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Constitutionalising regulatory governance: the case of the Victims' Commissioner

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Abstract

Commissioners sit at the heart of multi-level governance in England and Wales in providing regulatory links between identifiable policy constituencies and government. They are public scrutiny bodies that seek to set and uphold standards for a wide range of public services but, in practice and by design, have very few powers to enforce those standards. This article explores the varying powers of what we term "special interest" commissioners. It focuses on the constitutional nature and powers of the Victims' Commissioner contrasting these with those of other commissioners. Drawing particularly on Black's innovative analysis of ways of constitutionalising regulatory governance frameworks, and with reference to the literature on "guarantor institutions", it highlights inconsistencies within the constitutional position of the Victims' Commissioner. While these are not unique to this body since, as we will demonstrate, there is no one constitutional arrangement for a special interest commissioner, they are of particular significance given current debates on victims' rights, the call for a more robust code of such rights and Parliamentary consideration of the Victims and Prisoners Act 2024. They also speak to a wider implementation gap within prevailing multi-level governance mechanisms. This article suggests that this could be addressed, in part, by strengthening commissioners' ability to enforce standards as well as to exert influence, and by ensuring that, following Black, commissioners' work is more closely aligned with constitutional values and norms. The Victims' Commissioner would then have a clearer role on behalf of, and for, victims and ensure respect for constitutional norms in the criminal justice system.

Keywords: *Commissioner for Victims and Witnesses; Constitutional law; Enforcement*

Introduction

The Victims' Commissioner for England and Wales, established by the Domestic Violence, Crime and Victims Act 2004 (DVCVA 2004), is one of a modern cohort of commissioners established to protect and further the interests of particular groups. These include the Children's Commissioner (2004); Independent Anti-Slavery Commissioner (IASC) (2014); Domestic Abuse Commissioner (DAC) (2021); and a Commissioner for Patient Safety (2022). We refer to these bodies as "special

interest" commissioners. The recent development of their roles, shaped in part by historical precedent,¹ reflects a pressing perceived contemporary need for a visible body associated with government, but at arms-length from it, capable, in principle, of giving voice to and championing certain causes or groups, informing policy debates and decisions, imposing some measure of accountability on the government, and engaging with the public and the media. But as well as these roles furthering the interests of particular groups, commissioners may also be considered to have a broader constitutional function. They have

characteristics analogous to what have been referred to as "guarantor" or "Fourth Branch" institutions,² ensuring respect for fundamental constitutional norms. It is the constitutional roles these bodies adopt that is the focus of this article, considering how, as regulatory actors, they protect and promote constitutional norms. For example, in the context of the criminal justice system, which is our prime concern, protection of the requirements of the rule of law and access to justice are central to the effective operation of criminal justice agencies.

All these new commissioners have been created in fields involving contested social needs identified as requiring specific representation in the policy sphere and exist alongside a growing number of more general regulatory commissions.³ Despite their socially contested and politicised roles, surprisingly little scholarly attention has been paid to the constitutional place of "special interest" commissioners within regulatory governance frameworks. This article begins to address this gap by examining the development, limitations and potential of the Victims' Commissioner (VC), a body which potentially overlaps with other commissioners' remits, and in an area of the criminal justice system that has attracted attention as victims of crime have struggled to engage with the prosecution process.⁴ Further amendments to the VC's powers have been proposed in the 2024 King's Speech as part of a forthcoming Victims, Courts and Public Protection Bill.

In 2020, the authors were commissioned by the Office of the Victims' Commissioner, the statutory body within which the VC sits, to review its powers in comparison with those of other commissioners and to identify changes required to better enable the VC to fulfil their statutory duties under the DVCVA 2004.⁵ We designed a new analytical framework to enable this comparison, differentiating between commissioners' powers concerning: strategic planning; standard-setting; dealing with wrongs; enforcement and remedies; and research and training. As this article demonstrates, we found that powers vary greatly between the different commissioners that we examined. The role of commissioners is dependent on the regulatory context and is inevitably dynamic, developing over time. But their creation recognises a need to improve protection of particular groups and interests and enhance legal and political accountability for the provision of state services and guarantees.

We identified a spectrum of powers ranging from authority to use law to compel compliance to ability to influence,⁶ with mechanisms of influence varying greatly. The reasons for such differences are largely due to the commissioners being set up at different times within different contexts and for different purposes. Another reason is their differing positions in relation to those they were identified to "represent". In the case of the VC, we concluded that, at present, rights and entitlements of victims to many services set out by statute are not being respected or effectively protected. This exacerbates long-standing and much-documented "implementation gaps" or "enforcement gaps" in the realm of victim policy.⁷ Such gaps undermine both the standing of the VC, but more broadly confidence in the ability of multi-level governance mechanisms generally to implement or enforce statutory standards and obligations.⁸

After our report was published by the VC, the role of the VC came under review through preparations for, and debates over, the new Victims and Prisoners Act 2024.⁹ These debates have highlighted key tensions concerning the constitutional nature of the VC, and the relationship of the VC to other aspects of the criminal justice system and government. Consideration of the role of the VC refocused questions concerning whether commissioners, including the VC, have appropriate powers, and regulatory techniques at their disposal, to generate improvements not only in practice, policy and law, but also in securing increased confidence and trust in the justice system.

Constitutionalising regulatory governance

Our discussion draws in particular on wider research in three fields spanning public law, multi-level or metagovernance, and regulatory governance.

UK public law research has focused on the place of the rule of law, rights and legal techniques and processes in our constitutional system, often presented as a clash, or at least tension, between legal and political constitutionalism, or between formality and

informality in decision-making techniques and systems.¹⁰ Debates in this space, well known to public lawyers, fall into two broad camps. Some scholars stress the importance of the legal constitution with the development of rights and the strengthening of legal mechanisms for enforcement and redress and an increased role for the courts. From this "legalist" perspective, the rule of law must clarify rights, ensure that rights are clearly set out in legally enforceable instruments, and facilitate meaningful

routes to redress when rights are violated.¹¹

By contrast, others argue that our un-codified constitution is essentially rooted in political processes and that law and legal institutions can and ought to play, at best, only a secondary role.¹² For supporters of this view, political accountability should be prioritised, and the role of law and the judiciary should be carefully circumscribed. From this perspective, techniques based on the ability to exert influence by means of dialogue rather than adjudication and non-binding "codes" rather than legal coercion, should be recognised as being potentially more effective and more legitimate than formalised legal instruments. These calls to be sceptical about the place and benefits of law and legal techniques have in recent years coincided with increased suspicion and even hostility to perceived judicial overreach and human rights enforcement. Some, take a more middling approach, recognising

that legal coercion and techniques such as dialogue, influence, "soft power" each have a place in regulatory systems.¹³ The differences between these camps speak to some of the most fundamental and enduring tensions within our constitutional system and, as we shall see below, are highly relevant to understanding the goals, powers and techniques of the modern generation of special interest commissioners, and in particular those of the VC.

Studies of the multi-level governance, or metagovernance, of public services offer a second lens through which to explore commissioners' powers as public scrutiny bodies. These typically focus on the mechanisms through which different agencies of governance interact, and on the relationships between such agencies.¹⁴ As Bob Jessop has shown, these mechanisms and relationships are rarely created by design. Rather, they tend to be the products of political and other contingencies that change over time.¹⁵ As a result, their statutory remits intersect, and their duties may overlap. The interconnected nature of multilevel governance mechanisms and their reliance on "soft powers", such as the power to promote, encourage and review, over "hard powers", such as the power to enforce compliance, is an inherent aspect of the relationships between bodies within the governance framework in the UK. The metagovernance of our health services, for example, involves the interaction of a range of agencies including, for example, the National Institute for Health and Care Excellence (NICE), the Care Quality Commission

(CQC), Integrated Care Boards (ICBs), Health and Wellbeing Boards (HWBs) and many others.¹⁶ Tensions between their independence and accountability have been explored within interdisciplinary studies.¹⁷ Similarly, the metagovernance of the criminal justice system involves many different historic and newer agencies spanning policing bodies, Police, Fire and Crime Inspectorates, Police and Crime Commissioners, Crown Prosecution Service (CPS), courts, the penal estate and beyond.¹⁸

In some respects, the special interest commissioners under discussion are agents of metagovernance, partially overseeing the work of state agencies. Created by statute, they are intended to exist at arm's length to the government and can determine their own agenda, activities and focus of their work (in line with their statutory functions). As bodies of influence, they seek to promote the interests of those they represent by changing government policy, legal frameworks and the actions of relevant agencies. The commissioners reflect on areas of policy where it is recognised that actions beyond legal provision may be required to support social change or enable individuals to act to protect their own interests. Importantly in the context of metagovernance, they typically work within and across areas of activity, such as the criminal justice system, that are populated by a mix of other agencies and bodies that have their own concerns but whose overall work should be affected by what commissions do. The image is of a patchwork of regulatory agencies, systems, processes, approaches and priorities that is ultimately intended to help ensure good government and protection of key interests, such as those of victims, that would otherwise be overlooked.

Studies combining insights from both the public law and multi-level governance fields offer a third valuable means of analysing ground-level policy initiatives that impact commissioners' powers. Ayres and Braithwaite defined "responsive regulation" in terms of deliberative regulatory strategies involving multiple stakeholders. Their proposed "enforcement pyramid" included

tactics escalating from informal persuasion in the first instance to formal legal enforcement in the last.¹⁹ Responsive regulation approaches offer useful tools for those seeking to strengthen the governance of, and reduce harms caused by, a range of public

and corporate entities.²⁰ These approaches have also informed the work of those investigating reflexive regulation and other more-constitutionally focused aspects of governance.²¹ Julia Black's work on constitutionalising, what she refers to as, "polycentric" regulatory governance systems is of particular importance because it sets out routes to politically accountable legal enforcement.²² We draw on this in order to extend our analysis of the constitutional standing and role of the VC as set out in our report.

Two preliminary points may be made about Black's approach in the context of our discussion. First, she considers the constitutionalising of regulation in a particular way. By constitutionalising she means operating "in line with the constitutional norms and values" of the state.²³ Importantly for Black this should be approached, "not just by looking (down) at regulatory systems from a constitutional perspective" but also by looking "(up) at constitutions from a regulatory perspective".²⁴ We take this to mean that the constitutional status of a commissioner such as the VC is not to be determined solely by reference to how it was established, its legal powers and formal institutional relationships with other branches of the state. That the VC was established by Parliament to achieve certain defined aims and has various duties imposed by legislation is important but only tells part of the story about the constitutional nature of the VC. A more complete assessment of the constitutional status of bodies such as the VC requires consideration of a wider range of dynamic factors, including whether they do actually operate in conformity with constitutional values and norms themselves, and whether they are able to promote and enhance constitutional standards and values in other bodies.

This leads to the second preliminary point. Black stresses the role of regulatory bodies, and here we would include bodies such as the VC, in what she refers to as "regulatory conversations."²⁵ Participation in such conversations shapes the regulatory process that proceeds through a series of:

"intentional, sustained and focused attempts to change the behaviour of others in order to pursue a collective purpose, using a range of techniques which ... [may] include a combination of rules or norms and some means of their implementation and enforcement".²⁶

With these factors in mind, Black identifies six dynamic elements that are relevant when assessing the constitutional nature of regulatory regimes.²⁷ First, the goals, purposes and values of the organisation. Secondly, its place in supporting the development of knowledge and understanding within the policy process and the resources available to it for this purpose. Thirdly, the range of tools and techniques available to it: these may be legal or non-legal in character, i.e. forms of hard law enforcement or compulsion, or soft law influence and engagement. Black stresses that while the nature of available techniques is significant, we should not focus on these techniques to the exclusion of other features of the regulatory system. Focusing solely on techniques risks oversimplifying the challenges of achieving change by under playing "the normative goals of regulation and its need for trust and legitimacy".²⁸ Fourthly, organisational dynamics that seek to secure its place in the regulatory conversation. Fifthly, behaviours of the organisation in securing its status in the regulatory conversation and its ability to engage to secure its regulatory purpose. Finally, Black flags what she refers to as the most important element, namely the need for trust and legitimacy of the body, noting that "whilst a legal mandate may be necessary, it may not be sufficient"²⁹ to secure trust.

In the discussion that follows, we reflect on how this over-arching framework might inform current legal and political debates about the roles of commissioners.

Comparing commissioners: goals, purposes and techniques

With Black's framework in mind, we offer a comparison of the powers of other commissioners, the first such comparison of its kind. A full assessment applying Black's framework is beyond the scope of this paper, not least because this would require much deeper knowledge and analysis of the working dynamics and values of all these organisations, as well as of their lived relationships with other bodies. For our purposes we limit our comments on these commissioners to aspects of Black's framework that are easier to assess from an external perspective, in particular their stated goals and purposes, and tools and techniques. When we turn to look more specifically at the VC, we will be able to say more about values, development of knowledge and understanding, behaviours, and trust and legitimacy.

While our main concern is with what we have called "special interest" commissioners rather than the regulatory commissions or "guarantor institutions",³⁰ we consider briefly the powers of the Information Commissioner's Office (ICO) and Equality and Human Rights Commission (EHRC) in order to provide a useful point of comparison, especially in relation to the hard legal enforcement of rights and duties. Table 1, below, offers a comparison of the duties and powers of the VC, the ICO; EHRC; the IASC; the Children's Commissioner for England (CCE); and the DAC.³¹ It is notable that the geographical scope of commissioners' activities varies, with the EHRC covering England, Wales and Scotland (but not Northern Ireland), whereas there is a Children's Commissioner for each of the four nations, while the VC covers only England and Wales. Scotland is currently in the process of legislating for a "Victims and Witnesses Commissioner" in the Victims, Witnesses and Justice Reform Bill (Scotland) 2023.

There is no single model or constitutional framework governing the work of contemporary commissioners. Table 1 identifies the role and powers of each commissioner thematically, according to their purpose and their ability to respond to issues falling within their remit. The goals and purpose of each commissioner are set out in their governing statute, as are the tools and techniques to be adopted by each commissioner. It is evident from Table 1 that there is no core set of aims and powers common to all commissioners, nor is there a clear structural arrangement of commissioners' powers.³² As can be seen in comparison these are highly variable, but the special interest commissioners have few hard powers to enforce the values or purpose they seek to protect. The legal or non-legal nature of the powers conferred upon the commissioner seems to be heavily influenced by the underlying framework or standards that they seek to enforce or promote. This affects how the commissioner may achieve their responsibilities identified within the statutory framework. Whilst diverse in form, they broadly fall into two categories: powers to influence and powers to enforce. That said, most "special interest" commissioners are focused only on the use of influence or, "soft power" to represent the interests of a particular constituency, as one contributor to the conversation within

a wider regulatory framework. Our general finding is that these are bodies that are established to achieve change by influence rather than through coercive power.

A comparative review of the powers and duties of selected Commissioners in England and Wales		COMMISSIONERS						
		ECHRC	ICO	ECC	DAC	IASC	VC	OVW 24
GENERAL FUNCTIONS								
	Must promote and support the interests of constituency		X	X	X		X	X
	Take appropriate steps to encourage good practice		X	X	X	X	X	X
	To exercise functions with a view to protecting rights	X	X	X				
STRATEGIC PLANNING								
	To prepare a strategic plan				X	X		X
	To prepare/keep under review a plan of action/inspection	X						
STANDARD SETTING								
Codes	Draft and issue codes of practice	X	X					
	Duty to monitor compliance with codes of practice	X	X	X				
	Power to review and recommend change to codes of practice	X	X				X	
Changes in law	Power to recommend law reform	X						
Changes in practice	Power to recommend changed practice to ensure compliance with codes/standards	X	X		X	X		X
Reports	Publication of annual report on exercise of functions/powers	X	X		X (duty)		X	X (duty)
	Report issues directly to Parliament (duty/power)	X	X		X (duty)			X (power) <i>*P.L. 292</i>

A comparative review of the powers and duties of selected Commissioners in England and Wales		COMMISSIONERS						
		ECHRC	ICO	ECC	DAC	IASC	VC	OVW 24
	Report issues to minister(s) (duty/power)	X		X	X (power)	X (power)	X (power)	X (power)
	Report on outcomes of inquiries/investigations		X	X	X			X
Make recommendations	To make recommendations to an authority within its remit		X		X		X	X
Highlight wrongs	Bring matters to the attention of Parliament		X	X				
Advice and guidance	Provision of advice/guidance/support unrelated to legal proceedings	X	X		X	X		
	Disseminate information and good practice	X	X		X	X		
	Provide advice to government depts and agencies	X	X	X				X
	To give advice/report to Ministers if required		X		X		X	
Encourage	Encourage bodies to take specified interests into account in their decision-making		X	X	X			
Impacts of legislation	To consider the potential effects of government policy/proposals on relevant rights/interests			X				
Monitoring	Monitor the implementation of relevant international law	X	X	X				
DEALING WITH WRONGS								
Inquiries/investigations	Conduct inquiries and make reports into related systemic problems	X	X	X	X			
	Investigate availability and effectiveness of complaints procedures		X	X <i>*P.L. 293</i>				

A comparative review of the powers and duties of selected Commissioners in England and Wales		COMMISSIONERS						
		ECHRC	ICO	ECC	DAC	IASC	VC	OVW 24
	Investigate the availability and effectiveness of advocacy services			X				
	Investigate whether a person has committed an unlawful act	X	X					
Complaints	Receive individual complaints	X	X					
	Receive super complaints from designated bodies							
Access information	Access to government/criminal justice agency records	X	X					
	Require information from public/government agencies	X	X	X				
Secure cooperation	Public authorities have duty to cooperate	X	X		X	X		X
Advise individuals/groups	Advice provided directly to individuals/groups		X	X	X			
ENFORCEMENT and REMEDIES								
To ensure compliance	Power to issue an unlawful act notice	X	X					
	Power to recommend changes in practice	X	X		X			X
Secure remedies	Power to recommend an apology	X						
Legal proceedings	To initiate/intervene in legal proceedings	X	X					

	Represent, assist or act as advocate on behalf of a victim/ constituency member	X	X	X <i>*P.L. 294</i>				
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A comparative review of the powers and duties of selected Commissioners in England and Wales		COMMISSIONERS						
		ECHRC	ICO	ECC	DAC	IASC	VC	OVW 24
RESEARCH/TRAINING/ SUPPORT								
Coordinate work	Coordinate work of support and other agencies	X	X		X			
Training	To conduct training	X			X	X		
Research	Undertake or fund relevant research				X	X		
Consultation	To consult with public authorities, voluntary bodies and others			X	X	X*	X	X
	To consult with persons/classes or persons	X			X			
Cooperation	To cooperate/work with public authorities, voluntary bodies and others				X	X*		X
Grants	To make grants	X						
EXCLUSIONS								
	Cannot exercise functions relating to individuals			X	X		X	X
	Cannot exercise functions relating to particular proceedings or anything done by a judge			X	X		X	X
Notes								
Powers and duties are drawn from the governing legislation for each Commissioner								
OVW is revision to OVC powers, drawn from the Victims and Prisoners Act 2024 <i>*P.L. 295</i>								

Information Commissioner's Office

The ICO was originally created from the European Union Data Protection Directive of 1995³³ to enforce legally defined standards in relation to the management of personal data and freedom of information requests. It is in this enforcement of standards that the ICO has hard powers to ensure compliance by non-state actors in relation to the management of data. It also has softer, more influence-based responsibilities in developing both regulatory and public understanding of data protection, and a duty to advise Parliament and the government on the protection of personal data.³⁴ It also prepares codes of practice in relation to the sharing of personal data.³⁵ In this sense, constitutionally it works between the state and non-state actors in relation to the management of data. As such, it is a body primarily focused on enforcement of data privacy, holding powers to issue enforcement notices,³⁶ penalties³⁷ and pursue prosecutions³⁸ of those breaching the law. In relation to freedom of information, the ICO gives advice,³⁹ and can issue and enforce decisions regarding the handling of specific requests for information.⁴⁰ The powers vested in the ICO are intended to make the underlying legal frameworks effective and accountable, and the powers it holds reflects the defined nature of the underpinning rights and obligations. However, its ability to provide advice on the protection of data also supports the overall purpose of providing an appropriate environment for privacy, the management of personal data and attitudes towards freedom of information requests made of the state.

Equality and Human Rights Commission

The general duty of the EHRC is to encourage the development of a society protecting human rights and human dignity allowing individuals to participate in society without prejudice or discrimination.⁴¹ To achieve this purpose, powers attributed to the EHRC, established under Pt I of the Equality Act 2006, are extensive in terms of standard setting for the protection and promotion of equality and human rights.⁴² It holds unique powers in terms of ensuring enforcement through investigations,⁴³ including both issuing proceedings for judicial review on its own account, and intervening in judicial proceedings initiated by others "if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function."⁴⁴ This provides the EHRC with hard powers to implement review of government decision making in accordance with human rights and equality obligations. As such, it is potentially a fundamental actor in the constitutional system of rights protection within the state.

Additionally, the EHRC may conduct an inquiry into any matter relating to equality, diversity or human rights, whether or not a breach of the law is suspected. Where it believes a public body has not complied with its equality duty, it has power to serve a compliance notice. If the body fails to comply with a notice, then the EHRC can apply for a court order and failure to comply with such an order is a criminal offence.⁴⁵ The EHRC holds significant, and unique, hard law tools to seek to enforce compliance with equality and human rights obligations against public bodies.

Alongside its enforcement role, the EHRC holds influential roles through its duty to promote understanding and good practice in relation to equality and diversity, and to work towards the elimination of unlawful discrimination and harassment.⁴⁶ However, given this broad material scope of regulatory interest, and the range of constituencies engaged by its work, the EHRC has struggled in ensuring that its actions are representative, and in implementing its softer obligations to develop understanding of equality issues.⁴⁷ It has experienced difficulties in both incorporating the protection of human rights in its work, and supporting public debates over such protections.⁴⁸ Articulating and acting on its role as an influencer has opened its activities to wider conceptual and personalised debates, demonstrating the political nature of its constitutional role in mediating opinion on socially contested issues. Barrett has identified that the EHRC has faced challenges in using its available tools and resources to achieve its goals:

"It was unclear whether it was the role of the Commission to ensure compliance with the law (ie focus on 'getting the bad guys') or to promote systemic change by encouraging organisations to go beyond formal legal requirements and achieve a higher standard of implementation (ie focus on 'guiding the good guys')".⁴⁹

In practice, the combination of enforcement powers with generalised responsibilities for the promotion of human rights and equality has caused difficulties in determining the best approach to achieving balance in pursuit of its stated goals.⁵⁰ The values associated with the underpinning framework, informed in part by the work of the EHRC itself, are often highly contested and difficult to reconcile, making the enforcement role outlined for the EHRC inherently challenging:

"... the EHRC lacks a clear set of priorities, it is not seen as a robust regulator or enforcer of the law, its impact is not always explained or measured, its influence and engagement with stakeholders is often not effective, and its approach to gathering intelligence and advising the public in places does not meet the Commission's needs."⁵¹

Black identifies that, where underlying written regulatory norms require interpretation conversations to resolve the meaning of terms, such as human rights, or equality norms, these debates are likely to be central to the conduct of the regulatory system.⁵² This aspect of its role the EHRC seems to have found challenging in terms of defining its values and the behaviours of the organisation.

Children's Commissioner for England

The CCE was originally created to channel children's views and interests into the processes of government and policymaking,⁵³ but was not conceived of as an active rights-protecting organisation.⁵⁴ The Children and Families Act 2014 significantly reformed the CCE, empowering the Commissioner to protect the rights and interests of children and promote compliance with the UN Convention on the Rights of the Child 1990 (UNCRC) as its underlying purpose. Despite the obligation to protect rights, the CCE has limited hard powers of enforcement. This is a constitutionally significant value framework against which regulation and policy implementation must be monitored, despite the fact that the UNCRC has not been incorporated into English law. Under s.2(3) of the Children Act 2004 (as amended) the CCE may advise and encourage persons exercising functions or engaged in activities affecting children on how to act compatibly with the rights of children. The CCE seeks to play a significant role in improving understanding of issues affecting children and is active in commenting on the effects of social and policy issues on children. Notably, the CCE can advise on the views and interests of children, potentially giving children an indirect voice in the regulatory conversation.

The CCE does hold some hard powers to enter premises to conduct interviews or observe standards, and can require the provision of information in respect of its functions from public bodies.⁵⁵ While the CCE has the power to provide advice and assistance to children living away from home or receiving social care, they cannot act on behalf of individual children to require that their rights are actively protected by a public body in the same way as the EHRC can through judicial review. Two years after the passing of the 2014 Act, the then Secretary of State for Children, Edward Timpson MP, noted the amplified role and independence of the Children's Commissioner, but resisted the idea of further legal enforcement powers, arguing that there were more effective ways of securing change for children.⁵⁶ Since the 2014 Act came into force, the Children's Commissioner has been active in promoting the interests of children and has been prepared to criticise government policy, for example,

in relation to the damage to children's education during the COVID-19 pandemic.⁵⁷ The Commissioner has also been robust⁵⁸

in seeking to promote knowledge of issues affecting children, and has a significant public profile, along with the Children's Commissioners from the other three nations.

Independent Anti-Slavery Commissioner and Domestic Abuse Commissioner

The IASC, created by the Modern Slavery Act 2015, and the DAC, created by the Domestic Abuse Act 2021 were both designed to enhance the protection of particular groups of victim with special support needs cross-cutting different policies and services. The IASC is charged with encouraging good practice in the detection and prosecution of modern slavery and the identification of victims.⁵⁹ To achieve these functions, the IASC does not have legal enforcement powers. The focus of IASC activities is on ensuring state authorities are effective actors to intervene in modern slavery practices, rather than on victims' rights, or on combating the exploitative practices themselves. As such, its powers are focused on state accountability through influence and reporting to the Home Office. It can support research, along with providing training to promote knowledge and understanding of modern slavery amongst government agencies, including the police, and private actors such as companies affected by the potential use of forced labour.⁶⁰ These powers are directly linked to the offences and other measures taken to combat modern slavery created by the 2015 Act which are enforced by other state bodies, so the IASC forms one aspect of a wider regulatory framework, focused on influencing understanding of modern slavery.

The DAC is charged with encouraging good practice in the prevention, detection and prosecution of domestic abuse, and the provision of services to those affected by domestic abuse.⁶¹ Similarly to the IASC, the DAC is expected to make recommendations to public authorities, and cooperate with voluntary and public services, and provide training and research.⁶² It is state accountability mechanism through reporting and influence, rather than using hard law mechanisms of enforcement with particular standards. The DAC research programme is underway, investigating the incidence and response to domestic abuse in the Family Court.⁶³

Both the DAC and IASC are located within an already complex regulatory landscape of criminal and civil law, third-sector support services, and public policy on areas of persistent social concern. They are specifically designed to promote knowledge and understanding in related state agencies. They can provide oversight of these social issues across regulatory contexts, making a broad contribution to criticism of policy implementation. Their soft powers are aimed at ensuring concerns affecting their constituency of interests are addressed by government and other relevant bodies, giving them an indirect voice in state regulatory conversations.

The Victims' Commissioner

We now turn to look more closely at the VC and offer an assessment of its current and potential constitutional powers as an actor within the criminal justice system, representing a specific category of interests.

The statutory purpose of the VC is to encourage good practice in the treatment of victims and witnesses in England and Wales. The Commissioner has statutory duties to: promote the interests of victims; encourage good practice in relation to the protection

of the rights of victims; and to review the operation of the Code of Practice for Victims. As originally conceived,⁶⁴ the purpose of the VC is therefore not just related to developing and sharing knowledge and understanding of issues affecting victims of crime with state agencies. The VC also has a right to contribute to the development of regulatory standards regarding the treatment of victims by actors in the criminal justice system. If required to do so by a Minister, the VC must give advice on any

matter related to victims and witnesses.⁶⁵ The VC does not, however, have any powers to ensure compliance or monitoring of compliance with the standards in the Code for the treatment of victims. It may also be noted that, while the VC originally had the power to commission research and give advice to prescribed authorities about victims and witnesses, this was removed by the Coroners and Justice Act 2009.

Part III of the DVCVA 2004 provided a range of measures for the protection and support of victims, including the statutory Code of Practice for Victims. The current Code addresses the existing *entitlements* that victims should enjoy when they engage with the criminal justice system including receiving information about the criminal justice process; charging and prosecution decisions made by the police and CPS; a right to review the decision if the case is discontinued; a right to make a victim personal statement; and to receive information about restorative justice and the powers of the Criminal Injuries Compensation Authority. These *entitlements* largely require the provision of information to, or support for, victims. The VC is charged with keeping the "operation of the Code under review" but has limited resources and no regulatory or hard reporting powers to achieve this. The VC may make proposals to the Secretary of State for Justice for amending the Code in relation to victims of

crime, consult and make recommendations to a relevant authority.⁶⁶ The VC is structured as a promoter, an encourager, and a reviewer of operational practice by state agencies in relation to victims of crime, but lacks the tools to enforce the Code, or develop knowledge about its effectiveness, or secure its enforcement in practice by state agencies. It is notable that, despite having the Code available, unlike the EHRC, the VC does not have the power to intervene where there is evidence of non-compliance. Its soft influence is more akin to the work of the IASC and DAC, but operates only within the criminal justice context.

The Code sets out the information, support and services that victims of crime are entitled to receive from 28 named criminal justice agencies in England and Wales. The range of bodies demonstrates that the VC necessarily operates in a complex regulatory landscape in relation to victims of crime but only within the criminal justice system. The focus on criminal justice means that the links between policy fields are not evident in the same way as in relation to domestic abuse, for example, but the VC is potentially in conversations across many state agencies. However, it is a very busy accountability space. In addition to the VC, there are other ostensibly independent, but state-supported bodies, for example, the elected Police and Crime Commissioners, HM Inspectorate of Constabulary, HM Inspectorate of the CPS, and the Independent Office for Police Conduct, who all have responsibilities to hold criminal justice actors to account.

The Code and the existence of the VC reflects the fact that in a prosecution, a victim may be expected to interact with several state agencies including, most often, the police and the CPS. It is often likely to be unclear to a victim of an offence where decisions are taken, or by whom. From the perspective of the victim this is a complex framework with which to interact giving the VC a potentially important *downward* constitutional role in supporting and advising victims of crime. However, in terms of enforcement, there are other constitutional actors who have enforcement powers, beyond influence, which limits the VC's *upward* constitutional role in ensuring that the interests of victims of crime are protected by state criminal justice agencies.

There is currently no overarching oversight of providers of services to victims and witnesses nor any formal reporting mechanisms linking these providers to the VC. This may stem in part from the amorphous nature of the Code itself, which draws from a range of different processes promulgated by different criminal justice bodies. There has been no overall reflection on the constitutional role of the VC as an actor within a wider state-system of accountability and oversight of criminal justice.

Assessing the constitutional nature of the VC

How should we assess the constitutional nature of the VC in the light of Black's framework? Some things are easier to assess than others. It is clear that the VC derives its status and authority from statute. It is also clear that the VC was conceived to contribute to the functioning of the criminal justice system and how this system is experienced, specifically to further the interests of victims of criminal acts during the process of complaint and prosecution. These are clearly matters of high constitutional importance. Other, perhaps equally or even more significant factors identified by Black, are less transparent and include issues around behaviour and whether the VC's engagement in regulatory conversations across the criminal justice landscape can be said to satisfy constitutional norms and values. Such issues could only be fully assessed following further research, but whilst a voice in the regulatory conversation is important, it is difficult to see how this is translated into direct influence over treatment of victims of crime.

A major factor here is that the powers of the VC have been tailored by compromises intended to enable the VC to contribute without trespassing on the work of other actors in the system or of the criminal process itself. Such compromises and contingencies are typical within the evolution of UK constitutional mechanisms. However, this approach to regulation may explain why the VC has few legal powers, but it is difficult to see why such factors would justify the VC's reduced ability to commission research, and its limited right to be consulted on the revisions to the Code of Practice for Victims. A cost of these compromises is that those outside the system, including victims themselves, may lose confidence and trust in the VC.

Powers, trust and legitimacy

With the above observations in mind there are three concerns that are likely to have special bearing on the VC's ability to satisfy the final and most important of Black's conditions of constitutionalism, the need for trust and legitimacy. These are i the appointments process; ii whether the VC has and exercises appropriate powers in practice; and iii whether the VC can engage effectively with the government.

Appointments

Actual and perceived independence from the government and other influential stakeholders is an important indicator of the constitutional standing of a regulator. How commissioners are appointed and by whom are key questions. That these appointments may be highly susceptible to political forces and open to accusations of government influence undermine perceptions that the commissioner is capable of effecting change as an actor in any regulatory conversation. Central to securing accountability and trust is avoiding the entirely possible appointment of candidates considered unsuitable or insufficiently independent from the government agenda of which they are ostensibly set scrutinise on behalf of their special interest constituency.⁶⁷

The re-appointment of Baroness Newlove as VC also highlights that the work of the commissioner often reflects their own personal expertise, inevitably shaping the operation of their office for the period of their appointment. Her support of victims stems from her own experience of anti-social behaviour and violence that resulted in the murder of her husband, and her focus is on the impact of anti-social behaviour on victims. This stands in contrast to Dame Vera Baird KC, who centred her work on the experience of victims of sexual abuse and rape in the criminal justice system, in part because of her experience as a criminal barrister, and on the role and powers of the office of the commissioner itself to support victims.⁶⁸ While the role and remit of commissioners is defined by legislation, there is no statutory obligation to fill any of the commissioner roles. The offices of two commissioners were recently left vacant for significant periods. Vera Baird resigned as VC in September 2022⁶⁹ but was not replaced until October 2023, a time when the Victims and Prisoners Bill was being discussed in government and debated in Parliament. Following criticism of the failure to appoint a new commissioner,⁷⁰ the previous VC, Baroness Newlove, was re-hired to the role for a year, with a full appointment process announced for a new appointment by summer 2024.⁷¹ As of November 2024, this reappointment process is not complete as the general election intervened. Similarly, the IASC was vacant from May 2022 when Dame Sara Thornton's term of office came to an end. As a result, the IASC could not "...provide views or take on or contribute to new work".⁷² This was a period when the Illegal Migration Bill 2023 was being discussed in Parliament with evident implications for victims of modern slavery.⁷³ In the debate surrounding the failure to appoint an IASC, it was suggested that Parliament should have the power to appoint the Commissioner, rather than the Minister for the Home Office, providing a greater degree of independence from government and supporting the wider legitimacy of an appointee.⁷⁴ There is a strong argument for appointments to be scrutinised by the relevant Select Committee before being confirmed.

Powers

The absence of legal techniques and powers attributed to the VC is particularly striking. Whilst the VC may encourage compliance with the terms of the Code of Practice, the VC cannot take enforcement action against failures to comply.⁷⁵ The Code of Practice refers to duties, rights, and entitlements, but there is no legal framework for enforcing these duties, protecting these rights, or securing entitlements.⁷⁶ While the VC can make recommendations to authorities, it lacks the formal power to review, monitor or enforce measures seeking to broaden public access to justice by, for example, encouraging "hidden victims" to report an alleged offence against them.⁷⁷ Indeed, failure to comply with the duties set out in the Code does not of itself give rise to criminal or civil liability.⁷⁸

Under DVCVA 2004 s.49, the VC has no express powers to recommend changes to the law, give advice to victims, report directly to Parliament, receive individual complaints, require changes in working practice or initiate legal proceedings. In practice, this means that very few victims are likely to be able to take effective legal action where their entitlements under the Code have not been met, and the VC cannot intervene on their behalf. The constitutional role of the commissioner is not anticipated to provide an individual level of accountability. Since each criminal justice body manages its own complaints procedures, this leaves an important enforcement gap, creating ambiguity and uncertainty for victims. This gap raises broader questions about whether there is a serious commitment to furthering and securing victim rights through external oversight.

All that said, as Black suggests, the absence of legal coercive powers is not necessarily a constitutional weakness. Non-legal or informal powers of influence may be regarded as more appropriate and may indeed be more effective depending on the regulatory context. Assuming a deliberate choice, this certainly seems to be the case in the design of the VC's powers which secure only participation in the wider regulatory conversation concerning criminal justice. The role of influencer is perhaps more conducive to enabling the VC to build relationships across the criminal justice system that are based on cooperation and trust, rather than on force and coercion. It is conceptually different to the influence role of the IASC and the DAC however,

because the VC has a specific Code to work with, which could be regarded as requiring enforcement. The constituency of victims of crime are likely to interact with the Code, and require accountability from, criminal justice agencies on this basis, but the VC has no role in enforcement.

The obvious challenge here is that trust is a relative concept heavily contingent on perspective. Giving the VC the influence to build the trust of government and stakeholders in the criminal justice system may be at the cost of undermining the trust of others, including victims and witnesses themselves. The existence of a VC office without true ability to represent victims then (further undermines confidence that the system takes victims' rights and entitlements seriously. This risk may be particularly acute where there are question marks concerning overall confidence in the integrity of the system. This may itself be adversely affected by factors such as the perceived independence of the VC, its ability to subject government to a searching degree of scrutiny, and to provide victims with a route to participating in the design and use of the wider criminal justice system. This includes the ability of the VC to provide insight into the perspective of victims, provide new data and overcome obstacles in victim participation.

Regulatory engagement

The powers of special interest commissioners seem intended to provide a link between government and constituencies of interest, mediating opinions of both the public and interest groups. The commissioners are at arms-length from the government and ostensibly independent with the ability to act in ways that conflict with, or are critical of, government policy. This close relationship with government, though ostensibly a body of accountability, has the potential to affect the values of the body and their ability to achieve their mandate—eventually affecting trust in the concept of the "commission" as a regulatory body. In recent years, for example, the EHRC has attracted controversy for alleged lack of independence from government, particularly in relation to LGBTQI+ and trans rights.⁷⁹ A former head of the EHRC, David Isaac, has identified that the body faced significant political pressure to support and promote a specific government agenda on shifting equality debates.⁸⁰

However, in practice, the evidence suggests that some commissioners have experienced significant difficulties in obtaining an audience in government to highlight specific problems or concerns associated with their general functions, and their relationship with the government has in fact broken down. Recent examples suggest that the government has been wary of engaging with commissioners as quasi-independent agents. For example, Anne Longford, the previous CCE, has stated that the government, particularly the Departments of Health and Education, were not receptive to her attempts to highlight the problems affecting children during COVID-19 lockdowns, including protecting children at risk, withdrawal from education and reopening of schools.⁸¹

The influence of commissioners can be significantly affected by the nature of their contact with the relevant ministers. In her letter of resignation from the role of VC, Dame Vera Baird stated that:

"Asking me to re-apply given that two opportunities to re-appoint me have already passed and my office is no longer given much access to ministers seems more a ploy to keep me in place as a nominal post-holder in the short-term ..."⁸²

She highlighted that there had been little contact with the Ministry of Justice, despite the introduction of the Victims Bill⁸³ into Parliament, with obvious significance for the proposed changes to the role and activities of the Commissioner. Whilst at arm's length to government, there must also be a close relationship for the individual commissioner to have a meaningful stake in the regulatory conversation at government level, rather than just expressing a view to the world at large. The use of commissioners in politically sensitive contexts, such as criminal justice or immigration, raises inevitable apprehensions that the commissioner is there to be heard, but not listened to, by government, providing a smokescreen of accountability. Whilst the commissioner may participate in the conversation, it is not with any actual degree of influence. This reality seems in evidence in relation to the VC.

It may also be anticipated in the impact of a "Migrants Commissioner" proposed in the aftermath of the Windrush Review.⁸⁴ Whilst such a commissioner may make recommendations regarding the treatment of migrants, the potential for their views to have an audience within the Home Office will heavily depend on the political acceptability of the view expressed.

Enhancing the powers of the Victims' Commissioner

Our work in this space indicates that there are several means by which commissioners' powers could be enhanced and, through which, more effective or responsive regulation secured.⁸⁵ If Parliament is serious about defending the rights of victims, it could grant the VC the same power to initiate or participate in legal proceedings, including judicial review, as is enjoyed by the EHRC. Such power could, like the EHRC's power to engage in litigation, be exercisable whenever it was considered "relevant to a matter in connection with which the Commission has a function".⁸⁶

Alternatively, the power could be constrained, for instance, to enable the VC to bring, or join, legal proceedings where this is considered necessary to clarify the law, including the nature of the duties imposed upon service providers, in the public interest. Either way such power would only rarely be needed, but the possibility of legal proceedings would help satisfy the wider public interests in the protection of victims. It would also significantly strengthen the VC's ability to hold service providers and government to account and provide an additional signal the practical importance of the duties in the Victims' Code. Importantly, it would be consistent with the recognition that victims have rights and, in this way, encourage further confidence in the system.

Another means to empower the VC as the overseer of the Code, would be to grant it oversight of the bodies generating complaints from victims about their treatment, and the nature of those complaints. The Commissioner should have the power to receive complaints from victims and direct them to the body alleged to be at fault. This role would ensure consistency in practice and provide a single point of contact for victims seeking to complain. It would also inform the Commissioner's other work,

promoting the interest of victims and awareness of the Code, and provide the basis for future support initiatives.⁸⁷ As discussed above, there is a precedent for upgrading the powers of a commissioner. The 2014 reforms to the CCE's powers make specific reference to the UNCRC, adding a rights-based framework to what had previously been a much less formal rubric.

In our work for the OVC, we recommended that avenues of both influence and enforcement should be made available to the VC. Our starting point was simple: if victims' entitlements were considered by Parliament to be important, why could they not be enforced? Applying a wider responsive regulation approach, Black argues that:

"[c]onstitutionalising regulation means ensuring that those exercising regulatory powers and functions within a regulatory system do so in line with constitutional norms and values."⁸⁸

It follows from this that reviewing and revising the constitutional powers of "special interest" commissioners would allow them to fulfil their duties as set out by Parliament in the public interest.

The missed opportunity of the Victims' and Prisoners Act 2024

The scope of the VC's powers was revised as part of the Victims' and Prisoners Act 2024. Key sections of the Act concerning the VC originated from a long anticipated "Victims' Law",⁸⁹ intended to improve the enforceability of victims' rights, provide support for victims in the criminal justice process and accountability for criminal justice agencies. Pre-legislative scrutiny by the

House of Commons Justice Select Committee⁹⁰ found that the original Victims' Bill provided little in terms of enforcement, or compulsion on criminal justice agencies to comply with the terms of the Victim's Code. The Select Committee suggested that

strengthening the role of the VC and linking the VC with Police, Fire and Crime Commissioners (PCC)⁹¹ would help oversight of compliance with the Code. The Bill, as introduced, removed the obligation on the VC to keep the Victims' Code under review, and inserted a power allowing the VC to make recommendations to criminal justice agencies, upon which there was an obligation on the agency to respond.⁹² It reached Committee stage in the House of Commons in the 2022/23 Parliamentary session,⁹³ becoming the Victims' and Prisoners Bill, and was reintroduced in the 2023/24 session. While it was closely scrutinised, a coherent approach to develop the role of the VC and provide clear accountability for duties under the Code was not possible across several iterations of the Bill. Attention shifted to other criminal justice issues including removal of parental responsibility where one parent kills another,⁹⁴ victims of major incidents⁹⁵ and aspects of sentencing.⁹⁶

Revisions made to the Bill on its legislative journey exemplify the continuing tensions between legal and political constitutionalism outlined earlier. Initially, the role of the VC remained limited without any major revisions to its remit or powers with no identified specific right of consultation regarding the adoption of, or revisions to, the Code.⁹⁷ However, in final amendments by the House of Lords before Parliament dissolved for the 2024 general election, the VC was awarded the right to be consulted by the Secretary of State in both the preparation of,⁹⁸ and revisions to, the Code,⁹⁹ and in the development of Regulations on compliance.¹⁰⁰ However, under s.8, the duty to collect data on compliance with the Code, and report to the Secretary of State has been left with local PCCs, with no role for the VC. In drafting the Regulations on this PCC reporting process, the Secretary of State should consult with the VC, but there is no statutory obligation to provide the data to the VC, or on the VC to monitor overall compliance for a national picture.¹⁰¹ Responsibility for raising awareness of the Code and reviewing services has instead been imposed on locally elected PCCs.¹⁰²

These provisions raise several issues concerning the overall accountability and awareness of the Code and reinforce the limited role of the VC in relation to compliance and enforcement. Local PCCs can be responsible both for initially supporting the provision of victims' services in their local area, and then subsequently for the centralised reporting on these services and their success. The Act contains no formal obligation on the VC to advise PCCs on developing local victim strategies, and PCCs are not listed as bodies within the VC's remit.¹⁰³ PCCs are also focused on *policing* and the operation of a police force covering of a particular geographical area, not on the entirety of the criminal justice process. Consequently, if a victim has an issue with, for example, the compliance of the CPS, rather than the police, with the Victim's Code, this may not be captured within the reporting process on compliance with the Code. Non-compliance with the terms of the Code will not give rise to liability, maintaining a significant lacuna in the enforcement of the entitlements expressed within the Code,¹⁰⁴ and there is no mandated oversight for Parliament or the Justice Select Committee in the appointment of the Commissioner, or in the annual reporting by the VC to Parliament. Finally, depending on the information released, it will now be difficult to gain an independent overall perspective on victims' services, or the effectiveness of the Code.

Certain of the changes in the Act are directed at enhancing the role of the VC under s.22 of the Victims and Prisoners Act 2024, amending the DVCVA 2004. VC reports may now be laid before Parliament, and may also include recommendations to criminal justice bodies.¹⁰⁵ This is complemented by a duty on criminal justice bodies to cooperate¹⁰⁶ and to respond to the recommendations made by the VC.¹⁰⁷ In addition, criminal justice inspectorates are required to consult the VC in designing their programmes of inspection,¹⁰⁸ and the MP bar is removed from referrals of complaints by victims to the Parliamentary Ombudsman.¹⁰⁹ Whilst these provisions reflect, to some extent, our recommendations on the constitutional role of the VC, it is difficult to apprehend how the VC can intervene and make recommendations without corresponding powers to oversee complaints and make the Code enforceable.

In our view, an opportunity to strengthen regulatory effectiveness has been missed. In this context, the potential role of the VC in terms of overall monitoring and ensuring compliance with the Code by criminal justice agencies across England and Wales would appear to be essential. This raises two important constitutional issues. First, when the VC seeks to promote and protect the rights and interests of victims, this is a duty imposed by Parliament which has given the office special standing to do so in the public interest. This differentiates the VC role from other public and non-public bodies who may also be concerned to promote victims' rights (such as the government-funded NGO Victim Support). Secondly, because the VC performs duties conferred by Parliament the office should play a role in relation to holding public agencies, including local and central government, but also other relevant government agencies, to account for their delivery of duties towards victims of crime and administration of the criminal justice system. For this reason alone, identification of best practice or advice to ministers requires respect. To carry out these obligations effectively, the VC requires sufficient powers to enable the performance of these statutory functions. Otherwise, the role of the VC in an already complex landscape of accountability to victims and witnesses, risks creating expectations of governance which cannot in reality be fulfilled.

In the King's Speech 2024, the Labour Government announced plans to introduce a further Victims, Courts and Public Protection Bill. This would potentially include measures further strengthening the VC's powers "to ensure that they are empowered to hold the system to account for the needs of victims not being met."¹¹⁰ The Prime Minister, Sir Keir Starmer, has a long history of public engagement with protection of victims' rights.¹¹¹ This poses a significant challenge of governance in a system that is already difficult for victims to navigate, but could empower the VC as a constitutional actor uniquely placed to ensure the victims have the information and means of redress they need to pursue their case/complaint.

Conclusion

The recent history of the development of the current corps of "special interest" commissioners suggests that government ministers and their officials have had opportunities to give greater and more effective hard enforcement powers to these commissioners but have chosen not to do so. Instead, while they have expanded general powers of influence, these may have little, if any, real bite. Experiences from the recent debate over the role of the VC (and our own involvement in that debate) suggest that this is deliberate.

Despite being charged with promoting the interests of specific vulnerable constituencies, there is little awareness of these bodies, the purpose and processes for providing accountability are highly variable between commissioners, and it is difficult to evaluate their contribution within a wider regulatory framework.¹¹² The modern cohort of commissioners are exemplars of the problems of multi-level regulatory governance and of operationalising tougher levels of responsive regulation. When the VC performs its duties to promote and protect the rights and interests of victims of crime it does so because Parliament has

given special standing to do so in the public interest. Because the VC performs duties conferred by Parliament, it has constitutional responsibilities in relation to holding public agencies, including central government, to account for their delivery of duties towards victims and witnesses. Despite this, the VC lacks sufficient powers to enable effective performance of its statutory functions and cannot enforce the laws that Parliament has passed.

This matters because poor performance of public services and the agencies that regulate them can breed public mistrust in both and undermine their legitimacy. As Black argues:

"...although state-based regulators are legally charged with achieving the goals set out for them by governments in line with the powers that they have been given, regulators, as both individuals and organisations, wield power over significant swathes of public and private life. Mistrust in the manner in which, and effectiveness with which, they perform their roles can be prevalent, all the more so in an era of populism. Thus, in democratic states there is a continual debate as to how much power should be delegated to regulators, who should be involved in their decision-making, how they should be called to account, by whom and with what consequences." ¹¹³

The "proceduralisation" of institutional processes by the state in seeking to regulate requires and facilitates deliberation between state bodies in monitoring or enforcing standards. ¹¹⁴ This regulatory conversation takes place under the auspices of the state, but the creation of commissioners allows part of this process of deliberation to occur apparently independently of government. However, this ostensibly independent role for commissioners is in tension with legal and political accountability for ensuring compliance with regulatory frameworks or standards, since the commissioners are appointed by government and have to maintain a productive relationship with it to be part of the regulatory conversation. ¹¹⁵ Commissioners provide both for the exertion of "soft" influence over government, but also for the articulation of the voices and interests of those whom they mandated to represent. In some circumstances, their roles provide an opportunity to amplify challenging or disruptive voices of those who would not otherwise be heard within government policy processes. On these occasions, problems affecting a particular constituency may be communicated to government outside any judicial or legal processes. But commissioners may be expected to do more than amplify voices. They may also be expected to achieve change.

Multi-level regulatory governance and responsive regulation rests on delegation. This article has addressed the challenge of ensuring that those, like commissioners, to whom power is delegated are empowered to act in line with constitutional norms and values. The case of the VC suggests that if it is to be trusted by the public to uphold victims' entitlements then it, in turn, needs to be trusted by Parliament to discharge its statutory duties on Parliament's behalf. If one of the founding values behind the Victims' Code is that victims' entitlements matter, then this value must animate the public scrutiny exercised on our behalf by our VC. If it cannot, this particular commission should be disbanded, and its vital public duties redistributed.

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Footnotes

- 1 Bodies known as "commissions" have existed since the 19th century, most notably the Poor Law Commission established by the 1834 Poor Law Amendment Act, established to administer relief to the poor.
- 2 e.g. T. Khaitan, "Guarantor (or the so-called 'Fourth Branch') Institutions" in J. King and R. Bellamy (eds), *Cambridge Handbook of Constitutional Theory* (Cambridge: Cambridge University Press, 2025); M. Tushnet, *The New Fourth Branch* (Cambridge: Cambridge University Press, 2021); M. Pal, "Electoral Management Bodies as a Fourth Branch of Government (2016), Ottawa Faculty of Law Working Paper, No.2016-25.
- 3 These include the Equality and Human Rights Commission (2006), Police and Crime Commissioners (2012); the Information Commissioner (2001, evolved from Data Protection Registrar/Commissioner); the Charity Commission (1853) and Immigration Service Commissioner (1999). There is no single framework for their establishment, or for labelling a certain body or actor as a "commission" with specific associated powers.
- 4 e.g. Victim Support, "Suffering for Justice: Sexual violence victim-survivors' experiences of going to court and cross-examination" (October 2024), <https://www.victimsupport.org.uk/more-us/policy-and-research/reports/suffering-for-justice-report-2/>.
- 5 Cox, Lamont and Sunkin, *Powers of the Victims' Commissioner* (2020).
- 6 What Khaitan refers to as "expressive capacity" (Khaitan, "Guarantor (or the so-called 'Fourth Branch') Institutions" in King and Bellamy (eds), *Cambridge Handbook of Constitutional Theory* (2025)).
- 7 For an overview, see P. Cox and S. Walklate, "Introduction" in *Victims' Access to Justice: Historical and Comparative Perspectives* (London: Routledge, 2022), pp.1–17.
- 8 For wider discussion of implementation and enforcement gaps, see M. Scholten, "Enforcement" in *Handbook of Regulatory Authorities* (Cheltenham: Edward Elgar, 2022), pp.394–409; A. Donald, "Closing the implementation gap in human rights" (Middlesex University London, 2015), <https://mdxminds.com/2015/10/21/closing-the-implementation-gap-in-human-rights/>; K. Schwarz and J. Allain, "Tracking the implementation gap: Empirically assessing the translation of international antislavery commitments in domestic legislation globally" (2020) 2 *Statelessness and Citizenship Review* 159; A. Valcke, "EU Citizens' rights in practice: exploring the implementation gap in free movement law" (2019) 21 *European Journal of Migration and Law* 289.
- 9 Ministry of Justice, *Delivering justice for victims: A consultation on improving victims' experiences of the justice system* (December 2021), CP 574, https://consult.justice.gov.uk/victim-policy/delivering-justice-for-victims/supporting_documents/deliveringjusticeforvictimsconsultation.pdf.
- 10 See, e.g. concerns around alternative dispute resolution and formal adjudication: A. Le Sueur, "Courts, Tribunals, Ombudsmen, ADR: Administrative Justice, Constitutionalism and Informality" in J. Jowell and D. Oliver (eds), *The Changing Constitution*, 6th edn (Oxford: Oxford University Press, 2007).
- 11 T. Bingham, *The Rule of Law* (London: Allen Lane, 2010).
- 12 J.A.G. Griffith, "The Political Constitution" (1979) 42 *M.L.R.* 1; A. Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005); M. Loughlin, *Against Constitutionalism* (Harvard: Harvard University Press, 2022).
- 13 See, e.g. Barrett's discussion of Fredman's persuasive arguments for "reflexive" regulation to better achieve respect for human rights and equality duties in S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) and D. Barrett, "The Importance of Regulators and Inspectorates to the Realisation of Equality and Human Rights: ensuring compliance and supporting mainstreaming" [2020] *P.L.* 56, 56–59.
- 14 B. Jessop, "Multi-level governance and multi-level metagovernance" in I. Bache and M. Flinders (eds), *Multi-Level Governance* (Oxford: Oxford University Press, 2004), pp.49–74.
- 15 In this sense the growth in the use of commissioners resembles the fragmented proliferation of tribunals and ombudsmen, and the absence of a coherent "system" of administrative justice.

16 J. Hammond, E. Speed, P. Allen, I. McDermott, A. Coleman and K. Checkland, "Autonomy, Accountability, and Ambiguity in Arm's Length Meta-Governance: the case of NHS England" (2019) 21 Public Management Review 1148.

17 S. McPherson and M. Sunkin, "The Dobson-Rawlins pact and the National Institute for Health and Care Excellence: impact of political independence on scientific and legal accountability" (2020) 216 British Journal of Psychiatry 231.

18 See Cox, Lamont and Sunkin, *Powers of the Victims' Commissioner* (2020).

19 I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the deregulation debate* (Oxford: Oxford University Press, 1992).

20 For an overview, R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation: Theory, Strategy and Practice, 2nd edn*, (Oxford: Oxford University Press, 2011), pp.259–280.

21 See Barrett, "The Importance of Regulators and Inspectorates to the Realisation of Equality and Human Rights" [2020] P.L. 56.

22 J. Black, "Constitutionalising regulatory governance systems", LSE Law, Society and Economy Working Papers 02/2021; Julia Black, "Constructing and contesting legitimacy and accountability in polycentric regulatory regimes" (2008) 2 Regulation & Governance 137; also S. Picciotto, "Constitutionalizing multilevel governance?" (2008) 6 International Journal of Constitutional Law 457.

23 From the perspective of constitutional guarantees the ability to enforce and protect norms and values would be stressed alongside the need to act in line with such norms and values, see *Khaitan, "Guarantor (or the so-called 'Fourth Branch') Institutions"*.

24 Black, "Constitutionalising regulatory governance systems", LSE Law, Society and Economy Working Papers 02/2021, p.4. Here Black's approach echoes what others have said about the need for dialogue and reflexivity to achieve goals: see also Barrett, "The Importance of Regulators and Inspectorates to the Realisation of Equality and Human Rights" [2020] P.L. 56.

25 Julia Black, "Regulatory Conversations" (2002) 29 Journal of Law and Society 163, 167.

26 Black, "Constitutionalising regulatory governance systems", LSE Law, Society and Economy Working Papers 02/2021, p.4.

27 Black, "Constitutionalising regulatory governance systems", LSE Law, Society and Economy Working Papers 02/2021, p.9.

28 Black, "Constitutionalising regulatory governance systems", LSE Law, Society and Economy Working Papers 02/2021, p.12.

29 Black, "Constitutionalising regulatory governance systems", LSE Law, Society and Economy Working Papers 02/2021, p.11.

30 *Khaitan, "Guarantor (or the so-called 'Fourth Branch') Institutions" Handbook of Constitutional Theory* (2025).

31 At the time of writing, calls have been made for the creation of more "special interest" commissioners including a Migration Commissioner, see *Wendy Williams, Windrush Lessons Learned Review, Independent Review (March 2020), HC 93, Recommendation 9*. This recommendation was not accepted by the then government, but the new Labour Home Secretary has indicated in October 2024 that a Windrush Commissioner will be appointed: Home Office and The Rt Hon Yvette Cooper MP, "Home Secretary launches new support for Windrush victims" (24 October 2024), <https://www.gov.uk/government/news/home-secretary-launches-new-support-for-windrush-victims>. A Commissioner to represent the interests of military personnel has reached Bill stage: A Bill to establish, and confer functions on, the Armed Forces Commissioner; to abolish the office of Service Complaints Ombudsman; and for connected purposes (2024-25), HC 124. A Maternity Commissioner was also proposed, by the *All-Party Parliamentary Group on Birth Trauma, Listen to Mums: Ending the Postcode Lottery on Perinatal Care (May 2024)*, p.6, theo-clarke.org.uk.

32 Victims, Witnesses and Justice Reform (Scotland) Bill, <https://www.parliament.scot/bills-and-laws/bills/victims-witnesses-and-justice-reform-scotland-bill>.

33 Under the Data Protection Act 1998, the "Data Protection Registrar" was renamed the "Data Protection Commissioner". The role was enhanced by the Freedom of Information Act 2000 and the Data Protection Act 2018, including the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (SI 2019/419).

34 Data Protection Act 2018 s.115.

35 Data Protection Act 2018 s.121.

36 Data Protection Act 2018 ss.149–153.

37 Data Protection Act 2018 ss.155 –159.
38 Data Protection Act 2018 s.197.
39 Data Protection Act 2018 s.47.
40 Data Protection Act 2018 ss.50 –51.
41 Equality Act 2006 s.3. Of the commissioners we are considering this is the closest to being a "guarantor"
or Fourth Branch institution, see *Khaitan*, "Guarantor (or the so-called 'Fourth Branch') Institutions".
42 The existence of the EHRC resulted from the merger of three equality commissions, created to represent
different constituencies subject to systemic discrimination: Commission for Race Equality, Equal
Opportunities Commission and Disability Rights Commission, see T. Choudhury, "The Commission
for Equality and Human Rights: Designing the big tent" (2006) 13 Maastricht Journal of European and
Comparative Law 277, 311.
43 Equality Act 2006 s.16.
44 Equality Act 2006 s.30(1).
45 Equality Act 2006 s.32.
46 Equality Act 2006 s.8(1).
47 R. Micklem, "Gender Equality and the Equality and Human Rights Commission: Dilution or
Connection?" (2009) 24(2) Public Policy and Administration 213, 215.
48 *Joint Committee on Human Rights, Equality and Human Rights Commission, Thirteenth Report of Session
2009–10 (London: TSO, 2010), HL Paper 72, HC 183.*
49 D. Barrett, "The Regulatory Space of Equality and Human Rights in Britain: The role of the Equality and
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50 See also Barrett, "The Importance of Regulators and Inspectorates to the Realisation of Equality and
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51 *HM Government, Tailored Review of the Equality and Human Rights Commission (Nov 2018), p.3.*
52 Black, "Regulatory Conversations" (2002) 29 Journal of Law and Society 163, 172.
53 Children Act 2004 s.2(1), as originally enacted.
54 J. Williams, "Effective Government Structures for Children? The UK's Four Children's
Commissioners" (2005) 17 C.F.L.Q. 37, 46.
55 Children Act 2004 s.2D.
56 *Evidence to the Education Select Committee, The Children's Commissioner for England—Inquiry (2016),
[https://www.parliament.uk/business/committees/committees-a-z/commons-select/education-committee/
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longfield-responding-to-the-governments-plan-to-reopen-schools-to-all-children-in-september/](https://www.childrenscommissioner.gov.uk/2020/07/02/anne-longfield-responding-to-the-governments-plan-to-reopen-schools-to-all-children-in-september/). Children's
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59 Modern Slavery Act 2015 s.40(1).
60 Modern Slavery Act 2015 s.40(3).
61 Domestic Abuse Act 2021 s.7(1).
62 Domestic Abuse Act 2021 s.7(2).
63 *DAC, The Family Court and Domestic Abuse: Achieving Cultural Change (July 2023), [https://
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Summary_2023_Digital.pdf](https://domesticabusecommissioner.uk/wp-content/uploads/2023/07/DAC_Family-court-report_Exec-Summary_2023_Digital.pdf).*
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65 DVCVA 2004 s.50.
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Review Commission: DVCVA 2004 s.49(2) and Sch.9.
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Conservative patsy", *The Guardian*, 11 October 2023.
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