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Rural Economy and Connectivity Committee

Report on the Memorandum of Understanding of Ofcom



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Rural Economy and Connectivity Committee

Remit: To consider and report on matters falling within the responsibility of the Cabinet Secretary for Rural Economy and Connectivity.



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Introduction

Background

1. In November 2014, The Smith Commission made the following recommendation with regard to the Office of Communications (OFCOM) as part of its overall final report:

 There will be a formal consultative role for the Scottish Government and the Scottish Parliament in setting the strategic priorities for OFCOM with respect to its activities in Scotland... OFCOM will lay its annual report and accounts before the Scottish Parliament and submit reports to, and appear before, committees of the Scottish Parliament.¹
2. The UK Government's Command Paper, containing draft legislative clauses, suggested that this recommendation of the Smith Commission would be dealt with via a Memorandum of Understanding (MoU), which would be entered into by the UK Government, Scottish Government, Scottish Parliament and OFCOM. The rationale of the previous UK Government for adopting this approach was as follows:

 The formal consultative role for the Scottish Government and the Scottish Parliament in the setting of Ofcom's strategic priorities will be achieved through an MoU between the UK Government, Scottish Government, the Scottish Parliament and Ofcom. The MoU will commit Ofcom to consulting the UK Government, the Scottish Government and the Scottish Parliament on their draft annual plan, which sets out Ofcom's strategic priorities for the year ahead. An MoU is the best means of providing clarity and certainty about how the different parties will be consulted on the setting of Ofcom's strategic priorities. This is because, due to Ofcom's independence from Government, the Secretary of State currently has no statutory role in the setting of Ofcom's strategic priorities and it is therefore not possible to give a statutory underpinning to a formal consultative role for the Scottish Government or Scottish Parliament.²
3. A final draft of the proposed MoU is set out in Annexe A of this report.

Parliamentary Process

4. The Parliamentary Bureau agreed, at its meeting on 20 September 2015, that the Rural Economy and Connectivity Committee should be the lead committee in consideration of the draft MoU and in producing a report for consideration by the Parliament. It was also agreed that parliamentary time would be made available for the consideration of the Committee's report and conclusions.

Scrutiny Process

5. The Rural Economy and Connectivity Committee considered the draft MoU at its meeting of Wednesday 28 September.
6. Members commented on the drafting of the MoU and raised a number of stylistic points. Members questioned whether a sufficient level of influence would be gained by the Scottish Parliament and Scottish Government through the Memorandum of Understanding.
7. The Committee welcomed that Scottish ministers would have sole responsibility for approving members of MG Alba.
8. Members also noted that Ofcom will now be required to appear before the committee, and this was seen as a welcome development.

The Committee noted that, should it be content with the draft MoU, it would then go before the Parliament for formal agreement.

Conclusion and recommendation

9. At its meeting of 28 September, the Committee agreed to recommend to the Scottish Parliament that it gives its approval to the Memorandum of Understanding relating to the relationship between the Office of Communications, the Scottish Government, the UK Government and the Scottish Parliament.

¹ *The Smith Commission*, Final Report 2014, paragraph 38.

² *The UK Government*, Scotland in the United Kingdom: An enduring settlement, January 2015.

Annexe A

MEMORANDUM OF UNDERSTANDING

Between the UK Government, Scottish Government, Scottish Parliament and the Office of Communications

[NOTE: this draft MoU is shared for the purpose of reaching agreement between the parties, and is without prejudice to further discussions.]

Scope and Purpose

1. This Memorandum of Understanding (MoU) concerns the relationship between UK Government, Scottish Government, Scottish Parliament and the Office of Communications (Ofcom) arising as a result of the Smith Commission Agreement.
2. The MoU commits Ofcom to consulting on their draft annual plan; and sets out the process for Scottish Ministers to appoint a member to the Ofcom Board. All parties are committed to working constructively together to achieve the purposes set out in the MoU.

Background

3. Following the Scottish independence referendum on 18 September 2014, Lord Smith of Kelvin was asked to convene cross-party talks and facilitate an inclusive engagement process across Scotland to produce recommendations for further devolution of powers to the Scottish Parliament.
4. That process led to the Smith Commission Agreement, published on 27 November 2014¹. This made several proposals specific to the Office of Communications (Ofcom), as set out in paragraphs 37 and 38 of the Agreement, with the objective of strengthening the engagement of the Scottish Parliament and Scottish Government with Ofcom:

Broadcasting

The power to approve Ofcom appointments to the board of the MG Alba will rest solely with Scottish Ministers.

Regulation of telecommunications and postal services

There will be a formal consultative role for the Scottish Government and the Scottish Parliament in setting the strategic priorities for Ofcom with respect to its activities in Scotland. Scottish Ministers will have the power to appoint a Scottish member to the Ofcom Board who is capable of representing the interests of Scotland. Ofcom will lay its annual report and accounts before the Scottish Parliament and submit reports to, and appear before, committees of the Scottish Parliament.

¹ <https://www.smith-commission.scot/smith-commission-report/>

5. The UK Government's Command Paper, 'Scotland in the United Kingdom: An enduring settlement', published in January 2015², set out at paragraphs 5.2.4 – 5.2.8 how paragraphs 37 and 38 of the Smith Commission Agreement would be implemented.

6. The Scotland Act 2016³ implements the majority of the Agreement:

- Section 54 amends section 183A of the Broadcasting Act 1990 to transfer the responsibility for approving members of the board of MG Alba solely to Scottish Ministers, securing their strategic oversight of the Gaelic Media Service, and the contribution it makes to an internationally respected British broadcasting service.
- Section 65⁴ amends the Office of Communications Act 2002 to confer the power on Scottish Ministers to appoint one member of Ofcom who is capable of representing the interests of Scotland. Prior to any appointment, the Scottish Government will be required to consult with the Secretary of State. This will enable the Secretary of State to ensure that the Board will function effectively as a whole. The appointment will be subject to the existing regulatory framework for appointments to the boards of public bodies, which is set out in the Code of Practice issued by the Commissioner for Public Appointments. The appointee will have the same UK-wide responsibilities as other non-executive members of Ofcom.
- Section 65 also amends the Office of Communications Act 2002 to require the Comptroller and Auditor General to send a copy of Ofcom's statement of accounts to Scottish Ministers to be laid before the Scottish Parliament, and to require Ofcom to send a copy of its annual report to Scottish Ministers to be laid before the Scottish Parliament.
- Section 66 amends the Scotland Act 1998 to provide that Ofcom is a body that may be required to attend before the Scottish Parliament.

7. The Command Paper also set out how the Agreement would be implemented via non-legislative means:

5.2.8 The formal consultative role for the Scottish Government and the Scottish Parliament in the setting of Ofcom's strategic priorities will be achieved through a MoU between the UK Government, Scottish Government, the Scottish Parliament and Ofcom. The MoU will commit Ofcom to consulting the UK Government, the Scottish Government and the Scottish Parliament on their draft annual plan, which sets out Ofcom's strategic priorities for the year ahead. A MoU is the best means of providing clarity and certainty about how the different parties will be consulted on the setting of Ofcom's strategic priorities. This is because, due to Ofcom's independence from Government, the Secretary of State currently has no statutory role in the setting of Ofcom's strategic priorities and it is therefore not possible to give a statutory underpinning to a formal consultative role for the Scottish Government or Scottish Parliament.

² <https://www.gov.uk/government/publications/scotland-in-the-united-kingdom-an-enduring-settlement>

³ The Act received Royal Assent on 23 March 2016

⁴ Section 65 of the 2016 Act came into force on 18 August 2016

Parties

- The Department for Culture, Media and Sport ("DCMS")
- The Office of Communications ("Ofcom")
- The Scottish Government
- The Scottish Parliament

Commitments

Formal consultative role for the Scottish Government and the Scottish Parliament in setting the strategic priorities for Ofcom with respect to its activities in Scotland.

8. Each year Ofcom publishes an Annual Plan which sets out its strategic priorities and describes the other work it will be conducting in the coming year.

The process for formally consulting the Scottish Government and the Scottish Parliament in the formulation of Ofcom's Annual Plan shall be as follows:

- Ofcom will consult the Scottish Government and appropriate committees of the Scottish Parliament on its draft Annual Plan once published.
- Ofcom will consider any representations from Scottish Government (Ministers and Officials), and the Scottish Parliament's appropriate committees through this process in formulating its Annual Plan;
- Ofcom will send its final Annual Plan to Scottish Government ministers and relevant committees of the Scottish Parliament outlining how it determined its priorities, with reference to the main issues raised during the preceding consultation process.

Scottish Ministers' power to appoint a member to the Ofcom Board

9. Section 1 of the Office of Communications Act 2002, as amended by section 65 of the Scotland Act 2016, provides that the Scottish Ministers have the power to appoint a member of the Ofcom Board and must consult the Secretary of State before doing so. Further agreed guidance on the operation of the appointment process is attached at Annex 1.

Annual report and accounts

10. Ofcom's Annual Report and Accounts are presented to the UK Parliament and the Scottish Parliament pursuant to paragraphs 11 and 12 of the Schedule to the Office of Communications Act 2002. Ofcom is required to send its accounts to the Secretary of State and the Comptroller and Auditor General (C&AG). Scottish Ministers will lay any report sent to them by C&AG before the Scottish Parliament. Ofcom will send a copy of its Annual Report to the Secretary of State and Scottish Ministers who will lay it before the UK Parliament and the Scottish Parliament respectively.

11. Ofcom also has a duty⁵ to send MG Alba's Annual Report and accounts to the Secretary of State for Scotland and to Scottish Ministers who must lay the documents before the UK Parliament and the Scottish Parliament respectively.

Other Ofcom appointments

12. Under section 17 of the Communications Act 2003, Secretary of State approval is required for appointments to the Communications Consumer Panel. In relation to the member for Scotland, Ofcom will also consult the Scottish Government. Further detail is at Annex 2.

Ofcom reporting and appearing before the Scottish Parliament

13. Section 23A of the Scotland Act 1998 provides that the Scottish Parliament may require Ofcom to attend its proceedings for the purposes of giving evidence in connection with the discharge of its functions in Scotland. Ofcom receives invitations to provide evidence to Committees of the Scottish Parliament both by production of documentary evidence and by appearing in person. Ofcom welcomes these invitations.

Meetings

15. There will be separate meetings between Ofcom and Scottish Ministers; and between Ofcom and Scotland Office Ministers. These will take place at least once a year.

16. There will be regular meetings as appropriate during the year between Ofcom and the Scottish Government; and between Ofcom and the Scotland Office at official level. It is recognised that more informal engagement at official level between Scottish Government and Ofcom on specific topics will continue and that the meetings envisaged above will not serve to limit that.

17. DCMS, Ofcom and the Scottish Government agree that this MoU will be the subject of periodic review, at official level, the first review to occur no later than two years after the date of signature.

Appointments to the Board of MG Alba

18. Section 183A of the Broadcasting Act 1990, inserted by sections 209 of the Communications Act 2003⁶, provides that Ofcom will seek approval from Scottish Ministers before making board appointments to MG Alba (the Gaelic Media Service), including of the Chairman. These appointments are subject to guidance from the Scottish Government about the respective roles of Ofcom and the Scottish Government at all stages of the process. The guidance is attached as Annex 3.

⁵ Schedule 19 to the Broadcasting Act 1990

⁶ Amended by section 17 of the Scotland Act 2012 and section 54 of the Scotland Act 2016.

Annex 1

Appointment by Scottish Ministers of a member of the Ofcom Board

1. The appointment of a Member of the Ofcom Board shall be made by Scottish Ministers following consultation with the Secretary of State.
2. The appointment of the Scottish Member shall be made in accordance with 'The Code of Practice for Ministerial Appointments to Public Bodies' (2016, or as updated from time to time) (the 'Code') published by the Office of the Commissioner for Public Appointments.
3. At the commencement of an appointment process the Scottish Government shall meet with the Chair of Ofcom to agree the key criteria for the appointment, including skills, knowledge and experience required of the individual.
4. The parties acknowledge that that any person so appointed will, as a member of the Ofcom Board, have the same UK-wide responsibilities as all other non-executive Members of the Board.
5. Ofcom and the Scottish Government will work together to agree the form of advertising, search process and timetable for the new appointment (with costs incurred being borne by Ofcom). DCMS will be advised of the role specification, details of the panel's composition and plans for advertising before the advert is published.
6. An Advisory Panel will be established in accordance with the Code and will include, as a minimum, a Chair nominated by the Scottish Government, an Independent Assessor and the Chair of Ofcom.
7. The Advisory Panel will agree the process for sifting candidates and the timetable and process for interviewing the short-listed candidates, allowing an opportunity for short-listed candidates to meet other Members of the Ofcom Board prior to interview.
8. Following the interviews, the Advisory Panel will make a recommendation to the Scottish Ministers on the individual or individuals the Panel believes meet(s) the criteria for the appointment.
9. The Scottish Ministers will approve the appointment (and will make the choice of appointment if more than one individual is recommended) and will formally document it with the successful candidate. This will be done following consultation with the Secretary of State.

Annex 2:

Other Ofcom appointments

1. Arrangements for consultation on certain appointments were originally agreed in 2004 by an exchange of letters between the UK Government, the (then) Scottish Executive and Ofcom. These arrangements have been updated and are set out below.
2. Under section 17(2) of the Communications Act 2003, Ofcom will consult the UK Government on the preferred candidates for the Consumer Panel. Ofcom will consult the Scottish Government at the same time on the preferred candidate for the Consumer Panel Member for Scotland. Consultation will normally take place at official level only.

Annex 3

Appointments to the board of MG Alba: Guidance to Ofcom

Background

In 2012, the Scottish Government, UK Government and Ofcom agreed guidance on the process of appointing MG Alba board members. The following is an updated version taking into account that there is no longer a formal role for the UK Government in producing this guidance or these appointments.

Introduction

1. This guidance conveys, on behalf of Scottish Government Ministers, guidance to Ofcom as provided for by section 183A of the Broadcasting Act 1990 (as inserted by section 209 of the Communications Act 2003 and amended by, inter alia, the Scotland Act 2012 and the Scotland Act 2016). Section 183A requires Ofcom to have regard to this guidance in exercising its statutory powers of appointment to the Gaelic Media Service (now operating under the name of MG Alba), as set out in the Broadcasting Act 1990 (“the 1990 Act”).
2. The guidance is concerned principally with the procedural steps to be taken to identify suitable candidates for appointment, and provides that Ofcom consider a number of factors in determining which candidates should be recommended to the Scottish Ministers for appointment as members of the Gaelic Media Service. The guidance does not cover all aspects of the recruitment or selection processes to be followed by Ofcom, but the processes must be transparent and open to scrutiny.

Overview

3. The objectives in establishing a body with responsibility for oversight of the Gaelic Media Service is to provide a broader base of representation and expertise in relation to broadcasting matters. However, this is to be coupled with adequate representation of consumer and other relevant interests. The Scottish Government is aware that it is important to avoid, as far as possible, conflicts of interest, particularly where nominations from broadcasters or other Executive Agencies are being sought. Schedule 19 to the Broadcasting Act 1990 already provides for resolution or declaration of conflict of interest. Nonetheless, it would not be appropriate to seek to appoint members likely to face sustained conflict of interest on matters to be considered by the Board.
4. Scottish Ministers expect Ofcom to be transparent in recruiting, assessing, and selecting candidates, therefore the inclusion of an independent element in the selection or interview process is required.
5. Section 183A(6)(a) refers to the desirability of having members who are proficient in written and spoken Gaelic. Ofcom will therefore need to ensure that they have available means of assessing the language competence of candidates where this is indicated. However, the legal duty is not framed in terms of all members having the same, or indeed any, proficiency in Gaelic. Scottish Ministers are of the view that the majority of members on the Board should be

proficient in, and are agreed that the working language of the Board should be, Gaelic. In some situations translation into English may be offered but any costs incurred, would fall to MG Alba.

6. In addition to the explicit experience and background relating to Gaelic matters, it is desirable for Ofcom to consider candidates with a broad range of relevant skills to enable MG Alba, to carry out its strategic and planning role.

7. As part of the process, Ofcom will draw up person specifications for MG Alba appointments and share with the Scottish Ministers, before the recruitment process begins. This will ensure nominating bodies and others are clear about the basis on which they should propose nominations or apply for the appointment.

Period of Appointment

8. The standard period of appointment should be 4 years. Should the need arise to extend this term, a case must be submitted to Scottish Ministers, for their agreement, before the appointment process begins. No member should be considered for more than two terms of appointment.

Nominating Bodies

9. Under section 183A(5) of the Broadcasting Act 1990 the Board must include:
- a member nominated by the BBC;
 - a member nominated by Highlands & Islands Enterprise (HIE); and
 - a member nominated by the Gaelic Development Agency (Bòrd na Gàidhlig).
10. In seeking nominations from these bodies, Ofcom must consider the following factors:
- the bodies are able to submit nominations from their board members serving employees and any other person that they consider suitable for membership of the Board;
 - the body should be discouraged from nominating individuals who are directly and exclusively concerned with the production, commissioning or distribution of Gaelic media programmes;
 - broadcasters should be invited to submit names of those with a good record of television or radio production, at either operational or managerial level
 - HIE may nominate a person from within or outwith HIE area;
 - the nominating bodies should be asked to submit to Ofcom a shortlist of at least three candidates from which assessment and selection may be made.
11. In order to assess nominations from nominating bodies, Ofcom should follow the procedures in place for assessment and selection of the best candidate. There may be a case for press and online advertisement as well as contact with relevant bodies to cover any categories of interest not already represented amongst potential candidates for appointment.

Other Interests

12. Section 183A(7) of the Broadcasting Act 1990 requires Ofcom, so far as practicable, to ensure adequate representation of:

- the independent television and radio production industries in Scotland;
- other persons and bodies concerned with the promotion and use of the Gaelic language, including those concerned with education in Gaelic and in Gaelic culture.

13. To enable this requirement to be satisfied, Ofcom should follow the procedures in place for assessment and selection of the best candidate and consider representations from the following sources:

- from the Producers' Alliance for Cinema and Television (PACT), the UK trade association representing and promoting the commercial interests of independent feature film, television, digital, children's and animation media companies. However this does not preclude Ofcom from recommending other candidates it considers to best placed to fulfil this role;
- from organisations with a specific interest in young people's issues, as they affect Gaelic culture and education;
- from organisations who specialise in areas other than traditional broadcasting, for example online content.

Submission to Scottish Ministers

14. Ofcom should normally plan to be in a position to submit their recommended candidates to Scottish Ministers for approval at least 8 weeks before the due appointment date to allow them adequate time to consider and agree. This timetable would apply equally to both new appointments and reappointments.

15. To assist the Scottish Ministers with consideration of the candidates, Ofcom must provide them with the names of the recommended candidates, the candidates' biographies and a summary of the candidates' performance during the selection process.

16. Following consideration of the candidate(s) if Scottish Ministers are content to approve the candidate(s), they will write to Ofcom within 2 weeks of receiving Ofcom's recommendation(s), confirming their approval.

17. In the event that Scottish Ministers are not content to provide their approval of the Ofcom appointments of the Chair or Board members of MG Alba, they should write to Ofcom within 2 weeks of receiving Ofcom's appointment and provide details as to why they are not willing to give their approval. Ofcom will invite the Chair of the interview panel to prepare a brief paper for Scottish Ministers setting out the Chair and panel's view on the preferred candidate/s giving reasons for their recommendation. The Scottish Government should be given the opportunity to meet with the Chair of MG Alba to discuss this matter. In the event that the Chair of MG Alba is vacant, the Chair of the Panel dealing with the appointment of the new Chair (a representative of Ofcom) should meet with the Scottish Government to discuss this matter. In the event that Scottish Ministers remain unable to provide their approval, the recruitment and selection process would be required to be run again with the vacancies being re-advertised.

