

Citizen Participation and Public Petitions Committee
Wednesday 26 June 2024
12th Meeting, 2024 (Session 6)

PE2093: Review and update the Scottish Ministerial Code

Introduction

Petitioner Benjamin Harrop

Petition summary Calling on the Scottish Parliament to urge the Scottish Government to review and update the Scottish Ministerial Code to:

- put the Code under statute
- enable the independent advisers (IAs) to initiate investigations, and if the First Minister decides to go against the IAs advice a statement should be provided to Parliament
- set out the sanctions for breaches other than misleading Parliament
- allow IAs to make recommendations for changes to the Code
- renaming the IA position to make it clear there is no judicial involvement
- require Ministers to make a public oath or commitment to abide by the Code.

Webpage <https://petitions.parliament.scot/petitions/PE2093>

1. This is a new petition that was lodged on 9 April 2024.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. Every petition can collect signatures while it remains under consideration. At the time of writing, 7 signatures have been received on this petition.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered.
6. The Committee has received submissions from the Scottish Government and the Petitioner, which are set out in **Annexe C** of this paper.

Action

7. The Committee is invited to consider what action it wishes to take on this petition.

**Clerks to the Committee
June 2024**

Annexe A: Summary of petition

PE2093: Review and update the Scottish Ministerial Code

Petitioner

Benjamin Harrop

Date Lodged

9 April 2024

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to review and update the Scottish Ministerial Code to:

- put the Code under statute
- enable the independent advisers (IAs) to initiate investigations, and if the First Minister decides to go against the IAs advice a statement should be provided to Parliament
- set out the sanctions for breaches other than misleading Parliament
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- require Ministers to make a public oath or commitment to abide by the Code.

Background information

I think the changes set out above would strengthen public standards in Scotland.

Through a statutory code (which Northern Ireland and partly Canada has), a First Minister (FM) would be unable to not have a Code.

Through self-initiated investigations by the IA, a FM could not block such investigations.

A statement in Parliament would enable an explanation as to why a FM has not taken the IAs advice.

The IAs should be able to offer their views on any potential short-comings of the Code itself so to improve it.

The IAs title gives an impression of judicial involvement which is misleading.

Ministers making public oaths would improve public confidence in adhering to it.

I also recommend the following reports which are useful reading:

- [Upholding Standards in Public Life – Published Report](#)
- [Institute for Government | Updating the ministerial code](#)
- [UK Governance Project – final report](#)

Annexe B: SPICe briefing on petition PE2093



Brief overview of issues raised by the petition

- The petitioner is calling for the Scottish Ministerial Code to be reviewed and given a statutory basis. The petition also calls for sanctions to be set out in the Code and for Ministers to make a public oath to abide by the Code. The petitioner also calls for changes to the remit of the independent advisers which would:
 - enable the independent advisers to initiate investigations
 - require the First Minister to make a statement to Parliament if they decide to go against the independent advisers' advice
 - allow independent advisers to make recommendations for changes to the Code
 - restate the independent advisers' position to make it clear there is no judicial involvement.
- The [Scottish Ministerial Code](#) ("Ministerial Code") is a code of conduct for members of the Scottish Government including the First Minister, Cabinet Secretaries, Law Officers and Junior Scottish Ministers.
- The Ministerial Code has no statutory basis, and a new version of the Ministerial Code can be issued at any time. Previous updates to the Ministerial Code have been issued [following Scottish Parliament elections](#) and [a change of First Minister](#).
 - The [Northern Ireland Executive Ministerial Code](#) is the only ministerial code of conduct in the UK that has a statutory basis. [Section 28A of the Northern Ireland Act 1998](#) provides that there must be a Ministerial Code and that it can only be changed with cross-community agreement in the Northern Ireland Assembly.
- The Ministerial Code includes the 'overarching duty' on Ministers to comply with the law and to abide by the [Seven Principles of Public Life](#) (a set of ethical standards which apply to all holders of public office).
- Scottish Ministers are accountable to the Scottish Parliament. This is reflected in the Ministerial Code with the inclusion of a duty to "*be held to account*" by the Scottish Parliament.

- The enforcement of the Ministerial Code is set out in paragraphs 1.6 and 1.7 of the Code. It notes that the First Minister is the ultimate arbiter of the standards of behaviour expected of a Minister and of the appropriate consequences of a breach of those standards.
- The decision to appoint or dismiss a Minister (or other member of the Scottish Government) is a power under the discretion of the First Minister. As such, the Ministerial Code is explicit in Paragraph 1.4 that it is not for Scottish Government officials to enforce the Ministerial Code.
- The Ministerial Code does not set out any specific sanctions for breaches of the Code. However, the Code does indicate that Ministers who knowingly mislead the Scottish Parliament will be expected to offer their resignation to the First Minister.
- The Ministerial Code provides for [a system of independent advisers](#). The First Minister may refer matters to the independent advisers to provide advice on which to base their judgement about any action required in respect of ministerial conduct. The findings of the independent advisers are published.
- The Ministerial Code states that “*Where a complaint against the First Minister is upheld the Deputy First Minister may refer the matter to the independent advisers*” and that “*The Scottish Government will publish information about concluded formal complaints about a Minister’s behaviour, including the name of the Minister*”.

Scottish Parliament Action

The Citizen Participation and Public Petitions Committee considered a similar petition, [PE1935 Create an Independent Committee to judge whether Scottish Ministers have broken the Ministerial Code](#), between 3 May 2022 and 23 March 2023. The Committee closed the petition on the basis that a system of independent advisers on the Ministerial Code is already in operation.

SPICe prepared a follow-up briefing for the Committee during its consideration of PE1935 on the [Ministerial codes of conduct in the governments of the United Kingdom](#). The briefing sets out the main provisions of the respective Ministerial codes of conduct and how they interact with independent advisors or standards bodies (where applicable), which may be of interest to the Committee in its consideration of PE2093.

Courtney Aitken

10 May 2024

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Annexe C: Written submissions

Scottish Government written submission, 18 April 2024

PE2093/A: Review and update the Scottish Ministerial Code

I am writing to provide the initial view of the Scottish Government on Petition PE2093, which calls on the Scottish Parliament to urge the Scottish Government to review and update the Scottish Ministerial Code to:

- put the Code under statute
- enable the independent advisers (IAs) to initiate investigations, and if the First Minister decides to go against the IAs advice a statement should be provided to Parliament
- set out the sanctions for breaches other than misleading Parliament
- allow IAs to make recommendations for changes to the Code
- rename the IA position to make it clear there is no judicial involvement
- require Ministers to make a public oath or commitment to abide by the Code.

As the Committee will be aware, ownership of the Scottish Ministerial Code, its content and when it is revised are ultimately matters for the First Minister.

The First Minister published a new edition of the Ministerial Code to further strengthen transparency and propriety on 20 July 2023. A new edition of the Code is typically published after each Scottish Parliament election or after the appointment of a new First Minister. Given a new edition of the Code was published last summer, the Scottish Government does not currently have any plans to update it during the remainder of this Parliament.

When a new Scottish Government is appointed following the next Scottish Parliament election in 2026, it will be for that Government's First Minister to consider whether he or she wishes to update the Code. The Scottish Government would be happy to consider the suggestions made in this petition, as part of any wider review of the Code at that time.

**Cabinet Secretariat
Scottish Government**

Petitioner written submission, 13 May 2024

PE2093/B: Review and update the Scottish Ministerial Code

I am writing in response to the Government's submission of 18th of April 2024, and to explore my reasons for each of the recommendations set out in my petition, including why I believe they should be implemented.

By way of background information, I submitted a Freedom of Information (FOI) request to the Scottish Government in April 2021 regarding the written evidence given to James Hamilton during his investigation into whether the former First Minister (FM) Nicola Sturgeon broke the Ministerial Code. As the committee will be aware, that [case ended up in the court of session in December of last year](#), and after the Government's defeat, the FOI is now being considered by the Information Commissioner after I appealed (again) following the Government's revised response to me.

My experience during this case: the decision made by the court through its reasoning, as well as Mr. Hamilton's report, and my observations in Scotland and the UK are why I have created this petition.

- **put the Code under statute**

Putting the Ministerial Code under statute would, in my opinion, strengthen the Code. Currently, the Code is non-statutory meaning that it has no legal or legislative backing, and crucially the FM is under no requirement to have a ministerial code. Whilst this could be considered an unlikely scenario, it is still a possibility, one which I think the Parliament should prevent by putting the Code under statute. Additionally, making the Code under statutory would not be unprecedented, indeed Northern Ireland has Acts that require by law for there to be a ministerial code, as well as Canada which has parts of its code under statute.

The recommendations I have suggested could be implemented as part of the process of putting the code under statute. If there was a legal requirement for there to be a ministerial code and with legal force behind it, this would improve public confidence and trust in the Code itself, as well as preventing a potential future FM from not having a code at all.

- **enable the independent advisers (IAs) to initiate investigations, and if the First Minister decides to go against the IAs advice a statement should be provided to parliament**

While there have been occasions where the previous FM has referred themselves to IAs, unless the FM chooses to do so, there would have been no way for the IA to carry out an investigation. Some may regard this as politically unlikely, but it remains a possibility, that a FM may utilise the current Ministerial Code to benefit themselves, i.e. to not have an investigation conducted by the IAs which may result in their resignation. This is a clear weakness in the code as it stands and can lend itself to being abused.

In a recent case, the FM refused to refer an allegation to the IAs relating to the former transport minister Jenny Gilruth MSP, when she was accused of breaking the ministerial code in May of 2023 over issues relating to railway works. Opposition MSPs demanded that an investigation by the IAs should take place to determine whether she did break the code or not. The then FM, Humza Yousaf MSP, decided not to ask for an investigation under the Code, and concluded himself that she had not broken the Code. In this scenario, if the above recommendation was implemented it would be for the IAs to decide whether to investigate the claims being made, and not the FM. Under the current Code, unless instructed to by the FM they

are unable to begin such an investigation. The result is that the issue became tainted by partisan politics, instead of a potential investigation by the IAs. Even in the scenario in which the IAs look at the allegations, and decide not to conduct a full investigation, this would go some way to satisfy questions surrounding the accusation. There is a clear difference between the FM not wanting to lose a minister due to his/her partisan concerns vs the IAs who are not affiliated.

During Mr Hamilton's investigation into the former FM Nicola Sturgeon, there were at times concerns in both parliament and the public that his remit was narrow, and would not include new allegations that came to light, thus preventing him from conducting a wider investigation. Part of this recommendation if implemented would enable the IAs to conduct their investigation on whatever allegations and breakages of the ministerial code may have occurred without remit restrictions.

The ability for the IAs to initiate such investigations can be seen in both Northern Ireland and Canada, where the equivalent person of IA level can initiate their own investigations into ministers, as well as enabling others. In Canada, members of the legislature can make their own complaints. In Northern Ireland any person can make a complaint to the Commissioner of Standards through its website. Steps have also been taken to make self-initiation a reality as part of the UK Government's Ministerial Code.

Additionally, I believe that whilst the recommendations of the IA should be adhered to, it is still (and should be in my opinion) the ultimate responsibility of the FM to decide the consequence of the investigation findings. If the FM were to go against the advice given to him/her by the IAs, such a step would be serious and unprecedented. This should require the FM to make a statement in Parliament. Opposition parties would most likely call for a statement themselves, but making a statement in such circumstances part of the Code would be beneficial for the Parliament and the wider public.

- **set out the sanctions for breaches other than misleading parliament**

While there is a clear sanction for deliberately misleading parliament, that a minister should offer their resignation, other potential breaches of the Code have no known sanction. This, in my opinion, creates numerous problems, such as a reduced deterrent for a minister to abide by sanctions and leaves the IAs (who may recommend sanctions) and the FM without clear guidance. Whilst I fundamentally believe that the FM is the ultimate arbiter of who should and should not be/continue to be a minister, this, in my opinion, tilts the balance too much in favour of the FM's decision-making.

As well as this, whatever sanction may be given to a minister in question, there would, I believe, be a lingering doubt in parliament and the public that the sanction given did not go far enough (or, however unlikely, too far). The absence of sanctions available could be the reason why such situations may occur. Whilst such an undertaking maybe be considerable, deciding what the sanctions for certain situations would be, i.e., what should the sanction be for not being objective per the Nolan principles? What should the sanction be for failure to take minutes? Other situations would need to be considered, and it would be beneficial to parliament and the wider public to be consulted on what these would be. Alternatively, there could

be a range of sanctions that are available to the IAs and FM which are publicly known, and it would be up to them to decide which would be used in the appropriate situation. For example, an apology made in parliament or a fine. These are important matters for the parliament and the public to consider.

Petitioner written submission, 14 May 2024

PE2093/C: Review and update the Scottish Ministerial Code

This is a further written submission due to the word limit on individual written submissions.

- **allow IAs to make recommendations for changes to the code**

As part of his remit in his investigation into the former FM Nicola Sturgeon the Independent Adviser was asked by the Deputy FM at the time to:

“consider and offer views on whether the Ministerial Code might need revision to reflect the terms of the Procedure and the strict limitations it places on the involvement of the First Minister in cases which fall to be considered under the Procedure”

I think it would be beneficial for the code itself, for the IAs who are responsible for investigating allegations to be able to freely make recommendations at any point (so as not to be limited to remits from an investigation) to the FM about weaknesses that they perceive to exist in the ministerial code. This would undoubtedly further serve to strengthen the code, and public confidence and trust in it, with the IAs only able to recommend changes when asked to do so.

- **rename the IA position to make it clear there is no judicial involvement**

During the court of session case in December of last year (The Scottish Ministers vs The Scottish Information Commissioner), in response to arguments being made by the Government’s defense counsel, the Lord President questioned the use of attaching weight to Mr Hamilton’s role as the Independent Advisor (IA) in his course of argument.

Lord President: “Speaking for myself Mr Mure, I find the constant references to the advisor being independent rather interesting. Why is it independent? This is an internal governmental devised process. The fact that you chose to ask somebody from out with that does not to my mind create independence. Independence is what you get when you involve people like the judiciary.”

Mr Mure: “Well plainly the judiciary aren’t going to be invited to rule upon compliance or not with the ministerial code

Lord President: “That a matter for the Government to decide who is going to do that”¹.

¹ [See the exchange from 1:26:08 of the Court of Session livestream](#)

Additionally, in its written ruling the court went further stating:

“The Ministers’ submissions seek to attach disproportionate weight to Mr Hamilton’s independence; they fail to acknowledge the wider context in which the investigation took place. The context was the operation of a system designed to ensure compliance with the Scottish Ministerial Code. Mr Hamilton’s role was essentially that of an adviser to the Scottish Ministers.”

In IfG’s analysis, if the IA cannot start their investigation without the directive of the FM, this also negates the so-called independence of the advisor. It maybe therefore prudent for the title of the IA to be renamed, to remove reference to the independence of the adviser, which is confusing for those who may give evidence to the adviser and the wider public too. Potentially, renaming to “Adviser of the Scottish Ministerial Code” would be a more suitable title, as the Court of Session described in its written ruling.

- **require Ministers to make a public oath or commitment to abide by the code.**

In the Scottish Parliament, unlike the UK Parliament, ministers are confirmed by appointment through a vote in Parliament, meaning there is already an opportunity present for a minister during their investiture to make a public oath or commitment to abide by the code, once their appointment has been confirmed by parliament. This could be akin to when MSPs make the oath of allegiance they are elected to parliament. This would in my opinion remind ministers that they are bound by the code and its Nolan principles through which they show that they are honest and have the integrity to make such a commitment. Additionally, taking an oath in public, would increase public awareness of the code, confidence in it, and accountability to the parliament and the public. Also, if a minister were to break the code this would further increase confidence that sanctions given to the minister are appropriate as they would have broken the code despite making a prior oath to abide by it. These can only be positives in public discourse in our country in my opinion.

Other recommendation

I would also add, that due to the character limit on the Parliament’s website, I was unable to add a further recommendation to this petition. I would like to do so at this point:

- **that the appointment of the IAs is made transparent and their term of office is established**

I think this is also a key point that the committee could consider as currently there are no job requirements or requisites for what quantifies as a qualified IA. Mr Mure KC in his oral arguments in the Court of Session in the case I have already referenced, stated:

“And the fact that those who are appointed as IA are persons of great experience”

Whilst this appears to be generalisation of those who have served as IAs in the past, it is not exactly clear what the actual requirements are to be an IA. Should they be

from the legal profession, and not have a history of involvement in politics? These are important questions for such critical roles.

Additionally, the process in which IAs are appointed is not currently transparent. This may be even more important soon as Mr. Hamilton has indicated that he is stepping down from his role as an IA. In an FOI that I have obtained, he has recommended a successor to himself (FOI 202400406283), indicating that it may be the role of the current IAs to suggest/recommend their successors. There is no mention of in the Ministerial Code of how IAs should be appointed. This could be an opportunity to implement a more transparent system. For example, if the FM makes a recommendation for an individual to be appointed as an IA per the requirements of the IA role, and then that individual goes before a committee such as the Standards, Procedures and Public Appointments Committee. The resulting transparency and accountability would enable the public to be aware of the IA, and have confidence and trust in the process.

Lastly, in reference to the IA term of office, there is an important question regarding how long an IA should remain in post. When Lord Geidt was appointed to his role for the UK Government role as IA, he was appointed on a five-year non-renewable term. There is an important question regarding whether IAs should have a fixed term (i.e. a parliamentary term). Would it be regarded as controversial if a new FM from a different party decided that he/she wanted new IAs following their election? How long should an IA remain in post?

The Government's written submission

I partly welcome the Scottish Government's response to this petition in that they would consider the suggestions made in this petition as part of a wider review when the code could be updated following the next elections in Scotland. Notwithstanding that this response was made prior to the resignation of the FM at that time, there are now two years left of the current parliament. If the suggestions in this petition are to be properly debated and discussed, this leaves ample time to do so. Meaning at the point at which a potential new Government is formed after the next election, this petition's suggestions are ready to be implemented or on a hopeful note are partly implemented/fully implemented.

If the Committee would like me to provide further written evidence, or for me to provide oral evidence, then I would be more than happy to do so.