

Constitutional powers of the Victims' Commissioner for England and Wales

November 2020



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Foreword

Victims of crime have rights to minimum standards of service from police, CPS and the other agencies involved in the criminal justice system. These are set out in a Victims' Code. They are important because almost all victims are affected in a negative way by suffering crime. The criminal justice system needs to treat them with respect and to give them support so they can cope and, if possible, recover from what has happened.



The latest Code of Practice for Victims of Crime in England and Wales, published on 18 November 2020, is clearer and stronger than earlier versions and better for victims. Unfortunately, the history of victims' codes is that everyone approves of them, but the rights are only patchily delivered. As a consequence, victims often feel unhappy about their treatment. They can even be made to feel worse after their involvement with the criminal justice system than about the crime.

For instance, in the year ending March 2019, more than half of victims said the police did not keep them well informed on progress in their case. And though the police are intended to refer them onto victims support services when a crime is reported, only around one in ten victims said they had contact with victims' services. Just one in seven victims recalled the police giving them an opportunity to make a Victim Personal Statement. All of these failings are a breach of the Victims' Code.

As Victims' Commissioner I have a statutory duty '*to keep the operation of the victims' code under review.*'¹ That is a responsibility I take very seriously. It is my intention to make the Victims' Code work properly for all victims. Of course, I will need to collect evidence and analyse data in order to assess its performance and recommend steps for improvement. Many of the 28 organisations subject to the Victims' Code send information on to the Office of the Victims' Commissioner on request, though others may not. As Baroness Newlove, the previous Victims' Commissioner made clear, to do so, '*should be a legal obligation and not a favour.*'

There are other similar low-level powers which may be needed to help me to carry out my statutory duty, but at present I have no powers at all. So, I can't guarantee to be able to do what the statute asks of me, which means victims cannot be satisfied that anyone is ensuring the new Victims' Code will make a difference for them.

I commissioned this research to have a fresh look at what minimum powers would be needed for the Victims' Commissioner properly to review the operation of the Victims' Code and to drive improvement in the interests of victims. The authors have surveyed other commissioners and inspectorates, who are similarly 'watchdogs' and by comparing and contrasting their duties and powers with my statutory obligations have devised some very well-researched proposals. I plan to give them very careful consideration.

¹ S.49(c), Domestic Violence, Crime and Victims Act 2004.

If we are to improve justice for victims, as we urgently need to do, simply ensuring they are guaranteed the rights that have been set out in the Victims' Code will be a foundational first step. The promise of a Victims' Law next year may give us the mechanism to take this thinking forward and this report will play a key part in shaping how we make the best of that opportunity.

A handwritten signature in black ink, appearing to read 'V Baird', written in a cursive style.

Dame Vera Baird QC

Victims' Commissioner – England and Wales

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Suggested citation

Cox, P., Lamont, R. and Sunkin, M. (2020) *Constitutional powers of the Victims' Commissioner for England and Wales*. Report commissioned by the Office of the Victims' Commissioner.

Acknowledgements

The authors wish to thank anonymous peer reviewers for their comments on the final draft of this report, and Simon Cooper, Barry Godfrey and Sandra Walklate for their comments on earlier drafts.

Executive summary

The Victims' Commissioner for England and Wales is a public office established by Parliament in 2004 and dedicated to promoting the interests of victims and witnesses.

The Code of Practice for Victims of Crime in England and Wales was established in 2004 by the same legislation. The most recent consultation on the Code closed in May 2020. It sought responses to proposals to establish overarching rights framed in accessible language and to set out minimum levels of service that victims can expect from criminal justice agencies. The Secretary of State for Justice indicated in March 2020 that he wished to consult on the detail of a Victims' Law that will guarantee victims their rights and look to further strengthen enforcement of the Code.

This report considers the current powers and duties of the Victims' Commissioner and compares them to those of selected public scrutiny bodies in England and Wales. Given that public complaints yield vital data on public service provision, it reviews the complaints procedures of selected public bodies named in the Code as these relate to victims of crime.

This report identifies significant gaps in the powers of the Victims' Commissioner in relation to the current Victims' Code. It identifies changes that could be made to close these gaps and to enable the Commissioner to better fulfil her statutory duties. At present, the Code is neither enforceable in law nor subject to effective review.

The Victims' Commissioner has three core statutory duties: to promote the interests of victims and witnesses; to take such steps as considered appropriate to encourage good practice; and to keep under the review the operation of the Code. This report recommends that, in order to fully perform these connected duties, the Commissioner needs additional powers to:

1. Undertake effective review of the operation of the Code;
2. Rely on the cooperation of bodies named in the Code when encouraging them to adopt good practice;
3. Identify weakness in the implementation of the Code;
4. Require action if bodies are found not to be complying with the Code;
5. In the last resort and if necessary to clarify the law in the public interest, to bring appropriate legal proceedings;
6. Receive and direct complaints from victims as users of services provided by bodies named in the Code;
7. Conduct and commission research and training on, for example, what constitutes good practice and on victims' emergent needs;
8. Require changes to the Code if it is found to be inadequate;
9. Ensure that Parliament is fully aware of victims' needs, and upholds their entitlements and rights;
10. Recommend changes to the law.

Acronyms

| | |
|------------|------------------------------------------------------------|
| CICA | Criminal Injuries Compensation Authority |
| Code | Code of Practice for Victims of Crime 2018 |
| CPS | Crown Prosecution Service for England and Wales |
| DAC | Domestic Abuse Commissioner |
| DVCVA 2004 | Domestic Violence, Crime and Victims Act 2004 |
| ECC | Children's Commissioner for England |
| EHRC | Equality and Human Rights Commission |
| HMICFRS | Her Majesty's Inspectorate of Constabulary & Fire Services |
| HMCPSI | Her Majesty's Crown Prosecution Service Inspectorate |
| IASC | Independent Anti-Slavery Commissioner |
| IOPC | Independent Office for Police Complaints |
| NCA | National Crime Agency |
| OVC | Office of the Victims' Commissioner for England and Wales |
| PCC | Police and Crime Commissioners |
| PHSO | Parliamentary Health Service Ombudsman |
| SFO | Serious Fraud Office |
| UNCRC | United Nations Convention on the Rights of the Child 1990 |
| VC | Victims' Commissioner for England and Wales |
| VPS | Victim Personal Statement |

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Introduction

If victims' rights are important, why is it that they cannot be enforced? If agencies have duties, why is it that they cannot be compelled to perform these duties?

The Victims' Commissioner and the Victims' Code of Practice

The Victims' Commissioner (VC) is a public office established by Parliament in the Domestic Violence, Crime and Victims Act 2004 to encourage good practice in the treatment of victims and witnesses in England and Wales.

Alongside the creation of the VC as a public office, Part III of the Act provided a range of measures for the protection and support of victims, including the introduction of a Code of Practice for Victims (the Code),² and for representation of victims' views in some circumstances.³ The Act was introduced, in part, to ensure that English law was compliant with EU law on victims' rights⁴ through the provision of the entitlements created by the Code. The Secretary of State for Justice, in consultation with the Attorney General and the Home Secretary, drafts the Code and having considered representations, lays it before Parliament. It sets out the information, support and services that victims of crime are entitled to receive from criminal justice agencies in England and Wales. The Code names 28 agencies responsible for ensuring delivery of victims' entitlements through a range of means, including by providing specific public services for them.

Despite the 2004 legislation, no Victims' Commissioner was appointed. In the Coroners and Justice Act 2009 the powers to commission research and give advice to prescribed authorities about victims and witnesses were removed⁵ to avoid duplication since, in the interim, Victim Support had become a national fully funded organization providing frontline information and advice and running the court-based Witness Service (now managed by Citizens' Advice). The 2009 legislation sought to focus the VC's work on understanding and promoting victims needs and interests⁶ and appointed the incumbent to chair the Victims' Advisory Panel⁷ until its abolition in 2013. The first VC was appointed in 2010, the second in 2012 and the third (and current incumbent) in 2019. The VC has a statutory duty to keep the Code under review, but the Secretary of State for Justice is not obliged to consult the VC on revisions to the Code.

² s.32, Domestic Violence, Crime and Victims Act 2004.

³ On imprisonment/detention of an offender for a crime of terrorism, violence, or of a sexual nature, a victim may make representation and/or receive information on release and licence conditions, s.35, DVCVA 2004.

⁴ At the time, Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, [2001] OJ L82. Now contained in Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, [2012] OJ L315.

⁵ s.49(2) and s.50(1), DVCVA 2004.

⁶ Maria Eagle, Minister of State for Justice and Equalities, HC 10 March 2009, Col 665.

⁷ The 'Victims' Advisory Panel' created by s.55, DVCVA 2004, was repealed by Public Bodies (Abolition of Victims' Advisory Panel Order) 2013/2853.

In September 2018, the Government published the 'Victims Strategy'⁸ and, as part of this, placed the Code under review. A consultation on proposals for revising the Code and to strengthen victims' rights closed in September 2019. A second consultation on proposals to establish 12 overarching rights framed in accessible language and setting out the minimum level of service that victims can expect from criminal justice agencies closed in May 2020. It is generally accepted that there is a need to strengthen victims' rights, and to clarify and improve the Code. Robert Buckland, the Secretary of State for Justice and Lord Chancellor, stated in March 2020 that 'after we have published the revised Code, we will turn to consulting on the detail of a Victims' Law that will guarantee victims their rights and look to further strengthen enforcement of the Code.'⁹

The current Code addresses the existing entitlements that victims should receive when they engage with the criminal justice system. These include entitlements:

- to receive information about the criminal process, about referral to victim support and a needs assessment on reporting of a crime to police;
- to information regarding charging and prosecution decisions made by the police and the Crown Prosecution Service, including a right to review the decision if the case is discontinued; entitlement to make a Victim Personal Statement (VPS);
- to information on provision of restorative justice; and the right to apply for compensation from the Criminal Injuries Compensation Authority.
- to complain to the specific service provider if the services described in the Code are not received.

There is also specific provision for victims of serious crimes, victims with specific needs, and children who are victims. These entitlements largely require the provision of information to, or support for, victims. There is currently no overarching oversight of providers of services to victims and witnesses nor any formal reporting mechanisms linking them to the VC.

Given that the VC has a constitutional role in the review and promotion of the Code and in providing a voice for victims, this report examines the current constitutional powers of the VC in order to determine the extent to which these enable the fulfilment of these duties. It compares the powers and duties of the VC to those of other relevant commissioners and inspectorates. It finds that, relative to these other scrutiny bodies, the VC currently lacks a number of key powers. The report explores these deficits and recommends ways to address these in order to ensure the more effective legal enforcement of victims' rights and entitlements.

⁸ Cm 9700. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746930/victim-strategy.pdf last accessed 6.7.20

⁹ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-03-05/HCWS150>

Research context and design

This report was commissioned by the Office of the Victims' Commissioner (OVC) in order to review the constitutional, regulatory and legal powers of the VC. It considers the current powers and duties of the VC and compares these to those of selected scrutiny bodies in England and Wales. It offers a brief review of the complaints procedures of selected public bodies named in the Code as these relate to victims of crime. It identifies additional powers that the VC would need to enable full performance of current statutory duties.

The report is informed by literature produced by, and about, the OVC. The VC reports annually to the Secretary of State for Justice, the Attorney General, and the Secretary of State for the Home Department, outlining how the Commissioner's functions have been exercised over the previous year. These reports review the activities and budget of the VC, outline the operation of the Commissioner's office and discuss the priorities and strategies of the VC in relation to the Code. Previous reviews have covered aspects of the impact of the Code on victims and criminal justice agencies. They do not, however, constitute a comprehensive review of the Code. The OVC undertakes and commissions research although this is no longer one of its formal functions. Recent research reports have investigated the broad operation of the Code, gaps in victims' experiences of its implementation, and the offer and uptake of Victim Personal Statements.¹⁰ Further academic research has addressed the original framing of the Code and aspects of its implementation and impact.¹¹

In addition to this body of work, this report is also informed by arguments offered within two wider research areas: one concerned with the place of the rule of law and rights in our constitutional system and the other concerning the place of public scrutiny bodies (such as the VC) within the multi-level governance, or metagovernance, of public services.

There are long standing debates within constitutional scholarship regarding the appropriate relationships between political, specialist and legal institutions within the UK's constitutional system. Some argue that our unwritten constitutional system is essentially rooted in political processes and that law and legal institutions should at best play only a secondary role: it is policy and political accountability that matters, and rights and the role of the courts should be carefully circumscribed. From this perspective non-binding codes, techniques based on the ability to exert influence rather than legal coercion are likely to be more effective and efficient than more formalized legal instruments.¹² Others, on the other hand, stress the importance

¹⁰ Wedlock, E. and Tapley, J. (2016) *What works in supporting victims of crime: a rapid evidence assessment*. London: Crown Copyright, commissioned by the Office of the Victims' Commissioner; Victims' Commissioner (2019) Analysis of the offer and take-up of Victim Personal Statements 2018 to 2019; Victims' Commissioner (2020a) Victims statistics, year ending March 2019: police, courts and the criminal justice system; Victims' Commissioner (2020b) Victims statistics, year ending March 2019: victims' services, restorative justice, and information, advice & support.

¹¹ Rock, P. (2004) *Constructing Victims' Rights: The Home Office, New Labour and Victims*. Oxford: Oxford University Press; Walklate, S. (2016). Code of practice for victims in England and Wales. In Corteen, K., Morley, S., Taylor, P. and Turner, J. eds, *A Companion to Crime, Harm and Victimisation*. Bristol: Policy Press, pp. 24-25; Walklate, S. ed (2017) *Handbook of Victims and Victimology*. London: Routledge; Duggan M. and Heap V. (2014) Victims as Vote Winners. In: *Administrating Victimization: The Politics of Anti-Social Behaviour and Hate Crime Policy*. Palgrave Hate Studies. Palgrave Pivot, pp 29-58; Manikis, M. (2012) Navigating through an obstacle course: The complaints mechanism for victims of crime in England and Wales. *Criminology and Criminal Justice*, 12 (2), pp. 149-173.

¹² Griffith, J.A.G (1979) The Political Constitution. *Modern Law Review* 1; Tomkins, A (2005) *Our Republican Constitution*. Oxford: Hart Publishing.

of the legal constitution with the development of rights, the strengthening of redress mechanisms, the increased role of the law and of courts. From this perspective the dominating principle is the rule of law that seeks to clarify rights, to ensure that rights are clearly set out in legally enforceable instruments; that emphasizes that when rights are violated victims must have meaningful routes to redress.¹³

In writing this report we recognize the force of both these positions. Both are important but neither is likely to provide complete answers in situations such as the one that we are considering. There is an emerging recognition that victims' rights need to be protected in a complex situation involving specialist agencies and inevitably competing interests and where non-legal and legal processes need to be used in combination to achieve the most effective outcomes. Here, we consider whether the outcomes of persuasion and dialogue can be improved by adding a legal framework and an element of enforcement; whether a non-binding code that refers to rights and duties creates uncertainty and needs to be given some legal underpinning to give it force and bite; whether specialist agencies should be free to act at their convenience, or should be compelled to cooperate; and whether enhancing the constitutional standing of the VC would materially strengthen her ability to perform her functions.

Studies of metagovernance, the second body of work on which we draw, focus on the mechanisms through which different agencies of governance interact, and on the relationships between such agencies.¹⁴ These mechanisms and relationships are rarely created by design. They change over time and are the products of political and other contingencies. Historic offices of state are obliged to engage with new agencies, such as commissioners, inspectorates and arm's-length bodies, as the functions of each evolve. As a result, their statutory remits intersect, and their duties often overlap. The review and reframing of the constitutional powers of these agencies presents particular challenges arising from 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.¹⁵

The metagovernance of our health services, for example, involves the interaction of a range of agencies including Public Health England, the National Institute for Health and Care Excellence, NHS Clinical Commissioning Groups, Health and Wellbeing Boards 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 the police, courts, judiciary,

¹³ Bingham, T. (2010) *The Rule of Law*. London: Allen Lane.

¹⁴ Bache, I. and Flinders, M. eds (2004) *Multi-Level Governance*. Oxford: Oxford University Press; Jessop, B. (2004) Multi-level Governance and Multi-level Metagovernance. In I. Bache and M. Flinders (eds) *Multi-level Governance*. Oxford: Oxford University Press; pp. 49-74.

¹⁵ Picciotto, S. (2008) Constitutionalizing multilevel governance? *International Journal of Constitutional Law*, 6 (3-4), pp. 457-479.

¹⁶ Hammond, J., Speed, E., Allen, P., McDermott, I., Coleman, A. and Checkland, K. (2019) Autonomy, accountability, and ambiguity in arm's-length meta-governance: the case of NHS England. *Public Management Review*, 21 (8), pp. 1148-1169.

¹⁷ McPherson, S. and Sunkin, M., (2020). The Dobson–Rawlins pact and the National Institute for Health and Care Excellence: impact of political independence on scientific and legal accountability. *The British Journal of Psychiatry*. 216 (4), pp. 231-234.

penal estate and beyond. There are no recent studies exploring this in detail.¹⁸ The VC has become the focal agency for victims of crime in England and Wales but works in relation to 28 separate agencies holding responsibilities for victims of crime. The Code names 14 organisations¹⁹ who are required to provide services to victims in accordance with its provisions, and 14 further organisations²⁰ that have other duties to provide services to victims. Thus, both the metagovernance structures of the criminal justice system, and the constitutional challenges outlined above, mean that the VC's duty to review the operation of the Code and enforce victims' rights and entitlements is complex and challenging.

¹⁸ For conceptual overview, see Braithwaite, J. (2008) *Regulatory Capitalism: How it Works, Ideas for Making it Work Better*. London: Edward Elgar, see Chapter 7 Metagovernance of justice; Vaughan, B. and Kilcommins, S. (2010) The governance of crime and the negotiation of justice. *British Journal of Criminology*, 10 (1), pp. 59-75.

¹⁹ The Criminal Cases Review Commission, the Criminal Injuries Compensation Authority, the Crown Prosecution Service, the First-tier Tribunal (Criminal Injuries Compensation), Her Majesty's Courts and Tribunals Service, Her Majesty's Prison Service, National Offender Management Service (now Her Majesty's Prison and Probation Service), the Parole Board, Police and Crime Commissioners, all police forces in England and Wales, the British Transport Police and the Ministry of Defence Police, the National Probation Service, the UK Supreme Court, Witness Care Units, Youth Offending Teams

²⁰ The Competition and Markets Authority, the Department for Business, Innovation and Skills (Criminal Enforcement), the Environment Agency, the Financial Conduct Authority, the Gambling Commission, the Health and Safety Executive, Her Majesty's Revenue and Customs, Home Office (Immigration Enforcement), the Information Commissioner's Office, the Independent Police Complaints Commission, the National Crime Agency, Natural Resources Wales, the Office of Rail and Road, the Serious Fraud Office.

Functions and powers of the Victims' Commissioner

The VC has statutory duties to: promote the interests of victims; to encourage good practice in relation to protection of the rights of victims; and to review the operation of the Code (see Box 1 for summary and Appendix 1 for more detail). The VC is thus established to be a promoter, an encourager, and a reviewer of operational practice, and is the only statutory public body with these overarching duties in relation to victims. This raises three important constitutional issues:

1. When the VC performs her duties to promote and protect the rights and interests of victims she does so because Parliament has given her special standing to do so in the public interest. This differentiates her from other public and non-public bodies who may also be concerned to promote victims' rights.
2. Because the VC performs duties conferred by Parliament, she has particular constitutional responsibilities in relation to holding public agencies, including central government, to account for their delivery of duties towards victims and witnesses. For this reason alone, she deserves special respect when, for example, she encourages best practice or advises ministers.
3. The VC therefore requires sufficient powers to enable her to effectively perform her statutory functions.

At present, the duties set out under the Code are not enforceable in law and there is very limited ability to ensure that the Code is respected in practice. In this report we make a number of recommendations that are intended to enhance the constitutional standing of the VC and her ability to perform her statutory duties in the public interest.

Box 1. Provisions of the Domestic Violence, Crime and Victims Act 2004

The general functions of the VC are to²¹:

- Promote the interests of victims and witnesses;
- Take such steps as [she] considers appropriate with a view to encouraging good practice in the treatment of victims and witnesses;
- Keep under review the operation of the Code of Practice for Victims of Crime²².

These three general functions are mutually supportive and equally important but require distinct approaches and powers to be successfully carried out. To meet these statutory functions, the VC has a broad discretion to determine a strategy defining priorities and activities. The current strategy is in place until 2022.²³

In carrying out these functions, the VC may make proposals to the Secretary of State for Justice for amending the Code of Practice, consult as appropriate, and make recommendations to an authority within her remit (including relevant

²¹ s.49(1), DVCVA 2004.

²² s.32, DVCVA 2004.

²³ <https://victimscommissioner.org.uk/publications/victims-commissioner-for-england-and-wales-2019-to-2022/> last accessed 23.6.2020.

government departments, criminal justice agencies including police forces, the National Crime Agency and the Serious Fraud Office, and bodies such as the Parole Board and the Criminal Cases Review Commission.²⁴ If required to do so by a Minister, the VC must give advice on any matter specified by the Minister related to victims and witnesses.²⁵

The DVCVA 2004 originally provided for the VC to undertake or arrange for carrying out of research, but this provision was repealed by the Coroners and Justice Act 2009 when the constitutional powers of the VC were restricted while frontline role of Victim Support was expanded. The duty of the VC to give advice to authorities under her remit has also been repealed. The VC may encourage but as currently structured cannot compel compliance with the Code or take enforcement action for failure to comply.

Section 51, DVCVA 2004 sets out specific limitations on the VC's functions, stating that the VC must not exercise her functions in relation to a particular victim or witness, or in relation to the bringing or conduct of proceedings. The exercise of the VC's functions has to be in the general interest of victims and witnesses and there is no scope for addressing individual complaints relating to compliance or the use of the Code.

The Code defines a victim of crime as a person who has suffered harm as a direct result of a criminal offence. A person may be a victim, even if no complaint is made, and no one is charged with, or convicted of, an offence.²⁶ This acknowledges that some victims neither recognise themselves as such nor seek access to justice through the criminal justice system.

The VC lacks the formal power to review, monitor or enforce measures seeking to broaden public access to justice, for example by encouraging 'hidden victims' to report an alleged offence against them.²⁷ This is de facto the formal responsibility of Police and Crime Commissioners in conjunction with police forces establishing local priorities in consultation with victims of crime. This report notes this but does not investigate this.

The VC's remit covers England and Wales. In other parts of the United Kingdom, other arrangements are in place. In Scotland, the Victims and Witnesses (Scotland) Act 2014 made no provision for an equivalent of a Victims' Commissioner in Scotland. This was considered as an option, but the choice was instead made to fund victims' services directly. There is a 'Victims' Taskforce' which is an expert group meeting quarterly since 2018.²⁸ The Taskforce has conducted a desk-based review of the function of Victims' Commissioners in other jurisdictions, including England and Wales, and has sought the opinion of bodies working with the VC in England and Wales regarding their experience of the VC's role. The introduction of a Scottish Victims' Commissioner has been suggested by victims and by members of the Scottish Parliament to create a uniform point of contact for victims, and the Cabinet Secretary has recently asked for a review of this matter.²⁹

²⁴ s.49(2) and Schedule 9, DVCVA 2004.

²⁵ s.50, DVCVA 2004.

²⁶ s.52, DVCVA 2004.

²⁷ Cox, P. and Godfrey, B. (2019) Editors' introduction. Victims' Access to Justice. *Societies* (special issue); Gill, A.K., Cox, P. and Weir, R., (2018). Shaping Priority Services for UK Victims of Honour-based Violence/Abuse, Forced Marriage, and Female Genital Mutilation. *Howard Journal of Criminal Justice*. 57 (4), pp. 576-595.

²⁸ <https://www.gov.scot/groups/victims-taskforce/>

²⁹ [Scotland Victims Taskforce, Special Projects, Minutes of Meeting 19 June 2019.](#)

Comparison of the powers and duties of other scrutiny bodies

The VC is one of several commissioners representing the interests of particular constituencies or seeking to protect and promote the rights of individuals. Created by statute, commissioners exist at arm's length to government and, in line with their general functions, can determine their own agenda, activities and the focus of their work. As bodies of influence, they seek to impact and change government policy, legal frameworks and the work of other relevant actors in incorporating and addressing the interests they promote. The commissioners reflect on areas of policy concern 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.

The role of commissioners is distinct from that of inspectorates, which typically have much more closely defined statutory functions to inspect and report on the work of a given set of agencies, although there is no consistent statutory definition of their functions. Inspectorate reporting responsibilities are restricted to these investigative functions and whilst they can recommend change, they cannot demand it from the body subject to an inspection, relying instead on the public nature of the inspection report and sharing of good practice to improve standards. The inspectorates can, however, focus on particular areas of concern in the operation of the powers exercised by other specified bodies when these are highlighted and provide recommendations to address any identified problems.

Within England and Wales, other commissioners have a greater range of powers, including those relating to enforcement, than the VC. Tables 1 and 2 offer a comparison of the duties and powers of the VC and those of the Equality and Human Rights Commission (EHRC); the Independent Anti-Slavery Commissioner (IASC); the English Children's Commissioner (ECC); and the proposed Domestic Abuse Commissioner (DAC). While these commissioners differ in a number of respects (the EHRC in particular has a broader range of responsibilities and powers) the IASC, ECC and the proposed DAC are designed to enhance the protection of particular groups and a comparison of their powers is therefore valuable. The tables also summarise the powers and duties of two inspectorates: Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) and Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI). Of the 28 agencies named in the Code, these two inspectorates arguably hold the most significant responsibilities in relation to victims of crime.

Each of the commissioners' broad functions are described in the statute establishing the office. This broadly breaks down into three functional categories concerned with (a) promoting interests, including standard setting and encouraging best practice; (b) dealing with wrongs when they occur, including undertaking inquiries, considering complaints, and (c) taking remedial steps, including to ensure compliance and secure redress. The primary function of the inspectorates is to inspect and report on the operation of specified services run by the state in the criminal justice system. To carry out their broad functions, commissioner and inspectorates' powers can be categorised as encompassing: strategic planning; standard setting; dealing with wrongs; enforcement and remedies; training and support; community engagement. The broad powers and duties of these scrutiny bodies are summarised in Table 2.

Table 1. Scrutiny bodies: comparing functions

| Scrutiny body | Function |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Equality and Human Rights Commission (EHRC)</p> <p>Equality Act 2006</p> | <p>General duty to encourage and support the development of a society in which potential is not limited by discrimination; there is respect for human rights; there is equality of opportunity and mutual respect based on valuing and understanding diversity.</p> |
| <p>Independent Anti-Slavery Commissioner (IASC)</p> <p>Modern Slavery Act 2015</p> | <p>Commissioner must encourage good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offences and the identification of victims of those offences.</p> |
| <p>English Children’s Commissioner (ECC)</p> <p>Children Act 2004</p> | <p>General duty of protecting and promoting the rights of children in England, including promoting awareness of the views and interests of children in England.</p> |
| <p>Domestic Abuse Commissioner (DAC) (proposed)</p> <p>Domestic Abuse Bill 2020</p> | <p>The Commissioner must encourage good practice in the prevention of domestic abuse, encourage the detection, investigation and prosecution of domestic abuse and the identification of perpetrators and victims of domestic abuse, and the provision of protection and support to people affected by domestic abuse.</p> |
| <p>Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS)</p> <p>Police Act 1996 Fire and Rescue Services Act 2004</p> | <p>Inspectors of constabulary inspect, and report on, the efficiency and effectiveness of every police force maintained for a police area. They carry out other duties as the Secretary of State directs furthering police efficiency and effectiveness and place an annual report before Parliament including an assessment of the efficiency and effectiveness of policing in England and Wales.</p> <p>English inspectors must inspect and report on the efficacy and effectiveness of fire and rescue authorities in England.</p> |
| <p>Her Majesty’s Crown Prosecution Service Inspectorate (HMCPSI)</p> <p>Crown Prosecution Service Inspectorate Act 2000</p> | <p>The Chief Inspector inspects the operation of the Crown Prosecution Service and Serious Fraud Office, reports to the Attorney General on any matter connected with the operation of these bodies which the Attorney General refers to them and submits an annual report to the Attorney General on the operation of these bodies.</p> |

Table 2. A comparative review of the powers and duties of selected other Commissioners and Inspectorates in England and Wales

| | | COMMISSIONERS | | | | | INSPECTORATES | |
|-------------------------------|----------------------------------------------------------------------------------------------------------------|-----------------------|--------------------------------------|-----------------------------|---------------------------------------|-------------------------------------|-----------------------------------------------------------------------|------------------------------------------------------|
| | | Victims' Commissioner | Equality and Human Rights Commission | Domestic Abuse Commissioner | Independent Anti-Slavery Commissioner | Children's Commissioner for England | Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services | Her Majesty's Crown Prosecution Service Inspectorate |
| GENERAL FUNCTIONS | | | | | | | | |
| | Must promote interests of (witnesses and victims, or other constituency) | ✓ | | | | ✓ | | |
| | Take appropriate steps to encourage good practice | ✓ | | ✓ | ✓ | ✓ | | |
| | To exercise functions with a view to encouraging/supporting development of a fair society/protecting rights | | ✓ | | | ✓ | | |
| STRATEGIC PLANNING | | | | | | | | |
| | To prepare a strategic plan | | | | ✓ | | | |
| | To prepare/keep under review a plan of action/inspection | | ✓ | | | | ✓ | ✓ |
| STANDARD SETTING | | | | | | | | |
| <i>Codes</i> | Draft and issue codes of practice | | ✓ | | | | | |
| | Duty to monitor compliance with codes of practice | | ✓ | | | ✓ | | |
| | Power to review and recommend change to codes of practice | ✓ | ✓ | | | | | |
| <i>Changes in law</i> | Power to recommend law reform | | ✓ | | | | | |
| <i>Changes in practice</i> | Power to recommend that public authorities change practice to ensure compliance with codes/standards | | ✓ | | ✓ | | | |
| <i>Reports</i> | Publication of annual report on exercise of functions/powers | ✓ | ✓ | | | | ✓ | ✓ |
| | Report issues directly to Parliament (duty/power) | | ✓ | ✓ (duty) | | | | |
| | Report issues to minister(s) (duty/power) | ✓ (power) | ✓ | ✓ (power) | ✓ (power) | ✓ | ✓ | ✓ |
| | Report on outcomes of inquiries/investigations | | | ✓ | | ✓ | | ✓ |
| <i>Make recommendations</i> | To make recommendations to an authority within its remit | ✓ | | ✓ | | | ✓ | ✓ |
| <i>Highlight wrongs</i> | Bring matters to the attention of Parliament | | | | | ✓ | | |
| <i>Advice and guidance</i> | Provision of advice/guidance/support unrelated to legal proceedings to victims (or other member of the public) | | ✓ | ✓ | ✓ | | | |
| | Disseminate information and good practice | | ✓ | ✓ | ✓ | | | |
| | Provide advice to government depts and agencies | | ✓ | | | ✓ | | |
| | To give advice/report to Ministers if required | ✓ | | | | | ✓ | ✓ |
| <i>Encourage</i> | Encourage bodies to take specified 'interests' into account in their decision-making | | | | | ✓ | | |
| <i>Impacts of legislation</i> | To consider the potential effects of government policy/proposals on relevant rights/interests | | | | | ✓ | | |
| <i>Monitoring</i> | Monitor the implementation of relevant international law | | ✓ | | | ✓ | | |

| | | COMMISSIONERS | | | | | INSPECTORATES | |
|----------------------------------|------------------------------------------------------------------------------------------|-----------------------|--------------------------------------|-----------------------------|---------------------------------------|-------------------------------------|-----------------------------------------------------------------------|------------------------------------------------------|
| | | Victims' Commissioner | Equality and Human Rights Commission | Domestic Abuse Commissioner | Independent Anti-Slavery Commissioner | Children's Commissioner for England | Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services | Her Majesty's Crown Prosecution Service Inspectorate |
| DEALING WITH WRONGS | | | | | | | | |
| <i>Inquiries/investigations</i> | Conduct inquiries and make reports into related systemic problems | | ✓ | | | ✓ | ✓ | ✓ |
| | Investigate availability and effectiveness of complaints procedures | | | | | ✓ | | |
| | Investigate the availability and effectiveness of advocacy services | | | | | ✓ | | |
| | Investigate whether a person has committed an unlawful act | | ✓ | | | | | |
| <i>Complaints</i> | Receive individual complaints | | ✓ | | | | | |
| | Receive super complaints from designated bodies | | | | | | ✓ | |
| <i>Access information</i> | Access to government/criminal justice agency records | | ✓ | | | | ✓ | ✓ |
| | Require information from public/government agencies | | ✓ | | | ✓ | ✓ | ✓ |
| <i>Secure cooperation</i> | Public authorities have duty to cooperate | | ✓ | | ✓ | | ✓ | ✓ |
| <i>Advise individuals/groups</i> | Advice provided directly to individuals/groups | | | | | ✓ | | |
| ENFORCEMENT and REMEDIES | | | | | | | | |
| <i>To ensure compliance</i> | Power to issue an unlawful act notice | | ✓ | | | | | |
| | Power to recommend changes in practice | | ✓ | | | | ✓ | ✓ |
| <i>Secure remedies</i> | Power to recommend an apology | | ✓ | | | | | |
| <i>Legal proceedings</i> | To initiate/intervene in legal proceedings | | ✓ | | | | | |
| | Represent, assist or act as advocate on behalf of a victim/constituency member | | ✓ | | | ✓ | | |
| RESEARCH/TRAINING/SUPPORT | | | | | | | | |
| <i>Coordinate work</i> | Coordinate and fund work of support agencies | | ✓ | | | | | |
| <i>Training</i> | To conduct training | | ✓ | | ✓ | | | |
| <i>Research</i> | Undertake or fund relevant research | | | ✓ | ✓ | | | |
| OTHER | | | | | | | | |
| <i>Consultation</i> | To consult with public authorities, voluntary bodies and others | | | ✓ | ✓* | ✓ | | |
| | To consult with persons/classes or persons | | ✓ | ✓ | | | | |
| <i>Cooperation</i> | To cooperate/work with public authorities, voluntary bodies and others | | | ✓ | ✓* | | | |
| <i>Grants</i> | To make grants | | ✓ | | | | | |
| EXCLUSIONS | | | | | | | | |
| | Cannot exercise functions relating to individuals | ✓ | | ✓ | | ✓ | ✓ | ✓ |
| | Cannot exercise functions relating to particular proceedings or anything done by a judge | ✓ | | ✓ | | ✓ | ✓ | ✓ |

Notes

* Relationship with Office of the Victims' Commissioner specified

Powers and duties are drawn from the governing legislation for each Commissioner/Inspectorate

Domestic Abuse Commissioner's powers are 'proposed' at the time of writing

Case studies

Equality and Human Rights Commission

The EHRC is a non-departmental statutory public body established under the Equality Act 2006. It took over the functions of the Equal Opportunities Commission (established in 1975), the Commission for Racial Equality (established in 1976) and the Disability Rights Commission (established in 1999). It has duties to (a) promote understanding of the importance of human rights, (b) encourage good practice in relation to human rights, (c) promote awareness, understanding and protection of human rights, and (d) encourage public authorities to comply with the Human Rights Act 1989.

It also has a range of more specific duties in relation to equality including to (a) promote understanding of the importance of equality and diversity, (b) encourage good practice in relation to equality and diversity, (c) promote equality of opportunity, (d) promote awareness and understanding of rights under the Equality Act 2010, (e) enforce that Act, (f) work towards the elimination of unlawful discrimination, and (g) work towards the elimination of unlawful harassment.

The main work of the EHRC is, in its own words, “to help organisations achieve what they should, not catch them out if they fall short.”³⁰ It seeks to provide information so that people and organisations know their rights and responsibilities. The EHRC also has a wide range of enforcement powers that can be used where it considers them necessary and proportionate. They can be used to clarify the law, to highlight priority issues and to challenge policies or practices that cause significant disadvantage.³¹ Unlike the VC, the EHRC is empowered to provide direct assistance to individuals through legal advice.³² It can also intervene in, or initiate, legal proceedings and apply for injunctions.³³

The EHRC highlights its record of “resolving matters without the need for formal proceedings”, undertaking pre-enforcement work with organisations to ensure remedial or preventative actions are taken and exchanging relevant information with other law enforcement bodies and regulators. However, where attempts to encourage compliance have failed, the EHRC may take formal enforcement action.³⁴ Such action may include:³⁵ inquiries and investigations; assessments; compliance notices; and legal action.

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. Recent examples include an inquiry into non-natural deaths of adults with mental health conditions in detention;³⁶ and another into the experiences of disabled defendants and accused people in the criminal

³⁰ <https://www.equalityhumanrights.com/en>

³¹ <https://www.equalityhumanrights.com/en/ein-pwerau/commissions-regulatory-approach>

³² S 30 Equality Act 2006. <https://www.equalityhumanrights.com/en/court-action>

³³ The Commission also has power to apply for an injunction where for example a public authority is likely to commit an act prohibited by the Equality Act 2010.

³⁴ <https://www.equalityhumanrights.com/en/our-powers/inquiries-investigations-and-wider-powers>

³⁵ The Commission may also: enter into formal agreements with a person or organisation that it believes has acted unlawfully; and issue unlawful act notices.

³⁶ <https://www.equalityhumanrights.com/en/preventing-deaths-detention-adults-mental-health-conditions> (2015).

justice system.³⁷ The EHRC may also investigate organisations suspected of acting unlawfully under the Equality Act 2010.³⁸ It may also undertake assessments to check whether a public body is complying with duties under the Act. Such assessments can help to obtain evidence that could be used in enforcement action and identify areas of best practice.

The EHRC can initiate legal action in several circumstances. 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.³⁹ It also has the power to initiate judicial review either before legislation is passed or within 3 months of enactment if it believes there is a threat to human rights. It can intervene in cases where the Commission has particular expertise. It can also bring legal cases in certain circumstances.⁴⁰ In its annual report for the year ended March 2019, the EHRC reports having supported 84 legal cases and initiated 4 judicial review cases. The following are examples of cases where these powers have been used:

- *Letts v Legal Aid Agency*:⁴¹ in which the High Court held that the Lord Chancellor's guidance on legal aid for representation at inquests incorporated an error of law and provided a misleading impression of what the law is. The guidance failed to recognise that investigations into certain deaths will automatically require the involvement of the families of the deceased. It could therefore lead to legal aid being wrongly refused and needed to be revised.⁴²
- *T v Secretary of State for the Home Department*:⁴³ T was 11 when he received warnings from Greater Manchester Police after being found with stolen bikes. In later life, T wanted to be a sports teacher and assumed these warnings had expired. In fact, they showed up several years later when a potential employer and a university carried out a criminal record check. The Supreme Court held that adults should not be haunted by relatively trivial offences committed when they were children as this would breach their human rights and could affect their employment prospects. The decision led the Government to rectify the problem.
- *R v T*:⁴⁴ the EHRC intervened in an appeal against the conviction of T, a 14-year-old Vietnamese boy, who was forced to work in a cannabis factory after being trafficked to England. The Commission submitted that child victims of trafficking should be given support, assistance and protection and not further victimised by being prosecuted. T's conviction, along with that of three other trafficking victims, were removed and the Court of Appeal accepted the EHRC's position that there is a heavy onus on the authorities to thoroughly investigate trafficking allegations, and to avoid unnecessary prosecutions.

³⁷ <https://www.equalityhumanrights.com/en/publication-download/inclusive-justice-system-designed-all> (2020).

³⁸ In its annual report for the year April 2018 – March 2019 the Commission reports having initiated 10 legal investigations leading to 9 legally binding agreements, p.16.

³⁹ S32 Equality Act 2006.

⁴⁰ <https://www.equalityhumanrights.com/en/court-action>

⁴¹ [2015] EWHC 402 (Admin).

⁴² In making its submissions to the Court the EHRC stressed that: "Inquests can be traumatic experiences for the families of the deceased. This is not just because of the issue with which they are concerned; the death of their loved one. It is also because the process of an inquest can be very much like a trial, with witnesses being called, submissions being made and documents being examined."

⁴³ [2014] UKSC 35.

⁴⁴ [2013] EWCA Crim 991.

The EHRC has been criticised, particularly by the House of Commons Women and Equalities Committee, for being insufficiently proactive in using its enforcement powers. The committee noted that no compliance notices have been issued since 2009/10, and only one formal investigation has been initiated. It called for the EHRC to make “much greater use of its unique enforcement powers, publicising that work and reducing its reliance on individual complainants.”⁴⁵

In summary, the EHRC is clearly not an exact comparator with the VC: it is larger and better resourced, its concerns are broader, the legal contexts more varied and its powers also concern a wide range of public and private sector organisations. Like the VC, the EHRC is charged with being a promoter, encourager and enforcer. Unlike the VC, enforcement is a key element of its statutory scheme. The enforcement powers of the EHRC provide valuable tools and have been used with some success. That said, the EHRC has been criticised for being overly cautious in its use of these powers. This may be due to strategic choices, but it might also reflect the high cost and risk of legal enforcement. It cannot be assumed that legal powers will always be suitable or that they will necessarily achieve the best results.

The Children’s Commissioner for England

The Children’s Commissioner for England was created by the Children Act 2004.⁴⁶ There are separate Commissioners for Scotland, Wales and Northern Ireland. The English Children’s Commissioner was originally conceived as a body designed to channel children’s views and interests into government and policy processes. There was no reference to relevant rights frameworks, particularly the UN Convention on the Rights of the Child 1990 (UNCRC) and the Children’s Commissioner’s office was not designed as a rights-protecting body.⁴⁷ However, the evolution of the office since then provides a valuable precedent for the adaptation and increase in powers to change the role of a Commissioner. The Children and Families Act 2014 significantly amended both the functions and the powers of the Children’s Commissioner to protect the rights and interests of children and promote compliance with the UNCRC. In particular, the Commissioner may now conduct investigations without seeking prior permission from the Secretary of State enabling much greater autonomy in determining focus and in identifying problems and potential policy changes affecting children.

The current general function of the Children’s Commissioner is protecting and promoting the rights of children in England, including promoting awareness of the views and interests of children in England. Under s.2(3), Children Act 2004 (as amended) the Children’s Commissioner may advise and encourage persons exercising functions or engaged in activities affecting children on how to act compatibly with the rights of children; advise on the rights, views and interests of children and consider the potential effect on the rights of children of government policy proposals and government proposals for legislation; monitor the implementation of the UNCRC and investigate the availability and effectiveness of complaints procedures so far as relating to children. This is a much broader remit that is

⁴⁵ See especially the highly critical report of the House of Commons Women and Equalities Committee, *Enforcing the Equality Act: the law and role of the Equality and Human Rights Commission*, Tenth report of Session 2017-19, HC 1470 30 July 2019.

⁴⁶ s.2(1), Children Act 2004, as originally enacted.

⁴⁷ Williams, J. (2005) Effective Government Structures for Children? The UK’s Four Children’s Commissioners’. *Child and Family Law Quarterly*, 17 (1), pp. 37-53.

active in promoting and encouraging compliance with the rights framework of the UNCRC. In particular, the newly conceived Children's Commissioner has been active in promoting the interests of children and criticizing government policy perceived to be as harmful to children's rights, for example on the availability of schooling during the Covid-19 pandemic.⁴⁸ The Commissioner has been robust in responding to claims regarding children's poverty figures⁴⁹ and has developed a significant public profile in promoting the interests of children.

The Children's Commissioner has the power to provide advice and assistance to children living away from home or receiving social care, but cannot act on behalf of individual children.⁵⁰ The Commissioner has the power to enter premises to conduct interviews or observe standards,⁵¹ and can require the provision of information in respect of its functions from public bodies.⁵² The office carries significant powers in terms of promoting children's rights and interests, but also in monitoring the behaviour of relevant bodies and holding the Government to account.

Despite the amended and extended responsibilities and powers associated with the Children's Commissioner, the current Commissioner, Anne Longfield, suggested to the House of Commons' Education Select Committee in 2016 that the most important powers she holds are the gathering of data and speaking directly to children who are away from home. She highlighted that she does not hold an enforcement role and is unable to consider individual case work and would seek to have a relationship with the heart of government. The Minister of State, Edward Timpson, made the amplified role and independence of the Children's Commissioner clear in his evidence, resisting the idea of enforcement powers, arguing that there were more effective ways of securing change.⁵³

HM Crown Prosecution Service Inspectorate

HMCPIS is charged with inspecting the Crown Prosecution Service (CPS) and the Serious Fraud Office (SFO) and submitting an annual report to the Attorney General on the operation of the service.⁵⁴ It is a statutory body created by the Crown Prosecution Service Inspectorate Act 2000 and it seeks to provide independent evidence of the operation of prosecution services to build public confidence in the criminal justice system.

The powers of HMCPIS are designed to enable completion of their investigations. HMCPIS designs a framework of inspections, but may still visit without notice⁵⁵ and change its programme to respond to particular needs or circumstances. It has freedom in determining the nature of inspections and its timing to respond to particular concerns. In securing the information pertinent to the inspection, HMCPIS may require documents to be produced, with associated explanatory data, and can require any other information to be provided.⁵⁶

⁴⁸ <https://www.childrenscommissioner.gov.uk/2020/07/02/anne-longfield-responding-to-the-governments-plan-to-reopen-schools-to-all-children-in-september/>

⁴⁹ <https://www.childrenscommissioner.gov.uk/2020/06/22/fact-checking-claims-about-child-poverty/>

⁵⁰ s.2D, Children Act 2004.

⁵¹ s.2E, Children Act 2004.

⁵² s.2D, Children Act 2004.

⁵³ 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/inquiries/parliament-2015/childrens-commissioner-england-15-16/publications/>

⁵⁴ s.2, Crown Prosecution Service Inspectorate Act 2000.

⁵⁵ Schedule 1, para 2, Crown Prosecution Service Inspectorate Act 2000.

⁵⁶ Schedule 1, para 7, Crown Prosecution Service Inspectorate Act 2000.

The reports are published on the HMCPSI website with an associated summary highlighting good practice and identifying issues of concern and for action. In conducting investigations, HMCPSI may consult with other bodies interested in the particular field subject to investigation, including relevant charities and other stakeholders in the prosecution process.

Recent reports have focused on areas of particular concern in prosecution, including an investigation into CPS decision-making in rape prosecutions at the request of the Attorney General, and an inspection on prosecution of evidence led domestic abuse cases in conjunction with the HMICFRS. The HMCPSI presents an annual report⁵⁷ on its activities in the previous year and the overall state of prosecution services to Parliament. In its most recent report⁵⁸ the HMCPSI highlights the continuing impact of restriction of financial resources on the criminal justice system in requiring prioritization of activities and affecting quality in decision-making and capacity to adhere consistently to good practice standards.

HMCPSI does not hold regulatory or enforcement powers over the CPS or the SFO. It relies upon the CPS and SFO taking action when inspection reports identify areas of concern and for improvement. The Chief Inspector has identified that inspections "...offer a certain level of assurance, and provide this from what has been seen in the year."⁵⁹ HMCPSI provides an overview of the operation of a particular aspect of the process of prosecution within the criminal justice system. The reports and recommendations provide critical comment and an element of public accountability on the operation of these services, but HMCPSI seeks to work with the CPS and the SFO in addressing concerns that are raised. It also provides an overarching perspective on the role and functioning of these bodies within the broader justice system to the Attorney General and to Parliament.

HM Inspectorate of Constabulary and Fire & Rescue Services

HMICFRS has a long history, originally formed as an inspectorate of constabulary in the 1850s with the inspection of fire and rescue services added by the Fire and Rescue Services Act 2004. The Inspectorate provides independent assessments and reporting on the efficiency and effectiveness of police and fire services in the public interest. The inspectorate may be directed to engage with a particular police service or matter by the Secretary of State, and places an annual review before Parliament on the efficiency and effectiveness of the services. It seeks to promote improvements in policing and, in having oversight of all police forces, it has an overall perspective on the operation and effectiveness of policing across the service. It will work with other agencies to provide integrated joint inspections and reports, for example on mental health or child protection services.

In carrying out an inspection, HMICFRS has the power to issue a notice to the affected service requesting the provision of information reasonably required for the inspection.⁶⁰ It may also require access to police premises as part of the inspection.⁶¹ On failure to comply with a notice without reasonable excuse, or knowingly or recklessly providing false

⁵⁷ s. 2(2), Crown Prosecution Service Inspectorate Act 2000.

⁵⁸ HMCPSI Annual Report for the period April 2019 to March 2020 HC 571:

<https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2020/07/2020-07-08-Annual-Report-2019-20.pdf>

⁵⁹ HMCPSI Annual Report for the period April 2018 to March 2019 HC 2477, p11:

<https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2019/07/HMCPSI-Annual-Report-2019-19-FINAL.pdf>

⁶⁰ Schedule 4A, para 6A, Police Act 1996.

⁶¹ Schedule 4A, para 6B, Police Act 1996.

information, the High Court can be informed and after hearing witnesses and statements in defence, the failure may be dealt with as contempt of court.⁶² These represent significant powers of enforcement designed to ensure compliance with the request for information and access to fulfil the inspection.

HMICFRS produces a PEEL (Police Effectiveness, Efficiency and Legitimacy) report on the operation of each police force. This assesses the overall performance of the force, the effectiveness, efficiency and legitimacy with which the force keeps people safe and reduces crime, and identifies areas for improvement, causes of concern and notable practice. It is designed for consumption by the public and provides an overall assessment and a rating for each service based on its effectiveness in keeping people safe and reducing crime, the efficiency of the service, and legitimacy in its treatment of the public and workforce. In addition, HMICFRS may inspect a force in relation to a particular issue, and may use the inspections of several forces to produce a general report on a particular issue, identifying themes and common issues. For example, a recent general report was produced on multi-agency responses to child sexual abuse in family environments, drawing together findings from six targeted area inspections. Whilst HMICFRS has no enforcement powers in ensuring compliance with its recommendations, it aims to work with police forces and the Home Office to improve the efficiency and effectiveness of policing, and adds to the legitimacy of policing in providing accountability.

The annual report on the state of policing is made to the Secretary of State.⁶³ It provides an overview of the state of policing based on the inspections from the previous year and reports from other relevant bodies and agencies, an overview of inspections carried out during the period and reports issued by HMICFRS. This report provides an overall perspective both on the state of policing, and the police within the wider criminal justice system. The most recent report included broader criticisms of the structure of policing, identifying roles for the Home Office and the College of Policing in reform of police forces and to encourage consistency in practice across forces. It also considered the importance of integration of policing with other vital services to reduce offending.⁶⁴

Providing accountability: commissions and inspectorates

There is a broad range of powers accorded to commissions and inspectorates in providing a measure of accountability for government services in particular contexts. There is little consistency between the scope of their functions and extent of their powers. However, for each of these bodies, working in partnership with the agencies falling within the commission/inspectorate field of influence seems key to the process of securing buy in and change as part of a 'critical friend' role. In addition, the underlying principles that the commission/inspectorate seeks to enforce or promote provides clarity over purpose that assists the body in developing and pursuing an effective agenda. The status of the VC and role of the Code is central to the work the VC does with criminal justice agencies in promoting and supporting victims involved in the prosecution of crime.

⁶² Schedule 4A, para 6C, Police Act 1996.

⁶³ s.54(4A), Police Act 1996.

⁶⁴ <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/state-of-policing-2019-part-1.pdf>

The Victims' Commissioner and complaints procedures

The remit of commissioners and inspectorates can encompass handling and responding to complaints in different forms. Given that public complaints yield vital data on public service provision, this report reviews the complaints procedures of selected public bodies named in the Code as these relate to victims of crime. We argue that there are good grounds for expanding the VC's remit in relation to complaints and set out available options.

The Victims' Code includes the entitlement to "make a complaint if you do not receive information and services you are entitled to, and to receive a full response *from the relevant service provider*." ⁶⁵

The service providers named in the Code, including the police and the Crown Prosecution Service, do not, however, tend to make any reference to the Victims' Commissioner in any of their online resources regarding complaints about their service provision for victims. The Victims' Code is sometimes referred to as a source of expected standards in relation to the treatment of victims and as a ground for complaint.

Manikis (2012, p.149) argues that the Code's complaints process is an ineffective and inadequate mechanism for victims of crime, since contrary to its aims, it is "inaccessible, long, overly complex and does not provide sufficient guarantees of privacy and objectivity [or] adequate redress and remedies for victims when service providers breach their duties". Victims of crime would "benefit from the development of a new mechanism that is sensitive to their needs, values accessibility and objectivity and provides effective remedies to ensure redress and accountability." We would concur with this view.

If a victim of crime has a complaint regarding their treatment by a particular service provider, they have to make their complaint directly to that provider. The Ministry of Justice hosts a website⁶⁶ which identifies and directs potential complainants to the direct service. The process of complaint then depends on the internal processes of the particular service provider, for example:

- *Crown Prosecution Service*: The CPS complaints procedure⁶⁷ is a three-stage process, 1. Local review; 2. Review by Deputy/Chief Crown Prosecutor; 3. Independent Assessor of Complaints. The Independent Assessor of Complaints⁶⁸ for the CPS operates independently from the CPS and is responsible for the handling and investigation of complaints from members of the public in relation to the quality of the service provided by the CPS and its adherence to its published complaints procedure. It can only investigate service complaints, such as the way a victim was treated by service staff; or a breach of obligations under the Victims' Code, rather than legal complaints. Under the CPS 'Victims' Right to Review Scheme'⁶⁹ (derived from EU Victim's Directive) victims can seek a review of decisions not to charge, to discontinue or otherwise terminate all proceedings on evidential or public interest

⁶⁵ Code of Practice for Victims of Crime p.i:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF

⁶⁶ <https://www.victimandwitnessinformation.org.uk/making-complaint/>

⁶⁷ <https://www.cps.gov.uk/sites/default/files/documents/publications/Feedback-Complaints-Policy-Jan-2019-v2.pdf>

⁶⁸ <https://www.cps.gov.uk/independent-assessor-complaints>

⁶⁹ <https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme>

grounds. The Victims' Code sets out enhanced entitlements for victims of the most serious crime, persistently targeted victims and vulnerable or intimidated victims because they are more likely to require enhanced support and services through the criminal justice process. Those entitled to enhanced assistance will be offered a meeting at the end of the review process to discuss the outcome.

- *Police and other crime agencies:*⁷⁰ Complaints about police behaviour are made directly to the relevant police force.⁷¹ The Victims' Right to Review Scheme applies to the police decision not to prosecute a suspect. If a complaint requires investigation, it will be referred to a standards team which follows guidelines issued by the Independent Office for Police Complaints (IOPC) and the law in examining the complaint. Serious complaints are forwarded to the IOPC, and lesser complaints addressed to the IOPC are sent back to the responsible police force.⁷² Serious complaints can be referred directly to the IOPC⁷³ which also has oversight of complaints against the National Crime Agency.⁷⁴ The Serious Fraud Office also maintains an independent Victims' Right to Review policy.⁷⁵ Most complaints are dealt with by the relevant police force, and there is a right of review or appeal against the decision of a police force.⁷⁶
- *Judiciary and the Courts:* Complaints may be made about a judge's personal conduct, but not the management or decision made in a case, to the Judicial Conduct Investigations Office.⁷⁷ Complaints regarding the handling of cases by administrative teams, the condition of court buildings or facilities, security procedures and personal searches, and the experience of victims are made to HM Courts and Tribunals Service, normally by contacting the court directly or via an online form.⁷⁸
- *Criminal Injuries and Compensation Authority:* complaints may be made by victims of crime regarding the handling of their compensation claims directly to the Criminal Injuries and Compensation Authority.⁷⁹

⁷⁰ Police complaints are governed by Police Reform Act 2002, as amended by Policing and Crime Act 2017. The statutory guidance governing complaints is available here:

https://policeconduct.gov.uk/sites/default/files/Documents/statutoryguidance/2020_statutory_guidance_english.pdf

⁷¹ Under s.1(8)(ca), Police Reform and Social Responsibility Act 2011 the relevant Police and Crime Commissioner has responsibility for holding the Chief Constable to account for the exercise of the Chief Constable's functions under Police Reform Act 2002 in relation to the handling of complaints.

⁷² Serious complaints referred to or overtaken by IOPC: action (or lack of action) that led to a person's death or serious injury, serious assault, serious sexual offence, or serious corruption.

⁷³ <https://policeconduct.gov.uk/complaints-and-appeals/make-complaint>

⁷⁴ <https://www.nationalcrimeagency.gov.uk/contact-us/complaints>

⁷⁵ <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/complaints-policy/>

⁷⁶ IOPC Statutory Guidance on the Police Complaints System:

https://policeconduct.gov.uk/sites/default/files/Documents/statutoryguidance/2020_statutory_guidance_english.pdf

⁷⁷ If complaint has been conducted, further recourse to Judicial Appointments and Conduct Ombudsman. See: <https://judicialconduct.judiciary.gov.uk>

⁷⁸ <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/complaints-procedure#if-youre-unhappy-with-judicial-conduct>

⁷⁹ <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority/about/complaints-procedure>

If the complainant is not satisfied with the handling or outcome of their complaint to the individual authority, it is possible to make a further complaint to the Parliamentary Health Service Ombudsman. This is a general oversight ombudsman for complaints not resolved by the NHS or other UK public services, so it is not specific to victims of crime. It is only possible to make a further complaint to this ombudsman if the complaint is referred by an MP once all other avenues of complaint have been exhausted.⁸⁰

Role of the Victims' Commissioner in relation to complaints

The existing system of complaints is a complex patchwork for victims to navigate, with no single point of contact for advice or support. The VC is specifically excluded from considering or resolving complaints from individual victims by s.51 DVCVA 2004 which states that the Commissioner must not exercise functions in relation to a particular victim or witness.

Complaints are an important indicator of how well different service providers are functioning and protecting victims' entitlements under the Victims' Code because they highlight where there are particular problems. They are also a potential indicator of how functional the Code is in promoting the interests of victims in the criminal justice system, suggesting what elements of victims' entitlement need protection. This raises the important question of what role the VC should have in handling and resolving complaints made by victims against service providers, and their compliance with the Victims' Code. The role of the VC in reviewing the Code and promoting and encouraging compliance with its terms includes respect for the terms of the Code in handling and responding to complaints. In this context, the VC could be responsible for handling complaints in a range of roles:

- *Super-complaints*: under the Police Reform Act 2002 a designated body may make a 'super-complaint' to HMICFS for investigation that a feature of policing by one or more policing authority is significantly harming the interests of the public. The VC is not listed as one of the designated bodies for the making of a super-complaint.⁸¹
 - *The VC could be designated as a body capable of making a super-complaint to the HMICFRS.* This would only apply to the provision of policing and the systematic failure of police services to comply with the Victims' Code and would not cover the actions of other service providers.
 - *The VC could receive super-complaints from other designated bodies regarding service providers' compliance with the Victims' Code.* This would

⁸⁰ The MP 'filter' required by s.5(1), Parliamentary Commissioner Act 1967 has been criticized as reducing the accessibility of the PHSO and consequently the number of complaints directed to the Ombudsman. It was originally designed to preserve the role of MPs and control the flow of complaints, but is now regarded as unnecessary and outdated since most MPs see no need for it, see Kirkham, R. 'The Parliamentary Ombudsman: Withstanding the Test of Time' 2007, HC 421, p.12. The 2016 Public Sector Ombudsman Bill provided for reforms to the public sector ombudsmen including abolition of the MP filter. These and other possible reforms, including allowing the Ombudsman to investigate matters on its own initiative have been widely called for but have yet to be introduced: see, Kirkham, R. and Gill, C. eds. (2020) *A Manifesto for Ombudsman Reform*. London: Palgrave; also: <https://ukaji.org/2020/04/29/a-manifesto-for-ombudsman-reform>

⁸¹ Reg 3, Police Super-complaints (Designation and Procedure) Regulations 2018/748. The Children's Commissioner is a designated body.

have to be associated with new corresponding statutory powers of investigation or inspection for compliance in a monitoring role, rather than the current promotion and reviewing role for compliance.

- *Act to resolve individual complaints:* the VC could be awarded the statutory power to act in individual cases and receive complaints against service providers for failure to comply with the Victims' Code. The VC could then seek to resolve these complaints with the relevant service provider. This would simplify the system of making complaints, but would also require a shift in statutory powers of the VC to investigation and inspection, with corresponding increase in budget and other resources. There would also have to be oversight of the VC's role in receiving complaints, presumably to the Parliamentary Health Service Ombudsman. This would fundamentally change the role of the VC.
- *Receive and direct complaints:* the VC would receive complaints from victims regarding the actions of all types of service provider, but rather than resolving the complaint, would act to direct the complaint to the correct service provider and monitor eventual resolution. This would ensure that the VC was not resolving complaints, but would have oversight of the types of complaint being made against which service providers. It would helpfully provide one point of contact for victims when seeking to complain and the complexities of identifying and approaching the specific service provider would thereby be ameliorated. There is a budget and resource implication for the VC in putting this system into operation and the role of the VC would have to be advertised and promoted by service providers. The interaction of the VC with bodies such as the IOPC would have to be clearly defined.
- *Survey and reflect on complaints:* the service providers could be required to report annually to the VC on the complaints made to them by victims of crime and their resolution. This would give the VC oversight of the types of complaint being made and to which service providers. Not all complaints will be regarding compliance with the Victims' Code, so there will potentially be an excess of less relevant data. This requirement would place an additional reporting burden on the service providers but does introduce monitoring of the overall provision of service providers and is consistent with the VC's role of encouraging and reviewing the operation of the Victims' Code.

Complaints from victims are a key aspect for understanding how service providers are implementing and complying with the Victims' Code. As the statutory body charged with promoting and reflecting on the use of the Code, the VC should have the capacity to understand which bodies are generating complaints and have a role in ensuring compliance with the terms of the Code. Whilst the VC would not be an appropriate forum for the resolution of individual complaints, as a single point of contact receiving complaints from victims and directing them to the relevant service provider, the VC would fulfil an important role for victims, ensure consistency of practice and monitoring of compliance, and would have oversight of complaints and areas of consistent failures in compliance. This power would not infringe the current responsibilities of the Parliamentary Health Service Ombudsman. The Ombudsman would remain as an avenue of further complaint once the complaints processes against the agencies or bodies in the particular case have been exhausted. The VC could eventually direct these cases towards the Ombudsman process as appropriate.

Enhancing the powers of the Victims' Commissioner

Current enforcement gaps and limitations

As the role is currently configured, the VC is established as an advocate for victims but not an enforcer of rights. The VC's duties to promote, to encourage, and to review operational practice are important and have facilitated some key improvements in how victims are treated and supported. However, the VC has very few legal tools with which to work. The VC is charged with keeping the 'operation of the Code under review' but has very limited resources and few clear scrutiny powers to do this, and, while the VC has general power to make recommendations to authorities, she has no express power to ensure compliance with the Code. This means that while the Code refers to 'rights' of victims and the 'duties' of agencies in respect of these rights, and although the latest iteration of the Code (published in October 2015) implements provisions of the EU Directive 2012/29/EU concerned with the 'rights, support and protection of victims of crime', currently the VC has no legal power to ensure that rights are protected and that duties are performed. Since no other body has this power this leaves an important enforcement gap.

This gap creates ambiguity and uncertainty. If victims' rights are important, why is it that they cannot be enforced? If agencies have duties, why is it that they cannot be compelled to perform these duties? There are also issues of perception and public confidence to be considered. If rights cannot be enforced how can victims be confident that their rights really do matter? As the previous Commissioner, Baroness Newlove, commented:

"We have now had a Victims' Commissioner for 10 years. It is time to review how future commissioners can best champion the victim cause. I believe my successors need more than just a voice – they need statutory clout to call others to account. I am not calling for draconian powers to direct others. On the contrary, it is not unreasonable, for example, to impose a statutory duty on criminal justice agencies to cooperate with the Victims Commissioner. Most do already, but it should be a legal requirement and not a favour."⁸²

The Government has recognized that the Code needs to be improved "so that it becomes a clearly defined set of rights, that are easy for victims to understand and which set out the minimum level of service they can expect from criminal justice agencies."⁸³ If the Code is to be improved in this way then it becomes even more important that the rights and duties that it contains are seen to be meaningful. Improving the range of tools available to the VC will be consistent with the strengthening of the Code.

While the legislation and the Code refers to duties and to rights it provides no legal framework for enforcing these duties or protecting these rights. Indeed, it provides that failure to comply with the duties set out in the Code does not of itself give rise to criminal or civil liability.⁸⁴ Rather than being based on enforceable duties and rights the VC appears to work on the basis of dialogue and trust that agencies will cooperate. Certainly, the VC has

⁸² 2018/19 Annual Report of the Victims' Commissioner for England and Wales, p.20: <https://s3-eu-west-2.amazonaws.com/victcomm2-prod-storage-119w3o4kq2z48/uploads/2019/06/annual-report-2018-2019.pdf>

⁸³ Alex Chalk, Foreword to the Consultation on Improving the Victims' Code and the Government Response to the 2019 consultation: proposals for revising the Code of Practice for Victims of Crime, (MoJ March 2020, CP 236).

⁸⁴ S 34, DVCVA 2004.

few legal tools compared with the powers of some of the other commissions and inspectorates that we have surveyed and there is scope for development of the VC's powers. The VC is charged with encouraging improvements in the practice of criminal justice agencies and reviewing the operation of the Code but has no express powers to:

- recommend changes to the law;
- give advice to victims;
- report directly to Parliament;
- receive individual complaints;
- gain access to criminal justice agency records;
- require information from such agencies;
- secure the cooperation of such agencies;
- require changes in working practice;
- or initiate, or participate in, legal proceedings.

The VC has no explicit legal power to consult with public authorities, voluntary bodies, or individuals or classes of individual; or to conduct training or research. The VC is expressly prevented from exercising functions in relation to a particular victim or witness or in relation to the bringing or conduct of particular proceedings or anything done by a person acting in a judicial capacity.⁸⁵

Explicit power to give advice, unless requested to do so by a minister, and to conduct or fund research originally existed but were removed by the Coroners and Justice Act 2009. The removal of the power to give advice to authorities within the VC's remit by their request,⁸⁶ seems to have reflected a reduction in the role of the VC as an independent promoter and supporter of victims' rights and is difficult to understand given that there is likely to be a close connection between the duty to encourage improvements in behaviour and giving advice as to how these might be achieved. The removal of the explicit power regarding research also removed a tool that is of potential value to the VC in establishing her own understanding of the system, including such matters as the experience of victims and the likely effects of possible changes.

The VC is a promoter, encourager and reviewer of action, rather than an enforcer, but would provision of powers to secure cooperation be incompatible with the role of the VC? The main objections to increasing the legal powers of the VC appear to be, that: this is unnecessary either because there are other ways of protecting the rights of victims and witnesses; and that enforcement is inconsistent with the role of the VC as a promoter, encourager and reviewer. There may also be concern that enforcement would conflict with the independence of the criminal justice system and require additional resources.

Regarding the first two objections, similar issues have been raised in discussions around the merits or otherwise of giving the Parliamentary Health Service Ombudsman the ability to force public bodies to comply with its recommendations. Currently the PHSO relies on a combination of trust, persuasion and publicity to see that its findings and recommendations

⁸⁵ s.51 DVCVA 2004.

⁸⁶ s.50(2), DVCVA 2004 (repealed).

are adopted. It cannot compel public bodies to follow its recommendations, although the courts may require public bodies to provide 'cogent reasons' why they failed to implement findings.⁸⁷ Some are critical of the lack of enforcement powers. Others, however, argue that such powers are unnecessary and would be undesirable. They are said to be unnecessary because the vast majority of findings are respected in any case. They are said to be undesirable because such powers could lead to greater formality and adversely affect working relationships between the Ombudsman and those being investigated, potentially undermining the willingness of public bodies to co-operate with the Ombudsman.⁸⁸

To what extent are these concerns relevant to the work of the VC? Regarding the issue of necessity, the previous VC has observed that criminal justice agencies can normally be expected to co-operate with the VC but do so as a 'favour' since co-operation cannot be compelled. Greater legal power would make it clear that performance of the duties under the Code is an obligation and not a matter of convenience dependent on the prevailing circumstances in the agency. In this way such power would add clarity, significantly strengthen the constitutional standing of the VC, and reinforce the status of the Code.

Regarding possible adverse effects on how the VC operates, like the PHSO, the VC appears to rely heavily on persuasion and dialogue, but the VC is concerned with seeing that criminal justice agencies deliver their duties to victims rather than with investigating individual cases. Given this role in respect of the Code, it can be strongly argued that having access to a range of legal tools will enable the VC to secure the cooperation of agencies and ultimately to require agencies to change their practice, following a review, more broadly to ensure respect for the Code. It will not undermine the capacity of the VC to work alongside the agencies it is reviewing, and to provide and support evidence of best practice, but will ensure that if consistent concerns or problems are identified without being fully addressed, there is an effective route of legal enforcement. Used appropriately greater legal powers to enforce duties under the Code would enhance respect for victims and their interests, and improve the quality of the criminal justice rather than detract from the independence of the system. Regarding resources it is clearly important that the VC has the resources necessary to ensure that she is able to perform her statutory role. While engagement in litigation is costly this is likely to be undertaken only exceptionally. More generally, it is not certain that having greater legal powers will necessarily increase costs.

Enhancing public scrutiny of the criminal justice system

There may be concern that conferment of additional legal powers to the VC could threaten the independence of the criminal justice system if their use caused the VC to intrude into matters that lie within the competence of the judiciary or interfere with the discretion of criminal justice agencies. It is clear that care is needed to ensure the integrity of the criminal justice process. Far from threatening the system, a key reason to improve the tools available to the VC is to strengthen and improve confidence in the criminal justice process through enhanced public scrutiny. Criminal justice agencies must operate within the law and the reforms being suggested are intended to help ensure that they also respect the rights and deliver the duties set out in the Code. The VC must also use her powers appropriately to

⁸⁷ *R(Bradley) v Department of Work and Pensions* [2008] EWCA 36, [72], per Sir John Chadwick.

⁸⁸ Richard Kirkham explains that: "It is the fear that powers of legal enforcement would radically alter the hitherto cooperative nature of the ombudsman's work that best explains why most ombudsmen are reluctant to go down this route". R. Kirkham, *The Parliamentary Ombudsman: Withstanding the Test of Time*, Fourth report, Session 2006-07, (HC 421, March 2007), p.13.

perform her statutory functions, and ultimately she can be held accountable, including in the courts, for its actions. How the VC deploys the tools at her disposal will be an important matter for judgement in the light of experience and knowledge. Further, good practice requires that the VC will explain how and when her various powers will be used and will provide reassurance that they will be employed when this is considered necessary and proportionate, having regard to factors including the need respect the independence and integrity of the criminal justice system.

So far, we have argued that powers to secure the cooperation of agencies and require changes of practice would enhance the ability of the VC to perform her functions, consistent with other commissioners' offices. This would underscore the VC's constitutional standing, emphasise the importance of compliance with the Code, and send a wider message that victims' rights matter and that they are not dependent on the convenience of criminal justice agencies. The more controversial question is whether the VC should be able to enforce decisions in legal proceedings. At present the VC is not empowered to conduct or engage in legal proceedings. In practice, very few victims are likely to be able to take effective legal action where their entitlements under the Code have not been met. The VC is also specifically prevented from exercising her functions in relation to a particular victim or witness or in relation to the bringing or conduct of particular proceedings⁸⁹. This means that in practice the courts are unlikely to be able to ensure protection of victims' rights or that public agencies perform their duties under the Code. This may be considered a fundamental weakness of the current system.

By contrast the EHRC is able to bring, and participate in, legal proceedings and as our brief review indicates the EHRC has found this to be valuable. In particular the ability to engage in judicial review proceedings enables the EHRC to seek legal clarity in matters of general public interest or strategic importance. The EHRC is a rather different agency to the VC in that it was clearly established to be an enforcer of rights. It also possesses substantially greater resources than the VC that enable it to engage in litigation. There is nonetheless a case for considering whether the VC should exceptionally be able to engage in litigation where this is considered necessary to clarify and enforce the duties imposed on public agencies in relation to victims under the Code. This power would be available to be used in exceptional circumstances when, for instance, there is real concern that a public agency has consistently failed to cooperate with the VC, or to act with proper regard to its duties under the Code. While the power to engage in legal proceedings would be only rarely needed, its existence would significantly strengthen the VC's ability to hold agencies and government to account and provide an additional signal that the rights and duties in the Code are ultimately underpinned by law and count for more than aspirational goals. Engagement in proceedings of the type that we recommend, in our view, would not conflict with the existing prohibitions in the DVCVA 2004 on the exercise of the VC's powers. In particular, the new power is not intended to permit the VC to exercise functions in relation to the bringing or conduct of particular proceedings on behalf of an individual victim.⁹⁰ Rather its purpose would be to enable the VC to clarify the law in relation to the duties under the Code in general and matters of public or strategic importance.

⁸⁹ s.51, DVCVA 2004.

⁹⁰ s.51, DVCVA 2004.

Proposed additional powers to enhance the constitutional standing and effectiveness of the Victims' Commissioner

The VC has three core statutory duties: 'to promote the interests of victims and witnesses'; 'take such steps as considered appropriate to encourage good practice'; and 'to keep under the review the operation of the Code'. In the light of the discussion above, we suggest that, in order to perform these connected duties effectively, the VC needs enhanced powers in ten areas. These are listed below and discussed in detail in Table 3.

1. Undertake effective review of the operation of the Code;
2. Rely on the co-operation of bodies named in the Code when encouraging them to adopt good practice;
3. Identify weaknesses in the implementation of the Code;
4. Require action if bodies are found not to be complying with the Code;
5. In the last resort and if necessary to clarify the law in the public interest, to bring appropriate legal proceedings;
6. Receive and direct complaints from victims as users of services provided by bodies named in the Code;
7. Conduct and commission research and training on, for example, what constitutes good practice and on victims' emergent needs;
8. Require changes to the Code if it is found to be inadequate;
9. Ensure that Parliament is fully aware of victims' needs, and upholds their entitlements and rights;
10. Recommend changes to the law.

Overall, we suggest that the current statutory framework should be clarified to make it clear that agencies need to co-operate with the VC and that the VC should have power to insist that action be taken or practices altered.

Consideration should be given to enabling the VC to bring or participate in legal proceedings where this is considered necessary in the public interest to clarify the law, for example where public agencies have failed to cooperate or alter their practice or behaviour. Consideration should also be given to enhancing the VC's ability to obtain information from research, from public bodies with responsibilities under the Code (see Appendix 2 for indicative data requirements), and from the complaints handling bodies discussed earlier. The EHRC and the ECC have power to conduct inquiries and investigations and have found these to be valuable tools. Such power would strengthen the constitutional role of the VC and enhance its ability to deliver its statutory duties, particularly where reviews indicate possible systemic failures in compliance with the Code. The outcome of inquiries and investigations could encourage learning both in specific situations and across service providers.

Given the special standing of the VC and her unique experience of the challenges facing victims and witnesses it seems incongruous that the Secretary of State for Justice is under no duty to consult with the VC when considering changes to the Code and that the VC has no explicit power to recommend changes to the law.

These changes would help to enhance the independent constitutional standing of the VC and further reinforce the legal importance of the Code. They would also increase the incentive⁹¹ upon agencies to respect the VC, including those generated by the negative effects of criticism, handling further complaints, and possible financial costs of defending actions including possibly in legal proceedings.

⁹¹ There is a substantial literature on incentivising public bodies to comply with legal requirements. See Platt, L., Sunkin, M. and Calvo, K., (2010) Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales. *Journal of Public Administration Research and Theory*. 20 (Supp 2), pp. i243-i260; Sunkin, M., Platt, L. and Calvo, K., (2010) The Positive Effect of Judicial Review on the Quality of Local Government. *Judicial Review*. 15 (4), pp. 337-342; Bondy, V., Platt, L. and Sunkin, M., (2015). [*The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences*](#). Public Law Project.

Table 3. Proposed enhanced powers: an overview

| Enhanced powers | Changes required | Justification |
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| 1. Undertake effective review of the operation of the Code. | 1a. That the VC be given adequate resource to undertake review of the operation of the Code. | The VC requires adequate resource to undertake review. |
| | 1b. That there should be a statutory obligation on public bodies named in the Code to facilitate, and co-operate with, VC reviews. | Criminal justice agencies named in the Code are not required to facilitate VC reviews. The constitutional standing of the VC and importance of the review process to victim support would be significantly reinforced if it was made clear that service providers had a statutory obligation to facilitate reviews. |
| | 1c. That a revised Code establishes protocols for data collection on Code compliance by named agencies. | There are no such protocols in place. |
| | 1d. That a revised Code establishes a regulatory framework governing how the VC may access relevant data and conduct a review. | There are no such frameworks in place. |
| 2. Rely on the co-operation of bodies named in the Code when encouraging them to adopt good practice. | 2a. That the VC be enabled to provide or contract to provide training services to encourage the development of good practice in the treatment of victims and witnesses. | The VC's current duty to encourage good practice is not accompanied by specific powers to enable this duty to be fulfilled. |
| | 2b. That the VC be enabled to consult directly with victims on what constitutes good practice in criminal justice settings. | Victims' experiences of service delivery are key sources of data for the development of good practice. |
| 3. Identify weakness in the implementation of the Code. | 3a. The VC shall be charged with an obligation to review the operation and implementation of the Victims' Code every 3 years and report directly to Parliament, including recommendations for changing the Code, and ensuring compliance with international standards. | The VC's ability to promote the interests of victims and witnesses is contingent on this. |

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| <p>4. Require action if bodies are found not to be complying with the Code.</p> | <p>4a. That service providers are placed under a duty to co-operate with the VC.</p> | <p>At present the VC can expect the cooperation of service providers however, it should be made that co-operation is necessary and not a matter of convenience.</p> <p>Giving statutory power to the VC to <i>require criminal justice agencies</i> to change their practice would enhance the ability of the VC to deliver its statutory duties and significantly strengthen the VC's constitutional standing, authority and effectiveness. Compliance could be monitored and be the subject of reports to the Secretary of State/Parliament.</p> |
| | <p>4b. That the VC should be able to require service providers to act or change practice where it is considered necessary to do so.</p> | <p>If Recommendation 5 regarding the ability to bring or join legal proceedings were adopted non-compliance could be considered in such proceedings.</p> |
| | <p>4c. That the VC should be able to conduct inquiries and investigations.</p> | <p>Power to conduct inquiries and investigations would strengthen the constitutional role of the VC and enhance its ability to deliver its statutory duties. Such powers would be particularly important where reviews indicate possible systemic failures in compliance with the Code. The outcome of inquiries and investigations could encourage learning both in specific situations and across service providers.</p> <p>The EHRC, the ECC and HMICFRS have statutory powers to conduct investigations and make reports into systemic problems; and the ECC can specifically investigate the availability of and effectiveness of complaints procedures.</p> |
| <p>5. In the last resort and if necessary to clarify the law in the public interest to bring or join legal proceedings.</p> | <p>5a. That the VC should have the ability to bring, or join, legal proceedings.</p> | <p>The legislative scheme intends service providers to comply with the Code to fulfil their duties to deliver victim entitlements. At present, however, the scheme provides very limited routes to legal enforcement. In practice, very few victims are likely to be able to take effective legal action where their entitlements under the Code have not been met.</p> <p>While the present legislation recognises that the Code may impose duties, failure to comply with such duties does not of</p> |

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|-------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | <p>itself give rise to criminal or civil liability (s34, DVCVA 2004).</p> <p>The imposition of ‘duties’ without enforcement is unclear and risks significant misunderstanding both on the part of victims and service providers.</p> <p>s51 DVCVA 2004 excludes the VC from the bringing or conduct of particular proceedings but not necessarily from bringing or joining judicial review proceedings.</p> <p>While direct enforcement by the VC is likely to be considered inappropriate in the current scheme, the VC should have the power to bring, or join, legal proceedings where this is considered necessary to clarify the law, including the nature of the duties, upon service providers, in the public interest. 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 to service providers and government of the importance of the duties in the Code.</p> |
| <p>6. Receive and direct complaints from victims and witnesses as users of services provided by bodies named in the Code.</p> | <p>6a. That the VC should have the capacity to receive complaints from victims regarding the actions of service providers and would act to direct the complaint to the correct service provider and monitor eventual resolution.</p> | <p>Unlike the EHRC, the VC has no statutory power to receive, consider, or act on complaints brought by victims or witnesses arising from their experience of the justice system.</p> <p>Nor, unlike the EHRC and ECC, does the VC have express power to investigate the availability and effectiveness of complaints procedures.</p> <p>The VC may not have the resources necessary to handle a significant number of complaints and more extensive legal powers would be needed to enable the VC to investigate and respond to individual complaints. However, complaints may be an important resource for the VC in identifying systemic problems and compliance issues with particular service providers. The ability to receive them and direct the complaint to the appropriate service</p> |

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| | | <p>provider would be a significant addition to the VC's powers, increasing the visibility of the VC and the consistency for victims in pursuing complaints.</p> <p>The Victims' Code and service providers would be required to provide information on the VC complaints mechanism and purpose.</p> |
| 7. Conduct and commission research and training on, for example, what constitutes good practice and on victims' emergent needs. | 7a. That the VC's prior ability to undertake research be restored in the revised Code. | s.49(2)(d), DVCVA 2004 as originally enacted enabled the VC to "undertake, arrange for or support (financially or otherwise) the carrying out of research". This provision was repealed by the Coroners and Justice Act 2009 and is no longer in force. It could be restored to the VC in the same terms to provide a power to conduct specialist research. |
| 8. Require changes to the Code if it is found to be inadequate. | 8a. That the Secretary of State be required to consult the VC when revising the Code. | As the body with primary responsibility for ensuring compliance with the Code the VC should have a statutory role in ensuring that the Code continues to meet the needs of victims and witnesses. At present that Secretary of State must consult the Attorney General and the Home Secretary when considering revisions to the Code, but there is no express duty to consult the VC. Imposing such an obligation would be a small but significant step towards enhancing the constitutional standing of the VC and its ability to deliver its statutory duties. |
| | 8b. That the VC shall be charged with an obligation to review the operation and implementation of the Victims' Code every 3 years and report directly to Parliament, including recommendations for changing the Code. | As the body with oversight of the operation of the Code, the VC should be required to report on its operation and implementation directly to Parliament. A period of every 3 years would allow changes to be evident in practice, and account for the term of appointment of each VC and their activities, and other Commissions hold this power. |
| 9. Ensure that Parliament is fully aware of victims' needs, and upholds their entitlements and rights. | 9a. That the VC be empowered to publish an annual report directly to Parliament on the activities of the VC and engagement of services providers and victims with the Victims' Code. | The role of the VC in providing oversight of the protection and support of victims within the criminal justice system requires a more direct reporting to Parliament to reflect greater independence of the VC from government. |

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| <p>10. Recommend changes to the law.</p> | <p>10a. That the VC be given the explicit statutory power to recommend changes to the law.</p> | <p>At present the VC does not have explicit power to recommend changes to the law. Giving this power would be a relatively minor change that would enhance the constitutional role of the VC and strengthen the ability to deliver statutory duties, including the duty to 'promote the interests of victims and witnesses'. The EHRC has this power.</p> |
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Conclusions

This report identifies significant gaps in the current powers of the Victims' Commissioner relative to the current Code of Practice. It identifies a number of potential changes that could be made to close these gaps. At present, the Code is neither enforceable in law nor able to be kept under effective review.

The report proposes that the VC requires additional powers in three broad areas: powers to require or recommend a change of practice; powers to deal with complaints; and powers to undertake litigation in the wider public interest, including exceptionally the ability to bring or join appropriate legal proceedings. Expanding the VC's powers in these ways would enhance the protection of the interests of victims and witnesses by making their entitlements legally enforceable, and by enabling the identification and meeting of their known and emergent needs.

In summary, the proposed additional legal powers would:

- increase the range of legal tools available to the VC to be employed where they are considered necessary and proportionate;
- increase incentives upon agencies to respect the VC including those generated by the negative effects of criticism, handling further complaints, and possible financial costs of defending actions including possibly in legal proceedings;
- enable the VC to rely on the co-operation of agencies and to insist that agencies alter their practices;
- emphasise that respecting victims' rights is a duty not a courtesy;
- strengthen the constitutional standing and authority of the VC; and
- underscore the importance of victims' rights and add force to the Code.

The powers of the VC as currently constituted are not coherent with providing full support for victims and witnesses involved with the criminal justice system, and do not permit the VC to undertake effective oversight of the operation of the relevant service providers.

In exercising a greater role in monitoring and enforcing the implementation of the entitlements contained in the Code, the VC would have an enhanced public role representing victims and shaping the justice system to further accommodate their needs. Such powers would enable the VC to more effectively carry out the prescribed and envisaged statutory functions. The VC would have a clearer role at the centre of protection and promotion of victims' interests across a multi-layered justice system and, in requiring some measure of accountability from service providers, support enforcement of the Code.

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Appendix 1. Powers and duties of the Victims' Commissioner

Statutory framework for the Commissioner for Victims and Witnesses

Domestic Violence, Crime and Victims Act 2004 (Amended by Secretary of State Justice Order 2007/2128 and Coroners and Justice Act 2009 which changed the status and functions of the Commissioner).

Summary

Note: Quotations from legislation are rendered in italics.

- Beyond awarding the Commissioner the function of promoting the interests of victims and witnesses, encouraging good practice and keeping the Victims' Code under review, there is broad discretion for the Commissioner to define their priorities and activities. (Latest policy outline available via: <https://victimscommissioner.org.uk/publications/victims-commissioner-for-england-and-wales-the-second-term-strategy/>)
- The Commissioner may report and give advice to the Secretary of State (SoS) and make 'recommendations' to any authority within remit. The authorities within remit are broad, including government departments, police, SFO, NCA, CICA, CPS etc. This is where the provision of information by agencies to the Commissioner would be of particular value: without placing obligations for the provision of information regarding interaction with victims on identified agencies, it is difficult to envisage how the Commissioner is to consistently identify systemic problems/concerns/areas of best practice. The Commissioner has no power to request or demand information from agencies or government.
- s.48(4) DVCVA 2004 stating the Commissioner was not regarded as an agent of the Crown has been repealed. The SoS for Justice controls remuneration, benefits, and expenses of the Commissioner.

Provisions in DVCVA 2004

s.48 Commissioner for Victims and Witnesses

- s.48(1)-(2) SoS for Justice appoint Commissioner after consultation with Attorney General and SoS for Home Dept.
- s.48(6) *The SoS may pay to, or in respect of, the Commissioner amounts (a) by way of remuneration, pensions, allowances or gratuities, or (b) by way of provision for any such benefits.*
- s.48(7) *The Secretary of State may pay sums in respect of the expenses of the Commissioner.*
 - Repealed by CJA 2009: s.48(4): *The Commissioner is not to be regarded as a servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown.*

s.49 General functions of Commissioner

- s.49(1): promote the interests of victims and witnesses; take such steps as he considers appropriate with a view to encouraging good practice in the treatment of victims and witnesses; keep under review the code of practice.
- s.49(2): Commissioner may: make proposals to the SoS for amending the code; make a report to the SoS; make recommendations to an authority within his remit; consult any person he thinks appropriate.
 - Repealed: undertake or arrange for or support financially or otherwise the carrying out of research.

s.50 Advice

- s.50(1) If required to do so by a Minister the Commissioner must give advice on any matter specified by the Minister related to victims and witnesses.
 - Repealed: s.50(2) If required to do so by an authority within his remit the Commissioner must give advice to the authority in connection with victims or witnesses.

s.51 Restrictions on Exercise of Functions

- Commissioner must not exercise functions in relation to a particular victim or witness; the bringing or conduct of particular proceedings; anything done by a person acting in judicial capacity.

s.32 Code of Practice for Victims

Schedule 8, Para 6: SoS must pay remuneration of the Commissioner and such expenses as SoS sees fit (repealed CJA 2009, never in force).

Schedule 9: Authorities within the Commissioner's remit: Department for Business, Energy and Industrial Strategy; Department for Education; Department for Transport; Department of Health and Social Care; Department for Work and Pensions; Foreign and Commonwealth Office; Home Office; Ministry of Justice; Ministry of Housing, Communities and Local Government; Commissioners of Customs and Excise; Police forces; Serious Fraud Office; National Crime Agency; CICA and first tier tribunal for appeals against CICA; Health and Safety Executive; Office for Nuclear Regulation; Persons exercising functions relating to the business of a court; Criminal Cases Review Commission; Crown Prosecution Service; Probation Boards and service providers; Parole Board; Prison Service; Youth Justice Board for England and Wales; Maritime and Coastguard Agency.

Appendix 2. Indicative data requirements for reviewing the Victims' Code

As set out in the Domestic Violence, Crime and Victims Act 2004, one of the general functions of the Victims' Commissioner (VC), is that "The Commissioner must: - keep under review the operation of the code of practice issued under section 32." (41(1)(c)). The Code of Practice for Victims of Crime sets out the services that must be provided to victims of crime by organisations in England and Wales. In principle, the operation of each organisation in respect of Code entitlements should be reviewable. An indicative list of key entitlements is included in the table that follows.

A basic requirement for reviewing the operation of the Code is access to data and evidence. The VC requires access to operational data that is, or should be, collected by organisations with duties under the Code. Fourteen listed organisations⁹² are required to provide services to victims in accordance with the Code (Chapters 1 to 4), and fourteen further listed organisations⁹³ have duties to provide services to victims (Chapter 5).

In principle, the VC requires access to operational data from each of these listed organisations. In turn, these organisations could be required to provide data on, or to develop standardised systems for recording, operational activities related to their obligations under the Code.

⁹² The Criminal Cases Review Commission, the Criminal Injuries Compensation Authority, the Crown Prosecution Service, the First-tier Tribunal (Criminal Injuries Compensation), Her Majesty's Courts and Tribunals Service, Her Majesty's Prison Service, National Offender Management Service (now Her Majesty's Prison and Probation Service), the Parole Board, Police and Crime Commissioners, all police forces in England and Wales, the British Transport Police and the Ministry of Defence Police, the National Probation Service, the UK Supreme Court, Witness Care Units, Youth Offending Teams

⁹³ The Competition and Markets Authority, the Department for Business, Innovation and Skills (Criminal Enforcement), the Environment Agency, the Financial Conduct Authority, the Gambling Commission, the Health and Safety Executive, Her Majesty's Revenue and Customs, Home Office (Immigration Enforcement), the Information Commissioner's Office, the Independent Police Complaints Commission, the National Crime Agency, Natural Resources Wales, the Office of Rail and Road, the Serious Fraud Office.

| Data required about the following key entitlements in Code of Practice for Victims of Crime ^{(1) (2)} | Service providers |
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| A written acknowledgement that you have reported a crime, including the basic details of the offence | Police forces |
| An enhanced service if you are a victim of serious crime, a persistently targeted victim of a vulnerable or intimidated victim | Police forces |
| A needs assessment to help work out what support you need | Police forces |
| Information on what to expect from the criminal justice system | Police forces |
| Be referred to organisations supporting victims of crime | Police forces |
| Be informed about the police investigation, such as if a suspect is arrested and charged and any bail conditions imposed | Police forces |
| Make a Victim Personal Statement (VPS) to explain how the crime affected you | Police forces |
| Read your VPS aloud or have it read aloud on your behalf, subject to the views of the court, if a defendant is found guilty | Crown Prosecution Service (CPS) |
| Be informed if the suspect is to be prosecuted or not or given an out of court disposal | CPS |
| Seek a review of the police or CPS's decisions not to prosecute in accordance with the National Police Chiefs Council (NPCC) and CPS Victims' Right to Review schemes | NPCC, CPS |
| Be informed of the date, time and location and outcome of any court hearings | Police forces, CPS |
| Be informed if you need to give evidence in court, what to expect and discuss what help and support you might need with the Witness Care Unit | Police forces |
| Arrange a court familiarisation visit/ enter the court through a different entrance from the suspect/sit in a separate waiting area where possible | Police forces, HMCTS |
| Meet the CPS advocate and ask him or her questions about the court process where circumstances permit | CPS |
| Be offered Special Measures to help give evidence and use special measures if applicable (by measure used) | HMCTS |
| Be informed of any appeal against the offender's conviction or sentence | Police forces, CPS |
| To opt into the Victim Contact Scheme (VCS) if the offender is sentenced to 12 months or more for a specified violent offence | National Probation Service |
| If you opt in to the VCS to: - make a VPS for consideration by the Parole Board if the offender is considered for release or transfer and apply to the Parole Board to read it out at the hearing - make representations about the conditions attached to the offender's licence on release and be informed about any licence conditions relating to you | National Probation Service, Parole Board |
| Apply for compensation under the Criminal Injuries Compensation Scheme | Criminal Injuries Compensation Authority |
| Receive information about Restorative Justice and how you can take part | Police forces |
| Make a complaint if you do not receive the information and services you are entitled to, and to receive a full response from the relevant service provider | All |

Note 1. This is indicative list, drawn from a short list of key entitlements in the *Code of Practice for Victims of Crime* under 'Summary of key entitlements' (2015: i). As the Code indicates: "This is not an exhaustive list and will not be applicable to all victims."

Note 2. The indicative list featured in this table does not include all the agencies named in the Victims' Code as having some responsibility to deliver aspects of the Code. These agencies are listed in footnotes 1 and 2 of the text preceding the table. Their responsibilities to victims as a community are likely to extend beyond the specific victim entitlements identified above.



Constitutional powers of the Victims' Commissioner for England and Wales

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