list more specifically relevant to Scottish citizens.” Although the Davies review did make recommendations to change the current list of protected events, these had not been implemented by the time of the UK General Election in May 2010.

The current UK Government has decided not to make any changes to the list of protected events until after digital television switchover has been completed across the UK in 2012. The Scottish Government still believes, however, that it would be appropriate for devolved administrations to have the power to add or remove events for their nations. In Scotland, this might mean granting protected status to qualifying matches for major international tournaments played by the Scottish men’s national football team. According to research conducted in Autumn 2009, 81% of people in Scotland support such a move. 6 other countries grant similar status to qualifying matches played by their respective national teams.

Conclusion

Current broadcasting arrangements are not meeting the needs of the viewing public in 21st century Scotland. It is agreed across the political spectrum that Scotland needs its own distinctive broadcasting space to reflect our society, our culture, our debates and decision-making.

This problem could in theory be addressed at Westminster. However in practice, there is little sign that this UK Government - or indeed any UK Government - is able to devote the time and energy to developing a clear and appropriate policy framework for broadcasting in Scotland.

It is important that the accountability arrangements for broadcasting adapt to match the devolution settlement. If measures to achieve this are not included in the Scotland Bill, we will attempt to ensure that, where possible, they are instead included in the UK Government’s proposed Communications Bill, which is scheduled to come into force in 2015. The amendments that we propose in this paper would grant the Scottish Parliament the power to address, if it so chose, the key priority of a new digital network for Scotland. They would also require appropriate consultation with the Scottish Government and the Scottish Parliament on broadcasting issues of central importance to Scotland. They represent a proportionate approach to adapting the UK broadcasting framework to the needs of devolution. This would benefit the UK Government, the Scottish Government and Parliament, and viewers and listeners within Scotland.
Annex A - Draft provisions which could be included within the Scotland Bill

Provision A – to enable the Scottish Parliament to establish new public service broadcasters

Public service broadcasting
After section 17 of the Scotland Bill insert—

“17C Public service broadcasting
In Part 2 of Schedule 5 to the 1998 Act, in Section K1 (broadcasting), at the end insert—

“Exception
The establishment, operation, remit and dissolution of corporations to provide public service broadcasting.”.”

Provision B – to ensure that the Scottish Government is consulted on the licensing of local television stations within Scotland, and on the negotiations relating to the television licence fee

Television services and TV licensing
After section 17 of the Scotland Bill insert—

“17B Local digital television services and TV licences
(1) The Communications Act 2003 is amended as follows.
(2) In section 244 (local digital television services), after subsection (8) insert—

“(8A) An order under this section to which subsection (8B) applies must not be made without the consent of the Scottish Ministers.

(8B) This subsection applies to an order in relation to a description of services which are, or include, services—

(a) intended for reception—

(i) at a place in Scotland, or

(ii) within an area or locality wholly or partly in Scotland, or

(b) provided for the purposes of an event in Scotland.”

(3) In section 365 (TV licence fees)—

(a) after subsection (5) insert—

“(5A) Before making regulations under this section the Secretary of State must consult the Scottish Ministers.”,

(b) in subsection (6), after “Treasury” insert “and of the Scottish Ministers”.

Explanatory Notes

Provision A is to enable the Scottish Government to establish broadcasting organisations, such as a Scottish Digital Network, and to provide for their remit, operation and - if necessary – their dissolution. Any such broadcasting organisations would be independent of government in editorial decision-making and day-to-day operational matters.
At present, it is possible that the Scottish Government could establish its own broadcasting organisation (for example by establishing and funding a limited company). However the Scottish Parliament would not be able to legislate to give that organisation a proper public service remit, and to ensure its independence from Government in day-to-day operations. This amendment would allow the Scottish Parliament to legislate to establish a statutory public service network, by making this matter an exception to reservation K1 (broadcasting) in Schedule 5 of the Scotland Act.

The measure would not grant any additional powers to secure the funding of a new broadcasting corporation within Scotland.

Although this amendment is a good illustration of how the Scottish Parliament could acquire the power to establish new broadcasting bodies, further powers to make consequential amendments to broadcasting legislation might be required to give a Scottish Digital Network the same regulatory status as the existing public service broadcasters e.g. spectrum access and electronic programme guide prominence.

**Provision B** is to ensure that no local television order can be made without the consent of Scottish Ministers, if it relates to local digital television services intended for reception within Scotland. The policy intention is to ensure that Scottish Ministers are fully involved, with the UK Government, in the decision-making process for local television services which will have a significant impact on the media scene within Scotland.

The amendment also ensures that Scottish Ministers must consent before any regulations relating to the television licence fee can be made. At present, whenever new licence fee levels are set, regulations must be made by the Secretary of State. Provision B therefore extends a key principle of the changes already included in the Scotland Bill in relation to the BBC Trust member for Scotland and MG ALBA Board appointments – and reflected elsewhere in the devolution settlement - that the consent of Scottish Ministers should be required before changes with a significant impact in Scotland are agreed.

It is possible that this legislative provision on its own is not sufficient to guarantee that Scottish Ministers are always consulted on the licence fee settlement. When the licence fee is frozen, for example (as is the case under the new settlement, which will last until 2016-17), there will not be a need for new regulations to set new licence fee levels. In addition, the amendment only affects the level of the television licence fee – it does not affect the uses to which the licence fee will be put (although the two issues are of course closely linked).

The amendment does however ensure that the consent of Scottish Ministers is required before changes to the level of the licence fee are decided upon. Furthermore, the amendment enshrines the principle that Scottish Ministers should be consulted on licence fee discussions.