

PE2093/C: Review and update the Scottish Ministerial Code

Petitioner written submission, 14 May 2024

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.

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

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

“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.