

PE2093/B: Review and update the Scottish Ministerial Code

Petitioner written submission, 13 May 2024

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.