INDEPENDENT CRITICAL INCIDENT INVESTIGATION AGENCIES: A UNIQUE FORM OF POLICE OVERSIGHT

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ABSTRACT

In 1990, the Province of Ontario, Canada, created the world’s first independent critical incident investigation agency (ICIIA). The Special Investigations Unit (SIU) was given the jurisdiction to conduct criminal investigations of police incidents resulting in death and serious injury. It took another twenty years, however, for this model of oversight to become generally accepted throughout Canada. In the meantime, the United Kingdom and Ireland created similar agencies. New Zealand, South Africa, and Jamaica followed suit. In the United States, out of more than one hundred oversight agencies, to include agencies in almost every large city in the country, only Chicago has created an agency that purports to conduct independent investigations of police-related critical incidents. Only fifteen ICIIAs exist in the world with fourteen in English-speaking countries, Norway being the one exception. Different models of this type of agency exist and the choice of the model is specific to the political, social, and cultural history of each jurisdiction. This Article examines and compares the statutory framework for these agencies and examines theoretical best practices in this unique area of police oversight. Further research needs to be conducted to identify to what

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extent theoretical best practices can be implemented through the various renditions of this oversight model, to include the quality of the investigations they conduct and the extent to which specific ICIIA agencies have been or could be successful in their quest to improve police accountability and the public’s faith in law enforcement.

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INTRODUCTION

Police misconduct and the use of excessive force by police have had a major impact on public perceptions of the police and the public’s willingness to cooperate with the police in promoting and ensuring public safety.1

Over the last two decades, many jurisdictions throughout the world have created professional ‘Civilian Oversight of Law Enforcement’ [COLE] agencies with the intent that the investigation, monitoring, auditing or adjudication of police complaints, police discipline and police use-of-force by independent civilian-led organizations will encourage public confidence in the police and help ensure accountable, effective and Constitutional policing.2

Although these oversight programs have been created in many different jurisdictions facing similar issues and controversies in policing, the programs tend to be extremely diverse.3 In fact, the specific politics, cultures, and histories of each jurisdiction determines what powers and attributes each agency will have. Although the concept of “best practice” is often the stated goal of oversight professionals, in actuality the term “best fit” is likely more apropos to an overall comparison of each oversight agency and the community that it serves.4

A recent research project, sponsored by the United States Office of Justice Program’s Diagnostic Center, identified a total of 144 oversight agencies in the United States and another 24 oversight agencies in Canada.5 Of those agencies, only seven jurisdictions, all but one in Canada, have created what this work will call independent

2 Rosenthal, supra note 1, at 435.
4 See DE ANGELIS ET AL., supra note 3, at 52.
5 See id. at 7. Canadian data was not available until after the publication of the project’s report. See id. at 15 n.6.
critical incident investigation agencies (ICIIAs)\textsuperscript{6} to conduct criminal investigations against on or off-duty police officers.\textsuperscript{7}

This Article examines and compares the statutory framework for ICIIA agencies in the English-speaking world and examines theoretical best practices in this unique area of police oversight. ICIIAs have been created, in large part, to improve public perceptions regarding the conduct of criminal investigations of police uses of force and police misconduct.\textsuperscript{8} The jurisdictions that have created these agencies have expended significant resources in the pursuit of this unique form of civilian oversight of law enforcement, even though it is largely unknown to what extent theoretical best practices have been implemented through the various renditions of this oversight model. Outstanding questions exist relating to the quality of the investigations they conduct and the extent to which specific ICIIA agencies have been or could be successful in their quest to improve police accountability and the public’s faith in law enforcement.

In order to better understand the significant government resources that have been expended to support ICIIA programs and determine how best to use those resources, this Article will explore the academic literature as it relates to the conduct of independent investigations of the police, the circumstances under which each agency has been created, the specific statutory frameworks that have been used to create these agencies, and the underlying theories and rationales supporting the creation of these agencies. The extent to which these agencies have been successful is still subject to legitimate debate, particularly given the significant costs associated with implementing and sustaining a competent program. However, certain best practices can be identified at this time even though additional research is needed.

This Article provides the first comprehensive look at these programs and can be used to identify what legislative foundations

\textsuperscript{6} The term: “Independent Critical Incident Investigation Agency” or “ICIIA” used herein has not been previously used to describe a civilian oversight of law enforcement model. The term ICIIA is defined within the context of this Article as “an agency that upon notification, has the authority to automatically conduct (and regularly conducts) original independent investigations of police-related critical incidents.” Although there are, in fact, many additional agencies world-wide that have the ability to conduct supplemental administrative investigations based on public complaints, the resources and qualifications to conduct such investigations is different than that which is needed to conduct an initial, original criminal investigation of a use of force or an in-custody or police-related death or serious injury.

\textsuperscript{7} Ontario (est. 1990), Alberta (est. 2008), Nova Scotia (est. 2012), British Columbia (est. 2012), Manitoba (est. 2015), Québec (est. 2016), and Chicago (est. 2007). See infra Sections III.A, III.C. Nova Scotia announced in 2019 that it would be creating its own ICIIA, however, the agency was not yet in place at the time of the writing of this Article.

\textsuperscript{8} See Rosenthal, supra note 1, at 435.
have been identified as needed to create a sustainable program and examines the circumstances under which such programs have been created to enhance community faith in the integrity of police accountability and oversight.

I. INDEPENDENT CRITICAL INCIDENT INVESTIGATION AGENCIES WORLD-WIDE

Outside of Canada and the United States, the United Kingdom created similar programs in Northern Ireland, England and Wales, and Scotland. Additional programs have also been created in Ireland, New Zealand, South Africa, and Jamaica. Only one such agency exists on a municipal level, located in the City of Chicago, Illinois, in the United States.

Three models of ICIIAs can be identified: 1) the Canadian model wherein the agency is solely responsible for criminal investigations against the police (and separate oversight agencies are responsible for administrative investigations involving public complaints against the police); 2) the U.K. model wherein the agency has both criminal and administrative investigation responsibilities (United Kingdom, Ireland, South Africa, and Jamaica); and 3) a pseudo-ICIIA model (New Zealand and Chicago), wherein although the agency is statutorily authorized to conduct original criminal critical incident investigations, it does not have the resources to conduct such investigations and instead conducts and adjudicates administrative investigations, with the occasional referral of potentially criminal cases to prosecuting authorities.

9 See Dominic Wood, Police Complaints in the United Kingdom, in POLICE-INVOLVED DEATHS, supra note 3, at 75, 75.

10 See discussion infra Sections III.B, III.C.

11 See ILANA B.R. ROSENZWEIG, INDEPENDENT POLICE REVIEW AUTHORITY ANNUAL REPORT 2007-2008 6 (2008). One additional agency, the Norwegian Bureau for the Investigation of Police Affairs, was identified as what appears to be the only ICIIA in the non-English speaking world but was excluded from this research underlying this Article due to the inherent difficulty in translating statutes, regulations and case law from Norwegian to English. Ombudsman-type agencies in Australia were determined not to fall within this definition as well as the Israel Police Internal Investigations Department (“Machash”). Although these agencies conduct independent criminal investigations of the police, they do not automatically and regularly conduct critical incident investigations. In addition, it is arguable as to whether the New Zealand and Chicago programs should fall within the population of ICIIAs covered by this Article. Agency reports indicate that investigations conducted by these agencies are subsequent to police criminal investigations and are generally and primarily administrative in nature. However, given that the statutory authority for the agencies provides for their ability to conduct original criminal investigations of police-related critical incidents, the agencies have been included in the population of ICIIAs evaluated in this Article, and identified as falling within a “pseudo-ICIIA” model of oversight.

12 See infra Part III.

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<th>Jurisdiction</th>
<th>Agency</th>
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<td>Ontario (Can.)</td>
<td>Special Investigations Unit (SIU)</td>
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<td>England and Wales (U.K.)</td>
<td>Independent Office for Police Conduct (IOPC); formerly the Independent Police Complaints Commission (IPCC)</td>
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<td>Ireland</td>
<td>Garda Ombudsman (GSOC)</td>
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<td>Nova Scotia (Can.)</td>
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* Pending.
II. THE ACADEMIC LITERATURE RELATING TO INDEPENDENT INVESTIGATIONS OF THE POLICE

Although there is “[a] reasonably large body of academic and policy writing on civilian oversight dat[ing] back to the 1970s” in the United States14 and there are a substantial number of public reports relating to the creation and review of Canadian oversight agencies,15 the literature comparing civilian oversight of law enforcement mechanisms globally is relatively limited; particularly when it comes to the specifics of agencies involved in the independent investigations of police-involved crimes and critical incidents.

Literature evaluating the “Civilian Control Model” of civilian oversight, defined as “involv[ing] genuinely independent investigation of complaints,” identifies two main arguments against the independent investigation model of oversight. “The first concerns the competency of the investigators and their capacity to penetrate the police world.”16 “The second main charge against civilian control—[is] that external investigation will destroy the authority and responsibility of police managers.”17

Criticisms of this model include comments made by multiple independent commissions investigating the causes and consequences of police corruption.18 These criticisms aside, many of the ICIIA agencies identified here have been created specifically as the result of independent inquiry (or commission) reports that generally recommended the creation of such agencies only as a last resort after systemic failures in police accountability were identified.19

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14 DE ANGELIS ET AL., supra note 3, at 16.
15 See, e.g., Frank V. Ferdik et al., Citizen Oversight in the United States and Canada: An Overview, 14 POLICE PRAC. & RES. 104 (2013) (providing a comprehensive review of the evolution of citizen oversight in Canada); Krista Stelkia, An Exploratory Study on Police Oversight in British Columbia: The Dynamics of Accountability for Royal Canadian Mounted Police and Municipal Police, SAGE OPEN, Jan. 9, 2020, at 1, 2, https://doi.org/10.1177/2158244019899088 (discussing current police oversight systems, specifically as they are implemented in British Columbia, Canada).
16 Tim Prenzler & Carol Ronken, Models of Police Oversight: A Critique, 11 POLICING & SOCY 151, 166 (2001). Although the authors, after identifying this concern, concluded it was “quite false” and argued that “a major deficiency in this argument is the assumption that investigation is a skill unique to conventional police.” Id. at 168.
17 Id. at 169. The authors also concluded this concern was “questionable,” arguing that “[t]he civilian control model need not exclude many internal disciplinary matters from the control of police management.” Id.
18 See id. at 167 tbl.3.
19 See generally THOMAS R. BRAIDWOOD, WHY? THE ROBERT DZIEKANSKI TRAGEDY: BRAIDWOOD COMMISSION ON THE DEATH OF ROBERT DZIEKANSKI (2010) (recommending the development of a civilian-based police oversight system charged with independently investigating police-related incidents within the province of British Columbia, Canada); WILLIAM H. DAVIES, ALONE AND COLD: THE DAVIES COMMISSION INQUIRY INTO THE DEATH OF
Some of the programs identified in this Article have been discussed in various books that have compared and discussed civilian oversight programs on an international basis. However, only one published article has spoken specifically to the need to enhance accountability and trust through the creation of ICIIAs in the United States. Katz used recent controversial police shootings in the United States to argue that the ICIIA model of oversight as “adopted in the United Kingdom, Norway, and Canada” should be implemented in jurisdictions in the U.S. He opined that the ICIIA model of oversight is “designed to produce bias-free investigations that enhance public trust in, and the legitimacy of, the government.”

There have also been limited discussions in the academic literature that is specifically applicable to the creation of the ICIIA model of

FRANK PAUL (2009) (recommended the creation of a civilian-based criminal investigation model for police related deaths occurring within municipal police departments); MAURICE HAYES, A POLICE OMBUDSMAN FOR NORTHERN IRELAND? (1997) (emphasizing the importance of implementing an independent oversight commission to be charged with investigating police related complaints); POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE (2016) [hereinafter RESTORING TRUST] (providing a substantive list of recommendations related to the development of a police accountability task force); RACE RELATIONS & POLICING TASK FORCE, REPORT OF THE RACE RELATIONS AND POLICING TASK FORCE (1989) [hereinafter REPORT OF THE RACE RELATIONS AND POLICING TASK FORCE] (calling for the immediate establishment of a police task force to investigate current police training, policies, and practices, specifically as it relates to interactions with minorities in the province of Ontario, Canada); ROGER SALHANY, REPORT OF THE TAMAN INQUIRY (2008) (recommending that the Minister of Justice consider implementing an independent commission for purposes of investigating any criminal acts allegedly committed by members of the police service). All of these reports recommend, in some form, the creation of an ICIIA.

20 See generally CIVILIAN OVERSIGHT OF POLICE: ADVANCING ACCOUNTABILITY IN LAW ENFORCEMENT chs. 6 & 10 (Tim Prenzler & Garth den Heyer eds., 2016) (South African IPID and New Zealand IPCA, respectively); CIVILIAN OVERSIGHT OF POLICING: GOVERNANCE, DEMOCRACY AND HUMAN RIGHTS 77–78, chs. 9 & 11 (Andrew J. Goldstein & Colleen Lewis eds., 2000) (Ontario SIU, South African ICD, and Northern Ireland PONI, respectively); COMPLAINTS AGAINST THE POLICE: THE TREND TO EXTERNAL REVIEW (Andrew J. Goldsmith ed., 1991) (observing and commenting on the development of civilian oversight programs in countries such as the United States, England, Australia, and Canada); POLICE-INVOLVED DEATHS, supra note 3 (discussing the differences of certain civilian oversight programs as implemented by various countries, such as the United Kingdom and Canada); ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA chs. 2 & 5 (Ian D. Scott ed., 2014) (Canadian ICIIAs and Québec BEI, respectively); id. chs. 6 & 13, 330–34 (Ontario SIU); SANKAR SEN, ENFORCING POLICE ACCOUNTABILITY THROUGH CIVILIAN OVERSIGHT chs. 5, 6, 8 & 9 (2010) (England and Wales IPCC, Ontario SIU, Northern Ireland PONI, and South African ICD, respectively). Each of these works discuss international civilian oversight programs.


22 Id. at 241.

23 Id. at 235.
 oversight, most of it relating to “capture theory”\textsuperscript{24} and “deterrence theory.”\textsuperscript{25}

The first reference to capture theory as it related to civilian oversight of law enforcement, appears to have been made by Prenzler when he discussed a “potential source of ineffectiveness [resulting from] undue influence or ‘capture’ by police.”\textsuperscript{26} In joint articles, based on interviews conducted with personnel from ICIIA organizations in the United Kingdom and Ireland, Savage discussed the related theories of “independence” and “civilianness” and in evaluating the ability of these agencies to conduct independent investigations of the police discussed what amounted to “a constant interaction between the aspirations of independence and the ever-present challenges of regulatory capture.”\textsuperscript{27}

While the theory of deterrence was discussed by Walker in his seminal work on the role of civilian oversight in police accountability,\textsuperscript{28} it was generally debunked by Livingston when she discussed its application to the New York City’s Civilian Complaint Review Board,\textsuperscript{29} one of the larger administrative independent investigation agencies in the world.\textsuperscript{30} Livingston noted the inherent limitations on the use of retrospective investigations “as a principle

\textsuperscript{24} See, e.g., Tim Prenzler, \textit{Civilian Oversight of Police: A Test of Capture Theory}, 40 \textit{Brit. J. Criminology} 659, 662–63 (2000) (discussing regulatory capture, also known as capture theory, as an alternative explanation for high attrition rates of police complaints); Stephen P. Savage, \textit{Seeking ‘Civilianness’: Police Complaints and the Civilian Control Model of Oversight}, 53 \textit{Brit. J. Criminology} 886, 887 (2013) [hereinafter Savage, \textit{Seeking ‘Civilianness}]] (analyzing empirical research related to the three ICIIA oversight bodies within the United Kingdom); Stephen P. Savage, \textit{Thinking Independence: Calling the Police to Account through the Independent Investigation of Police Complaints}, 53 \textit{Brit. J. Criminology} 94, 95–96 (2013) [hereinafter Savage, \textit{Thinking Independence}] (discussing how civilian oversight bodies can lead to potential issues of regulatory capture, in which the regulated subverts the impartiality and zealousness of the regulator). Each of these sources discuss the creation of ICIIA models of oversight with focus on capture theory.


\textsuperscript{26} Prenzler, \textit{supra} note 24, at 659.

\textsuperscript{27} See Savage, \textit{Thinking Independence, supra} note 24, at 94; Savage, \textit{Seeking ‘Civilianness’}, \textit{supra} note 24, at 886.

\textsuperscript{28} See Walker, \textit{supra} note 1, at 154–55. Although, Walker did note that “[d]etermining the general deterrent effect of any one change in policing is far more difficult. . . . many different factors influence police officer behavior and it is difficult to specify the impact of one factor on the performance of all officers in one department.” \textit{Id.} at 155.

\textsuperscript{29} See Livingston, \textit{supra} note 25, at 653, 654–56.

mechanism for rooting out officer malfeasance and enhancing the performance of police."\(^{31}\)

III. SUMMARY OF AGENCY HISTORIES AND POWERS

As previously indicated, in the creation of civilian oversight of law enforcement programs, the specific politics, cultures, and histories of each jurisdiction has determined what powers and attributes each agency will have.\(^{32}\) The same can be said for the ICIIA model of civilian oversight. In order to understand the choices made by the various jurisdictions, it is important to understand the circumstances under which each agency was created. As such, the following sections describe the history and resulting authority of each agency identified in this Article.

A. ICIIAs of Canada

The Canadian ICIIA model appears unique in that the agencies operate on a provincial as opposed to a national level and are responsible solely for criminal, as opposed to administrative investigations.\(^{33}\) In addition, two different ICIIA models exist in Canada, one allows for the use of “seconded” police officers as agency investigators,\(^{34}\) while the other forbids currently serving police from

\(^{31}\) Livingston, supra note 25, at 655. Livingston also notes that “[i]n reality, complaint investigation is but a small piece of any comprehensive strategy aimed at improving policing and minimizing abuse.” Id.

\(^{32}\) See FAQs, NAT'L ASS'N FOR CIVILIAN OVERSIGHT L. ENFORCEMENT, https://www.nacole.org/faqs [https://perma.cc/2WJF-BX6L].

\(^{33}\) See SCOT WORTLEY, POLICE USE OF FORCE IN ONTARIO: AN EXAMINATION OF DATA FROM THE SPECIAL INVESTIGATIONS UNIT 29 (2000); Civilian Oversight in Canada, CACOLE, http://www.cacole.ca/Links/Canadian\%20Links/Civilian\%20Oversight\%20in\%20Canada\%20.htm [https://perma.cc/9ENW-YWSF]. Administrative investigations relate solely to establishing whether an officer has violated the policies, procedures, training, or expectations of his or her employing agency. Cf. ANDRÉ MARIN, OVERSIGHT UNSEEN: INVESTIGATION INTO THE SPECIAL INVESTIGATIONS UNIT’S OPERATIONAL EFFECTIVENESS AND CREDIBILITY 16 (2008) [hereinafter MARIN 2008 REPORT] (distinguishing criminal investigations from administrative, specifically as it relates to the cooperation of subject officers and issues of self-incrimination). Criminal investigations relate to violations of statutes or ordinances which involve criminal sanctions, including the potential for imprisonment or fine. See, e.g., id.

\(^{34}\) See, e.g., About ASIRT, ALTA. CAN., https://www.alberta.ca/about-asirt.aspx [https://perma.cc/75Y4-3AUL] (stating that the Alberta Serious Incident Response Team (ASIRT) acts as an independent agency comprised of seconded police and civilian investigators). In this context, a “seconded” police officer is an investigator who currently serves as a sworn member of a police force, but is assigned to work for and report to the Director of an ICIIA. See DE ANGELIS ET AL., supra note 3, at 25 n.18.
serving as agency investigators. As of 2016, 92.6% of Canada's population was served by an ICIIA.

1. The Ontario SIU (Established 1990)

The first Independent Critical Incident Investigation Agency of Canada was the Special Investigations Unit (“SIU”) created in 1990 as the result of a number of police shootings involving youth from visible minority groups. In 1988, two fatal shootings of black men and an unarmed teenager resulted in sufficient community concern for the provincial government to create a “Task Force on Race Relations and Policing.” The Task Force submitted its report in April 1989 which made numerous recommendations for changes in the law on police use of force and training and included a recommendation to create an independent investigation body with the power to lay criminal charges at the discretion of its Director.

The Special Investigations Unit (SIU) consists of a civilian Director and investigators who are not currently serving police officers and has the jurisdiction to conduct criminal investigations against the police whenever an officer causes death or serious injury to a member of the community. In its formative years, the SIU was severely

35 See WORTLEY, supra note 33, at 28.
37 See WORTLEY, supra note 33, at 28–29.
38 See id. at 29; John F. Burns, Toronto Race Relations Shaken by Shootings, N.Y. TIMES, Jan. 19, 1989, at A16.
39 See REPORT OF THE RACE RELATIONS AND POLICING TASK FORCE, supra note 19, at 2, 129, 150; WORTLEY, supra note 33, at 29.
40 See WORTLEY, supra note 33, at 28–29.
underfunded and subject to substantial resistance from the police community.\textsuperscript{41}

The SIU has been the subject of multiple reports on its operations over the last twenty-five years.\textsuperscript{42} In 1993, as the result of the “Stephen Lewis Report on Race Relations in Ontario,”\textsuperscript{43} the SIU was transferred from the Ministry of the Solicitor General (who is responsible for policing in the Province) to the Ministry of the Attorney General “to facilitate its image as an agency operating at arm’s length from the government department responsible for policing.”\textsuperscript{44} The 1995 Cole-Gittens Report of the Commission on Systemic Racism in the Ontario Criminal Justice System noted systemic failures in the SIU system to include the under-funding of the organization and a lack of cooperation from police officers and police agencies.\textsuperscript{45} As a result of yet another public report (the 1998 Adams Report),\textsuperscript{46} the SIU finally received additional funding and an ability to enforce its mandate through the enactment of regulations to require officers to cooperate with SIU investigations.\textsuperscript{47}

In 2008, however, an audit of the SIU conducted by the provincial ombudsman (a former SIU director) criticized the SIU for a pro-police culture, ineffective investigative techniques, and an inadequate use of its resources.\textsuperscript{48} In 2011, the ombudsman followed up with a second report which was supportive of recent SIU initiatives, but noted systemic failures of the part of the government to support the SIU program.\textsuperscript{49}

The most recent special report, released in April 2017, reviewed police oversight mechanisms in Ontario after public controversy

\textsuperscript{41} See Issues in Civilian Oversight of Policing in Canada, supra note 20, at 100; Comm’n on Systematic Racism in the Ont. Criminal Justice Sys., Report of the Commission on Systematic Racism in the Ontario Criminal Justice System 381 (1995) [hereinafter Report of the Commission on Systematic Racism in the Ontario Criminal Justice System].


\textsuperscript{44} Issues in Civilian Oversight of Policing in Canada, supra note 20, at 100.

\textsuperscript{45} See id.; Report of the Commission on Systematic Racism in the Ontario Criminal Justice System, supra note 41, at 381.


\textsuperscript{47} See Issues in Civilian Oversight of Policing in Canada, supra note 20, at 101.

\textsuperscript{48} See Marin 2008 Report, supra note 33, at 44, 76, 88–89.

\textsuperscript{49} See Andrée Marin, Oversight Undermined: Investigation into the Ministry of the Attorney General’s Implementation of Recommendations Concerning Reform of the Special Investigations Unit 51 (2011).
about a perceived lack of transparency in SIU investigation conclusions.\textsuperscript{50} That report resulted in additional recommendations for legislative change including 1) requiring the SIU to report publicly on investigative conclusions where no charges are laid against officers; 2) requiring the police to notify the SIU after all police-related critical incidents (including non-hit police shootings); 3) recommending the creation of additional rules to foster officer cooperation with the agency; and 4) providing the SIU with broader powers to lay charges against officers.\textsuperscript{51} The report declined to recommend that the SIU be prohibited from hiring former police officers as investigators but did recommend that all Ontario oversight bodies “do more to increase their complement of high-quality investigators who do not have a background in policing.”\textsuperscript{52}

In 2019, the government-of-the-day extensively amended the Ontario Police Act to include detailed provisions relating to previously identified issues that related to SIU investigations.\textsuperscript{53} The new provisions greatly expanded upon the enabling legislation for the SIU, which initially consisted of only general and vague provisions regarding its operations and jurisdiction.\textsuperscript{54}

2. The Alberta Serious Incident Response Team (ASIRT) (Established 2008)

In large part due to ongoing controversies revolving around the competency of the SIU, it took 18 years for the next Canadian ICIIA program to be created. The Alberta Serious Incident Response Team (ASIRT) was significantly different than the model used in Ontario. Whereas currently serving police officers were forbidden from being used as SIU investigators,\textsuperscript{55} the ASIRT model called for the use of “seconded” police officers as investigators.\textsuperscript{56} These investigators were currently serving police officers from the Calgary and Edmonton Police Services and the K Division of the Royal Canadian Mounted Police (“RCMP”).\textsuperscript{57} The seconded officers were to be assigned to

\textsuperscript{51} See id. pt. I § 5.210, ¶¶ 34, 42; id. § 5.230, ¶ 64; id. § 5.240, ¶ 69; id. § 5.300, ¶ 120; id. § 6.300, ¶ 66.
\textsuperscript{52} Id. pt. I, ¶ 22.
\textsuperscript{53} Explanatory Note, Comprehensive Ontario Police Services Act, S.O. 2019, c 1 (Can.).
\textsuperscript{54} See, e.g., id. The “Investigations” portion of the Police Services Act provides specific provisions for the SIU.
\textsuperscript{55} See Issues in Civilian Oversight of Policing in Canada, supra note 20, at 29.
\textsuperscript{56} Id. at 20–21.
\textsuperscript{57} See id. at 11, 20.
ASIRT and answerable to the civilian director of the agency. Unlike the SIU, ASIRT was not created in response to any particular controversial police-related critical incident; instead it was established in consultation with the Alberta Association of Chiefs of Police.

In addition, unlike the SIU, which is required to conduct an automatic critical incident investigation in the case of any (on duty or under color of authority) officer-involved fatality or serious injury, ASIRT obtains its jurisdiction as the result of an order from the Solicitor General to conduct an investigation in appropriate cases; to include officer-involved shootings, in-custody deaths, investigations involving allegations of corruption and other allegations of criminality against an officer.

As a result of the collaborative approach by which ASIRT was created, and likely due to its use of currently serving police officers as investigators, there has been no reported systemic opposition to the ASIRT program on the part of the police leadership of the province or the RCMP.

3. The Nova Scotia Serious Incident Response Team (SiRT) (Established 2012)

The SiRT was created by Legislation introduced in 2010 and became operational in 2012. The SiRT program was created after a December 2008 RCMP shooting on a First Nations reserve and the in-custody death of a First Nations’ woman in September of 2009. The SiRT model adopted the Alberta model of using seconded police officers as investigators, under the supervision of a civilian Director.

The Nova Scotia SiRT is the only jurisdiction in the world with a population of less than one million to have created an ICIIA.

58 See id. at 20–21.
59 See id. at 20.
60 See id. at 29.
61 See id. at 20–21.
62 See id. at 20.
65 See ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, supra note 20, at 35.
66 See id.

The IIOBC became operational in 2012, as the result of the recommendations of two public inquiries. The first inquiry investigated the 1998 death of Frank Paul, an Aboriginal man who died of hypothermia after he was dropped off by a Police Department van in a Vancouver alleyway (the “Davies Inquiry”). The Davies Inquiry noted substantial investigative failures which led to a lack of accountability for the officers involved in the incident. A second inquiry investigated the highly publicized (and videotaped) death of Robert Dziekanski, a Polish immigrant at the Vancouver International Airport after he was tased by RCMP officers on October 14, 2007. This second inquiry, known as the “Braidwood Inquiry” noted the RCMP’s failure to accurately report the facts of the incident to the public and reiterated the Davies Inquiry’s conclusions that there was an inherent conflict of interest involved in the police policing themselves.

Both inquiry reports recommended the creation of an “independent investigation office” to investigate police related deaths. The Braidwood Inquiry report recommended provincial jurisdiction for the office over municipal police and the RCMP (who act as the provincial police service in British Columbia), and recommended that the agency investigate all on and off-duty police acts resulting in death or “serious harm.” It was further recommended that the agency be completely civilianized within five years, and that the use of “seconded” officers as investigators be prohibited.

Although the government did not adopt the recommendation that the IIOBC be civilianized within a five-year period, it did prohibit any currently serving officer from being hired as an IIOBC investigator and also prohibited the hiring of any person who had served as a police officer in British Columbia in the five years preceding his or her appointment as an IIO investigator. In addition, the government included in the enabling legislation a long-term goal for

67 FAQ’s, IIOBC, https://iiobc.ca/faqs/ [https://perma.cc/7B8Q-HF8E].
68 See DAVIES, supra note 19, at 3, 79.
69 See id. at 119–20.
70 Referred to as “the Braidwood Inquiry.” See BRAIDWOOD, supra note 19, at 5–8, 17.
71 See id. at 16, 19.
72 Id. at 24; DAVIES, supra note 19, at 21–22.
73 See BRAIDWOOD, supra note 19, at 24.
74 See id. at 25.
75 See id.
complete civilianization of the IIO (the only such goal in existence relating to an ICIIA world-wide). By 2019, however, the government of the day backtracked on the issue of short-term civilianization. Based on the recommendations of its original director77 (in 2016) and its subsequent director, the government amended the IIOBC enabling legislation to prohibit only the hiring of currently serving police officers as IIOBC investigators, thus giving the director the discretion to hire officers with current B.C. police experience.78 The government made it clear that it was still committed, however, to the long-term civilianization of the IIOBC.79

The IIOBC, like the SIU, is required to conduct a criminal investigation into any incident where an officer may have caused death or “serious harm” to any person.80 As such, the IIOBC must investigate all police related critical incidents involving death or serious harm regardless of whether or not there is an allegation of misconduct or criminality.81 The IIOBC jurisdiction, unlike the SIU, also includes off-duty conduct causing death or “serious harm” regardless of whether the act was taken under color of authority.82

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76 See Police Act, R.S.B.C. 1996, c 367, s 38.13, subpara. (2), subpara. (b) (Can. B.C.).
77 The author of this Article served as the first Chief Civilian Director of the IIOBC from 2012 to 2016. See B.C.’s First Police Watchdog Leaving Agency He Built, VANCOUVER SUN (Jan. 13, 2016), http://www.vancouversun.com/first+police+watchdog+leaving+agency+built/11649965/story.html [https://perma.cc/KA9C-KQ22].
78 See Police Act, R.S.B.C. 1996, c 367, s 38.06, para. (3) (Can. B.C.).
79 See Police Act, R.S.B.C. 1996, c 367, s 38.13, para. (2), subpara. (b) (Can. B.C.). The current director of the IIOBC said in an interview, “I think it’s important to keep in mind the government’s goals with respect to the civilianization of the office, but at the same time here we need to fill the positions and make sure our experience level is high.” Jennifer Saltman, Cop Watchdog Can Now Hire Ex-B.C. Officers to Fill Vacancies, with Police Act Changes, VANCOUVER SUN (Apr. 30, 2019), https://vancouversun.com/news/local-news/cop-watchdog-can-now-hire-ex-b-c-officers-to-fill-vacancies-with-police-act-changes [https://perma.cc/E2A9-23LU]. The IIOBC was created in 2012 by a government controlled by the Liberal Party of B.C., (considered to be a centrist/conservative political party). See Justin McElroy, Why the B.C. Liberals are Sometimes Liberal and Sometimes Not, CBC (May 6, 2017, 8:00 AM), https://www.cbc.ca/news/canada/british-columbia/why-the-b-c-liberals-are-sometimes-liberal-and-sometimes-not-1.4100339 [https://perma.cc/G4U7-C7CY]. The 2019 amendment to the enabling legislation was sponsored by a new government controlled by the British Columbia New Democratic Party (NDP) (considered to be a more liberal political party). See British Columbia, Legislative Assembly of British Columbia, Official Report of Debates, No. 241 (Apr. 29, 2019) (providing a statement on behalf of Lieutenant-Governor showing that Bill 31, the Police Amendment Act of 2019, was supported by the government of the day of British Columbia).
81 See What We Do, supra note 80.
82 See Police Act, R.S.B.C. 1996, c 367, s 38.09 (Can. B.C.).
5. The Manitoba Independent Investigations Unit (IIU) (Established 2015)

The Manitoba IIU was created based on the recommendations of the “Taman Inquiry” which resulted from a 2005 fatal traffic collision in which an impaired off-duty police officer killed a young mother of three. The Inquiry report was published in 2008, and amendments to the Police Act received Royal Assent in 2009. It took another four years, however, until 2013 for a civilian director to be appointed and the unit became operational in 2015. The IIU was given the jurisdiction to conduct investigations into on and off-duty incidents involving police officers which resulted in death or serious injury as well as other criminal conduct.

6. The Québec Bureau des Enquêtes Indépendantes (BEI) (Established 2016)

In Québec, the practice of allowing police to police themselves was often the subject of public controversy. In response, the Québec government introduced legislation which was passed in 2013 creating the Bureau des Enquêtes Indépendantes (BEI). The BEI, however, did not begin operations until 2016. Similar to ASIRT, in addition to automatically conducting police-related critical incident investigations and allegations of sexual misconduct, it may conduct criminal investigations of allegations of officer corruption at the behest of the Minister of Public Security. However, the BEI follows the Ontario and British Columbia models in that none of its investigators are currently serving police officers.

84 See SALHANY, supra note 19.
85 See ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, supra note 20, at 26.
87 See ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, supra note 20, at 25–26.
89 See id.
90 See id.
B. ICIIAs of the United Kingdom and Ireland

Four ICIIA agencies currently exist in the United Kingdom and Ireland, with the first being created in Northern Ireland in 2000, followed by England and Wales in 2004 (the most populous jurisdiction with an ICIIA), Ireland in 2007, and Scotland in 2013. Unlike the Canadian ICIIA model, the U.K./Ireland model gives its organizations jurisdiction over both police complaints (administrative and criminal) as well as both administrative and criminal investigations of police-related critical incidents. With the creation of Scotland’s ICIIA, the entirety of the U.K. and Ireland are now served by ICIIA agencies.

The creation of the Police Ombudsman’s Office (PONI) was recognized as an important aspect of the ongoing peace process in Northern Ireland after being identified as a necessity following a report into the police complaints system in Northern Ireland (Hayes 1997) and the publication of Patten’s (1999) review of policing arrangements in the province.

The evolution of civilian oversight of law enforcement in England and Wales has been described as “an unending cycle of scandal and reform’ that has fostered a ‘trend towards non-police engagement.” And in Scotland, the Police Investigation and Review Commissioner’s (PIRC) Office was created simultaneously with the creation of a single Police Service of Scotland.

1. The Police Ombudsman for Northern Ireland (PONI) (Established 2000)

The Office of the Police Ombudsman opened for business on November 6, 2000, and was represented as “the first fully-funded and

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93 See Wood, supra note 9, at 75–76.
94 See id. at 77.
95 See id. at 75–76; Dermot P.J. Walsh, Police Complaints Procedures in the United Kingdom and Ireland: Why are the Reforms Not Working!, EUR. POLICE SCI. & RES. BULL., SPECIAL CONF. EDITION 48, 50 (2013); About Us, POLICE INVESTIGATIONS & REV. COMMISSIONER, https://pirc.sco/AboutUs/ [https://perma.cc/FNS5-5QPY].
96 See Wood, supra note 9, at 80–81.
97 See supra text accompanying notes 93–95.
98 Wood, supra note 9, at 76.
99 Id. at 79.
100 See About Us, supra note 95.
completely independent police complaints organisation in the world.” The legislation for the office was based on a report issued in 1997, created by a senior civil servant who had been appointed in 1995 to review the police complaints system and propose appropriate changes to “earn the confidence of the people of Northern Ireland.”

In addition to conducting independent investigations of police complaints, the office was also given the jurisdiction to investigate police-related critical incidents, to include historical investigations of police-involved murders that were alleged to have taken place during “The Troubles” (the conflict in Northern Ireland between 1968 and the signing of the Good Friday Agreement in 1998).

The office has the authority to conduct both administrative and criminal investigations and is required to submit any case involving allegations of criminal behavior to the Director of Public Prosecutions for consideration of criminal charges. In addition, the office is required to “formally” investigate any matter where the conduct of a police officer may have resulted in the death of another person.

2. The Independent Office for Police Conduct (IOPC) for England and Wales, Formerly the Independent Police Complaints Commission (IPCC) (Originally Established 2004; Renamed and Reconstituted 2018)

The Independent Police Complaints Commission (IPCC), established in 2004, replaced its predecessor agency, the Police Complaints Board (PCB), “following the publication of the Macpherson Report 1999 [also known as the Stephen Lawrence...

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102 Id.
103 See About Us, POLICE OMBUDSMAN FOR NORTHERN IR., https://www.policeombudsman.org/About-Us [https://perma.cc/LL26-YKCI].
105 Id. The Historical Investigations Directorate of the PONI “looks at matters in which members of the RUC [Royal Ulster Constabulary] may have been responsible for deaths or serious criminality in the past, and in particular between 1968 until 1998. It also receives complaints of a grave or exceptional nature from members of the public about police conduct during this period, including allegations of police involvement in murder, attempted murder, as well as conspiracy and incitement to murder.” Id.
106 See Police (Northern Ireland) Act, 2003, c. 6, § 13 (U.K.) (providing the Police Ombudsman the power to conduct administrative investigations into police practices and policies);
Inquiry] and a ruling from the European Court of Human Rights, both of which expressed the view that England and Wales lacked a sufficiently independent body to investigate complaints against the police.”

The IPCC had the authority to manage or supervise police investigations into complaints as well as the ability to conduct independent investigations of serious cases or cases involving police-related critical incidents (including deaths in police custody, officer involved shootings and fatal traffic collisions involving police officers). The IPCC engaged in four modes of investigation: 1) “independent investigations” carried out by IPCC’s own investigators; 2) “managed investigations” carried out by police agencies under the direction and control of the IPCC; 3) “supervised investigations” carried out by police agencies in accordance with IPCC terms of reference; and 4) “local investigations” carried out entirely by the involved police agency. The IPCC was overseen by a Chair, two Deputy Chairs and ten Commissioners.

The IPCC was reconstituted in 2018 and renamed the Independent Office for Police Conduct (IOPC); a new single executive director position was created in lieu of the prior commission structure. The Policing and Crime Act 2017 added additional authority to include the power to “initiate its own investigations,” eliminated the concept of “managed” and “supervised” investigations, and gave the IOPC the ability to reopen previously closed cases for “compelling reasons.”

3. The Garda Ombudsman Commission for the Republic of Ireland (GSOC) (Established 2007)

A number of police scandals in the 1970s and 1980s resulted in political pressure to create police oversight in the Republic of Ireland. The Garda Síochána Complaints Board was created in 1986 and was subsequently replaced by the Garda Ombudsman Commission after repeated complaints from civil rights bodies and

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108 Wood, supra note 9, at 78.
109 See id. at 81.
110 See id.
111 Id.
112 See id. at 80.
114 Id.
“Events in Donegal and the establishment of the Morris Tribunal, combined with Government commitments under the Good Friday Agreement, were perhaps the final catalyst in spurring the government into proposing change.”

The Garda Síochána Ombudsman Commission (GSOC) is a three-member body charged with providing oversight of policing in Ireland. The Commission was established by the Garda Síochána Act 2005 and began operations in 2007. The Commission’s “main area of responsibility is to deal with complaints concerning garda [police] conduct.” However, the GSOC is also responsible for conducting independent investigations of incidents where “it appears that the conduct of a garda, or gardai, may have resulted in death or serious harm to a person.” Such incidents are referred to the GSOC by the Garda Síochána (the police force of the Republic of Ireland).

4. The Police Investigation and Review Commissioner (Scotland) (Established 2013)

Contrary to the experiences of most jurisdictions, “the move towards developing an independent model of police complaints in Scotland [to include independent investigations of police-related critical incidents] . . . has arisen in spite of the absence of any ‘major crisis in police complaints in Scotland.’” It has been suggested that the creation of the PIRC was based, in large part, on the existence of other similar agencies in the United Kingdom.

The PIRC was introduced in 2013 at the same time as the single Police Service of Scotland was established. At that time, the remit of the Police Complaints Commissioner for Scotland was expanded to include investigations into police-related critical incidents. To

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116 See id. at 110–12.
117 Id. at 111.
119 See About GSOC, supra note 118.
120 GSOC’s Functions, GARDA OMBUDSMAN, https://www.gardaombudsman.ie/about-gsoc/gsocs-functions/ [https://perma.cc/2KX5-4CF8], Id.
121 See id.
122 See id.
123 Wood, supra note 9, at 85.
125 See About Us, supra note 95.
reflect that change, the agency was renamed as the Police Investigations and Review Commissioner (PIRC).\textsuperscript{127}

\section*{C. Other ICIIAs}

Outside of Canada and the U.K./Ireland, there are only four additional agencies in the English-speaking world that have the statutory authority to conduct independent investigations of police-related critical incidents: the Independent Police Complaints Authority (IPCA) in New Zealand; the Civilian Office of Police Accountability (COPA) in Chicago, Illinois; the Independent Commission of Investigations for Jamaica (INDECOM); and the South African Independent Police Investigative Directorate (IPID).\textsuperscript{128}

All of these agencies follow the U.K./Ireland model wherein they not only have jurisdiction over the criminal and administrative aspects of police-related critical incidents, but also are involved in the investigation and taking of public complaints against the police.\textsuperscript{129}

The New Zealand and Chicago models, however, are a pseudo-ICIIA model that primarily conduct administrative investigations of police-related critical incidents with the expectation that potential criminal violations are referred to appropriate prosecutorial agencies for consideration of criminal charges.\textsuperscript{130}

\textsuperscript{127} See About Us, supra note 95.


1. The New Zealand Independent Police Conduct Authority (IPCA) (Established 2007)

Police oversight was first created in New Zealand in 1989, "[f]ollowing several years of debate about Police accountability, sparked in part by the role of Police during the 1981 Springbok Tour." The 1981 Springbok Tour involved a tour of the South African rugby team through New Zealand. Over the course of that tour, which took place from July through September 1981, New Zealand suffered that largest civil disturbance seen in decades. "More than 150,000 people took part in over 200 demonstrations in 28 centres, and 1500 were charged with offences stemming from these protests." In 2000, as a result of public concerns regarding the independence of the Police Complaint Authority (PCA), changes were made to the PCA structure that included the appointment of independent investigators. A 2004 Commission of Inquiry followed after a scandal involving how allegations of sexual assault were handled by the national police. In 2007, a report was completed which made recommendations to increase the powers of the PCA and which resulted in the creation of the Independent Police Conduct Authority.

The IPCA Authority Act gave the IPCA the jurisdiction “to investigate of its own motion... any incident involving death or serious bodily harm” caused by a police action. However, in practice, independent IPCA investigations of police-related critical incidents are supplemental and subsequent to New Zealand State Police investigations.

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133 See id.
134 Id.
135 See History, supra note 131.
136 See id.
137 See id.
138 See Independent Police Conduct Authority Act 1988, s. 12, subs. (1)(b) (N.Z.).
139 See, e.g., Reports on Independent Investigations, INDEP. POLICE CONDUCT AUTHORITY, https://www.ipca.govt.nz/Site/Outcomes/Reports-on-independent-investigations.aspx [https://perma.cc/QGY4-NSU7] (noting one investigation in December 2018 by the IPCA that found a police investigation into inappropriate contact between a teacher and a student was deficient in several aspects).
2. The Civilian Office of Police Accountability (COPA) for the City of Chicago, Illinois; Formerly the Independent Police Review Authority (Originally Established 2007; Reconstituted 2017)

As of 2016, the United States of America had more than 140 civilian oversight of law enforcement agencies at the county and municipal level. In addition, almost all large cities in the United States had implemented some form of oversight. Thirty-four of those agencies were identified as “investigation-focused” and were responsible for conducting independent investigations of police conduct. Out of those thirty-four agencies, however, only one agency in the United States has the purported authority to conduct original independent investigations of police related critical incidents.

The Independent Police Review Authority for the City of Chicago was created in 2007. However, although the IPRA was given the statutory authority to conduct original investigations of police-related critical incidents, its investigations were actually subsequent to investigations conducted by the Chicago Police Department.

In December 2015, the United States Department of Justice (DOJ) initiated a civil rights investigation into the Chicago Police Department as the result of public outrage after the delayed release of a video showing a white police officer fatally shooting a black teenager.

The aftermath included protests, murder charges for the involved officer, and the resignation of Chicago’s police superintendent. The McDonald incident was widely viewed as a tipping point—igniting longstanding concerns about CPD officers’ use of force, and the City’s systems for detecting and correcting the unlawful use of force.

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140 See DE ANGELIS ET AL., supra note 3, at 7, 14.
141 See id. at 14.
142 See id. at 24, 24 tbl.1.
143 See ROSENZWEIG, supra note 11, at 1.
145 See INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT, supra note 144, at 1.
146 Id.
The ultimate results of the DOJ investigation found that the accountability systems for the Chicago Police Department were “deeply flawed,” that the IPRA investigations “suffer[ed] from entrenched investigative deficiencies and biased techniques[,]” and noted that “[w]hile IPRA is vested with the authority to investigate officer-involved shootings, the initial evidence gathering and reporting on the scene of an officer-involved shooting is largely in the hands of CPD [the Chicago Police Department].”

During the course of the DOJ investigation and based on a report issued by a task force created by the City, the City replaced the IPRA with a new agency, the Civilian Office of Police Accountability (COPA). That office was given additional authority to take charge of critical incident scenes and submit potential criminal charges to the state prosecutor’s office. Even so, a review of current COPA policies indicates the agency appears to still rely in large part on Chicago police investigations of these incidents.

3. The Independent Police Investigative Directorate (IPID) for South Africa; Formerly the Independent Complaints Directorate (ICD) (Originally Established 1995; Reconstituted 2012)

“The South African Police (SAP) had a long and notorious history as the enforcer and defender of apartheid.” The Truth and Reconciliation Commission (TRC), created by the Promotion of National Unity and Reconciliation Act (Act No. 34 of 1995), identified routine forms of police brutality, involving torture and abuse of criminal suspects . . . the enforcement of racist policies . . . the assassination of leaders of the African National Congress (ANC) and other liberation movements and, in latter years . . . the promotion and orchestration of political violence.

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147 Id. at 8, 56.
148 See INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT, supra note 144, at 1; RESTORING TRUST, supra note 19, at 3.
150 See CIVILIAN OFFICE OF POLICE ACCOUNTABILITY RULES AND REGULATIONS, supra note 129, at §§ 3.10.3.1, 3.10.3.2, 3.12.
151 See id. at § 3.10.3.2.
153 Id.
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Even after the signing of the National Peace Accord of September 1991, members of the security forces were found to have been “deeply implicated” in continuing political violence in the period prior to the 1994 elections.154 “A Green Paper and draft Bill published in July 1994 . . . led to the passage in October 1995 of the new South African Police Act” Chapter 10 of which established the Independent Complaints Directorate (ICD).155

The ICD was given authority to investigate officer-involved shootings, deaths in police custody, crimes allegedly committed by police officers, violations of police policy and public complaints against the police.156 The ICD was reconstituted in 2012 with the passage of the Independent Police Investigative Directorate Act in 2011.157 The IPID Act compelled the South African police to immediately report critical incidents to the IPID and to cooperate with IPID investigations upon penalty of criminal prosecution.158

4. The Independent Commission on Investigations (INDECOM) for Jamaica; Formerly the Police Public Complaints Authority (Originally Established 1992; Reconstituted 2010)

In Jamaica, a country of roughly 2.8 million,159 the police were historically responsible for “an astounding” 18% of the country’s homicides.160 In fact, between 1999 to 2010, it was reported that 2,257 people were killed by the police.161 According to media reports, the Independent Commission on Investigations (INDECOM) was formed in 2010 “after pressure from the United States over the scale of human rights abuses by security forces in Jamaica.”162

INDECOM was created based on the conclusion that “the existing system of investigations into public complaints concerning

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154 See id. at 196–197.
155 Id. at 199, 201.
misconduct by Members of the Security Forces has been found to be ineffective and lacking in integrity.”163 The Independent Commission of Investigations Act, 2010 (Act 12 of 2010), repealed the Police Public Complaints Act and provided for a new organization that would “undertake investigations concerning the actions by members of the Security Forces and other agents of the State that result in death or injury to persons or abuse of the rights of persons; and for connected matters.”164 INDECOM was given jurisdiction to investigate serious complaints against the police as well as police-related critical incidents resulting in death or injury to any person.165

IV. COMPARING THE STATUTORY FOUNDATIONS OF
ICIIAS AROUND THE WORLD

A review of the enabling statutes and ordinances for the aforementioned ICIIAs identify two distinct models: The Canadian criminal investigation model and the U.K. combined criminal-administrative model (which is followed by all agencies outside of Canada). As previously noted, a version of the U.K. model (used in Chicago and New Zealand) involves the conduct of independent administrative investigations subsequent to police original critical incident investigations.

This section compares the enabling statutes and associated regulations for the identified ICIIA agencies. As such, it explains the various different potential models as well as the powers and authorities identified by the various jurisdictions as essential to ensuring a successful ICIIA program.

A. Comparison of Canadian ICIIA Agency Enabling Acts

The Canadian ICIIA model operates on a provincial level with each agency being responsible solely for criminal—as opposed to administrative—investigations.166 Two different versions of the ICIIA model exist in Canada: one that allows for the use of “seconded” police officers as agency investigators (Alberta, Manitoba, and Nova

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164 Id.
165 See The Independent Commission of Investigations Act 12 of 2010, part III, s. 10 (Jam.).
the other which prohibits currently serving officers from serving as ICIIA investigators (British Columbia, Ontario and Québec). In addition, three agency statutes specifically provide for the hiring of civilians without police experience (British Columbia, Manitoba, and Québec), while the other agencies have no statutory provisions one way or the other. Only one agency has a statutory goal in favor of civilianization of its ICIIA work force (British Columbia).

Three agencies (Nova Scotia, Ontario and Québec)—two which prohibit the use of seconded officers—specifically prohibit investigators from leading investigations involving their former employers.

Table 2. Enabling Statutes for Canadian Agencies

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169 See Police Act, R.S.B.C. 1996, c 367, s 38.08, para. (1) (Can. B.C.); Police Services Act, C.C.S.M., c P.94.5, s 60 (Can. Man.); Police Act, C.Q.L.R., c P-13.1, s 289.11 (Can. Que.).

170 See generally Police Act, R.S.A. 2000, c P-17 (Can. Alta.) (lacking statutory provision in regard to hiring civilians without police experience); Police Act, S.N.S. 2004, c 31 (Can. N.S.) (lacking statutory provision in regard to hiring civilians without police experience); Police Services Act, R.S.O. 1990, c 15 (Can. Ont.) (lacking statutory provision in regard to hiring civilians without police experience).

171 Cf. Police Act, R.S.B.C. 1996, c 367, s 38.08, para. (6), subpara. (a) (Can. B.C.) (bestowing the independent investigations office with “a duty to cooperate with a civilian monitor in the exercise of powers or performance of duties under this Act”).

In addition, there are two different models relating to the mandate of the agencies. The Ontario SIU model requires the agency to investigate any case where an officer may have caused death or "serious harm" to any person.\textsuperscript{173} That model is followed by British Columbia and Québec.\textsuperscript{174} The ASIRT statute allows for discretion (on the part of the Minister of Public Safety) in the choice of cases that are assigned to ASIRT and allows for ASIRT to investigate allegations of criminal conduct, even those not involving a critical incident.\textsuperscript{175} The ASIRT model is followed by Manitoba and Nova Scotia.\textsuperscript{176} All Canadian agencies have mandates that include the investigation of police-related critical incidents (officer-involved shootings causing injury or death, in-custody deaths, vehicular accidents causing serious injury or death, and police uses of force involving serious injury and death).\textsuperscript{177} Only one agency has a

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
Agency & Enabling Statutes \\
\hline
Québec BEI & Québec Police Act, CQLR Chapter P-13.1, Title II, Chapter 1 (Police Forces), Division III.1 (Specialized Police Forces), Sections 89.1-89.2; Title V, Chapter III (Investigations), Division II (Investigation of a Police Officer or a Special Constable), Sections 286-289; Chapter III.1 (Independent Investigations), Division 1 (Conduct of an Independent Investigation) Sections 289.1-289.4; Division 2 (Bureau des Enquêtes Indépendantes) Sections 289.5-289.27. \\
\hline
\end{tabular}
\end{table}


\textsuperscript{174} \textit{See Police Act, R.S.B.C. 1996, c 367, s 38.09 para. (1), subparas. (a)–(b) (Can. B.C.); Police Act, C.Q.L.R., c P-13.1, s 289.1 (Can. Que.).}

\textsuperscript{175} \textit{See Police Act, R.S.A. 2000, c P-17, s 46.1 (Can. Alta.); \textit{About ASIRT, supra} note 34.}

\textsuperscript{176} \textit{See Police Services Act, C.C.S.M., c P.94.5, s 66(2) (Can. Man.); Police Act, S.N.S. 2004, c 31, s 261, para. (1), subparas. (a)–(b) (Can. N.S.).}

\textsuperscript{177} \textit{See, e.g., Police Act, R.S.A. 2000, c P-17, s 46.1, par. (2) (Can. Alta.) (providing a mandatory investigation for serious incidents and complaints, such as an incident involving death or serious injury); Police Act, R.S.B.C. 1996, c 367, s 38.09, paras. (1)–(3) (Can. B.C.) (stating that immediate notification and subsequent independent investigation is required when an officer arrives at the scene of an incident involving the death of or serious harm to an individual); Police Services Act, C.C.S.M., c P.94.5, s 65(1) (Can. Man.) (requiring mandatory investigation and notice of any incident involving serious injury or death); Police Act, S.N.S. 2004, c 31, s 261, para. (1) (Can. N.S.) (providing for a mandatory notifying of the director of any incident in which the actions of a police officer may have resulted in death, serious injury, or sexual assault of any person); Police Services Act, R.S.O. 1990, c P.15, s 113, para. (5) (Can. Ont.) (requiring mandatory investigation for incidents involving serious injury or death, serious harm, accident, or incidents involving a police officer).}
legislative mandate that specifically includes the investigation of any criminal conduct by a police officer when in the public interest to do so (Nova Scotia).  

Four of the agencies prohibit the Director from ever having served as a police officer (British Columbia, Manitoba, Nova Scotia, and Québec); only Québec contains additional requirements to include that the Director must have served either as a judge or a lawyer for a period of at least fifteen years.

Canadian ICIIA agencies are equally divided between those that have the authority to lay charges directly against police officers (Ontario, Nova Scotia, and Manitoba) and those that are required to refer their cases to an independent prosecutorial authority for a charging decision (Alberta, British Columbia, and Québec). Even in those provinces where the ICIIA agency can lay charges, however, Crown Counsel has the discretion to pursue or stay those charges. No research has been conducted, to date, on the actual impact of the ability of an ICIIA Director to independently lay charges, on charging practices against police officers.

Although arguments have been made for ICIIAs to report to all-party committees of the Legislature, all Canadian agencies are part of their respective Ministries of Justice, generally reporting to the Attorney General of the Province. Three agency statutes provide for some form of oversight over ICIIA investigations. In British Columbia, the Director is specifically authorized to appoint a “civilian monitor” to review specific investigations and the IIIOBC was

Ont.)(explaining that a case investigation shall be conducted into the circumstances of serious injuries and death that may have resulted from acts committed by police officers); Police Act, C.Q.L.R., c P.13.1, s 289.1 (Can. Que.) (maintaining that an independent investigation must be conducted when an individual sustains serious injury or dies as a result of police actions); see also Terminology and Definitions, INDEF. INVESTIGATION UNIT OF MAN., http://www.iiumanitoba.ca/Terminologies.html [https://perma.cc/H88Z-DCXA] (defining serious injury to include injury from a firearm).


179 See Police Act, R.S.B.C. 1996, c 367, s 38.03, para. (2) (Can. B.C.); Police Services Act, C.C.S.M., c P.94.5, s 57(2) (Can. Man.); Police Act, S.N.S. 2004, c 31, s 26B, para. (2) (Can. N.S.); Police Act, C.Q.L.R., c P.13-1, s 289.9, para. (3) (Can. Que.).

180 See Police Act, C.Q.L.R., c P.13-1, s 289.9, para. (1) (Can. Que.).

181 Police Services Act, O. Reg. 267/10, s 5 (Can.); Police Act, S.N.S. 2004, c 31, s 26K, para. (1)–(3) (Can. N.S.); Police Services Act, C.C.S.M., c P.94.5, s 75(1) (Can. Man.).

182 Police Service Regulation, Alta. Reg. 356/1990, s. 10.2 (Can.); Police Act, R.S.B.C. 1996, c 367, s 38.02 (Can. B.C.); Police Act, C.Q.L.R., c P.13-1, s 289.1 (Can. Que.).


184 See ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, supra note 20, at 163–84.

required to undergo a review by a legislative committee within three years of its creation. In Manitoba, the IIU Director is required to appoint a civilian monitor to monitor IIU investigations relating to police-involved fatalities. In Nova Scotia, the Director has the discretion to “appoint a community liaison or observer to work with the Team in the course of an investigation.”

Table 3 compares the enabling statutes for all six Canadian ICIIAs. Table 6 contains the same information for the four agencies in Ireland and the United Kingdom. Table 9 provides comparison information for the four ICIIAs outside of Canada and the U.K./Ireland.

1. Canadian ICIIA Regulations

Five of the six Canadian ICIIAs have regulations in place to supplement their enabling legislation; the sixth agency, British Columbia, uses a memorandum of understanding with all British Columbia police agencies in lieu of the enactment of formal regulations.

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187 See Police Services Act, C.C.S.M., c P.94.5, s 70(1) (Can. Man.).
189 See, e.g., Police Services Act, C.C.S.M., c P.94.5 (Can. Man.); Police Act, S.N.S. 2004, c 31 (Can. N.S.) (providing the parameters for the Nova Scotia Serious Incident Response Team); Police Act, C.Q.L.R., c P-13.1, s 289.1 (Can. Que.) (providing the appropriate procedures for conducting an independent investigation of alleged police acts); Police Service Regulation, Alta. Reg. 356/1990, s. 2 (Can.) (explaining that the regulation applies to the discipline and performance of police officers); Police Services Act, O. Reg. 267/10 (setting forth the appropriate conduct and duties to be respected by officers involved in an independent investigation initiated by the SIU).
<table>
<thead>
<tr>
<th>Statutory Issues</th>
<th>Ontario SIU</th>
<th>Alberta ASIRT</th>
<th>Nova Scotia SiRT</th>
<th>British Columbia IIO-BC</th>
<th>Manitoba IIU</th>
<th>Québec BEI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulation or MOU</td>
<td>Regulations only</td>
<td>Regulations only</td>
<td>Regulations and confidential MOUs</td>
<td>MOUs in lieu of regulations</td>
<td>Regulations only</td>
<td>Regulations only</td>
</tr>
<tr>
<td>Date of Enaction of Regulations or MOU</td>
<td>1999</td>
<td>2008</td>
<td>April 2012</td>
<td>August 2012</td>
<td>June 2015</td>
<td>June 2014; June 2016</td>
</tr>
<tr>
<td>Amendments of Regulations or MOU</td>
<td>2011; 2019</td>
<td>2011; 2014</td>
<td>None</td>
<td>Feb. 2013</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Ontario SIU</td>
<td>Alberta ASIRT</td>
<td>Nova Scotia SIRT</td>
<td>British Columbia IIO-BC</td>
<td>Manitoba IIU</td>
<td>Québec BEI</td>
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</tr>
<tr>
<td>Mandate</td>
<td>On duty or related to duties; incidents resulting in death or &quot;serious harm&quot; (to include sexual assault)</td>
<td>On and off duty as assigned by Solicitor General</td>
<td>On and off duty &quot;serious Incidents involving the police&quot; including incidents involving death, injury, and sexual assault, and &quot;where in the public interest&quot;</td>
<td>On and off duty incidents resulting in death or &quot;serious harm&quot;</td>
<td>On and off duty incidents involving death, serious injury or any crime</td>
<td>On duty, and related to duties as assigned by the Minister of Public Security, for incidents involving death or serious injury, or firearm related injury, or any allegation of a criminal offense of a sexual nature in performance of duties</td>
</tr>
<tr>
<td>Involvement in Administrative investigations or Police Discipline?</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Notification Requirements</td>
<td>Police “shall immediately notify” the SIU of an incident falling within its jurisdiction</td>
<td>“As soon as practicable”</td>
<td>“As soon as practicable”</td>
<td>“Immediate” notification required</td>
<td>“Immediate” notification required</td>
<td>Notification “without delay”</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Ontario SIU</td>
<td>Alberta ASIRT</td>
<td>Nova Scotia SIRT</td>
<td>British Columbia IIIO-BC</td>
<td>Manitoba IIU</td>
<td>Québec BEI</td>
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</tr>
<tr>
<td>Ability to Lay Charges?</td>
<td>Yes, and referred to the Crown Attorney for prosecution</td>
<td>Referral to Minister of Justice if “of the opinion that . . . the actions . . . constitute an offense”</td>
<td>Yes</td>
<td>Referral to Crown Counsel if the director “considers that there are reasonable grounds to believe that an officer may have committed an offence”</td>
<td>Yes</td>
<td>Referral to Director of Criminal and Penal Prosecutions</td>
</tr>
<tr>
<td>Seconded officers as investigators?</td>
<td>Not permitted</td>
<td>Yes, and serving</td>
<td>Yes, and serving</td>
<td>Not permitted</td>
<td>Permissible, but none serving</td>
<td>Not permitted</td>
</tr>
<tr>
<td>Civilians with No Police Experience used as Investigators?</td>
<td>No statutory reference, but currently used</td>
<td>No statutory reference, but currently used</td>
<td>No statutory reference, but only current and former officers used</td>
<td>Yes, if they have “investigative experience”; currently used</td>
<td>Yes, if they have “investigative experience”; currently used (1)</td>
<td>Yes, by government regulation; currently used</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Ontario SIU</td>
<td>Alberta ASIRT</td>
<td>Nova Scotia SIRT</td>
<td>British Columbia IIQ-BC</td>
<td>Manitoba IU</td>
<td>Québec BEI</td>
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</tr>
<tr>
<td>Qualifications or Limitations for Director</td>
<td>No limits specified</td>
<td>No limits specified</td>
<td>Cannot have been a former or current police officer</td>
<td>May never have been a police officer</td>
<td>May never have been a police officer</td>
<td>May never have been a police officer; must have been a Judge or 15-year lawyer; Must meet requirements for hiring as a police officer; Canadian citizen of good moral character</td>
</tr>
<tr>
<td>Selection of Director</td>
<td>Appointed by Lieutenant Governor upon recommendation of Solicitor General</td>
<td>Designated by the Minister of Justice</td>
<td>Appointed by Lieutenant Governor</td>
<td>Appointed by Lieutenant Governor by Order-in-Council</td>
<td>Appointed by Lieutenant Governor in Council</td>
<td>Three finalists chosen by a selection committee and forwarded to the Justice Minister</td>
</tr>
<tr>
<td>Director Term of Office</td>
<td>No term specified</td>
<td>No term specified</td>
<td>Five-year term with potential for second term only</td>
<td>Five-year term with potential for second term only</td>
<td>Five-year term with potential for second term only</td>
<td>Fixed term of five years or less; serve until reappointed or replaced</td>
</tr>
<tr>
<td>Director Removal from Office</td>
<td>No removal terms specified</td>
<td>No removal terms specified</td>
<td>No removal terms specified</td>
<td>No removal terms specified</td>
<td>Termination for cause only</td>
<td>No removal terms specified</td>
</tr>
</tbody>
</table>
## Canadian ICIIAs

<table>
<thead>
<tr>
<th>Statutory Issues</th>
<th>Ontario SIU</th>
<th>Alberta ASIRT</th>
<th>Nova Scotia SIRT</th>
<th>British Columbia IIO-BC</th>
<th>Manitoba IIU</th>
<th>Québec BEI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Director Chain of Command</td>
<td>Unit within Ministry of Solicitor General</td>
<td>Director reports to Minister of Justice</td>
<td>Director reports to Minister of Justice</td>
<td>Director is a Deputy Minister of Justice&lt;sup&gt;a&lt;/sup&gt;</td>
<td>Director reports to Minister</td>
<td>Director reports to Minister</td>
</tr>
<tr>
<td>Limitations on Investigator Hiring or Assignments</td>
<td>An investigator shall not participate in an investigation that relates to members of a police force of which he or she was a member</td>
<td>No limitation on investigator assignments</td>
<td>No person may perform the role of a team commander or a lead investigator in an investigation relating to a police officer who is a member of the same agency</td>
<td>No limitation on investigator assignments</td>
<td>No limitation on investigator assignments</td>
<td>An investigator may not be designated as the principal investigator if the investigation concerns a police force of which the investigator has at any time been a member or an employee</td>
</tr>
<tr>
<td>Police Powers</td>
<td>Director and investigators are &quot;peace officers&quot;</td>
<td>Director &quot;deemed to be Chief of Police&quot;; investigators &quot;deemed to be police officers&quot;</td>
<td>Director and investigators are &quot;peace officers&quot; with &quot;all of the powers, authority, privileges, [and] immunities&quot;</td>
<td>Director and investigators have all powers, duties, and immunities of a peace officer and constable at common law</td>
<td>Investigators have &quot;all the powers, duties, privileges and protections of a peace officer and constable at common law&quot;</td>
<td>The Bureau is a specialized police force for the purposes of the pursuit of its mission; the director of the Bureau acts as director of the police force</td>
</tr>
</tbody>
</table>

<sup>a</sup> The Director is a Deputy Minister of Justice.
<table>
<thead>
<tr>
<th>Statutory Issues</th>
<th>Ontario SIU</th>
<th>Alberta ASIRT</th>
<th>Nova Scotia SIRT</th>
<th>British Columbia IIO-BC</th>
<th>Manitoba IIU</th>
<th>Québec BEI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cooperation Requirements</td>
<td>All members of police forces and &quot;appointing officials&quot; shall cooperate</td>
<td>Not specified; Lieutenant Governor may make regulations regarding conduct of investigations</td>
<td>Not specified</td>
<td>Officers must &quot;cooperate fully&quot; with the Director and investigators</td>
<td>Not specified</td>
<td>Not specified; to be determined by regulations</td>
</tr>
<tr>
<td>Independent Evaluation of Program</td>
<td>None specified, but within the jurisdiction of the provincial ombudsman</td>
<td>None specified</td>
<td>Director may appoint &quot;civilian liaison or observer to work with the team in the course of an investigation&quot;</td>
<td>Director may appoint &quot;civilian monitor&quot; to audit an investigation; 3-year special committee evaluation of program</td>
<td>Civilian monitor required in police-related fatality; civilian monitor at discretion of director in all other cases</td>
<td>None specified</td>
</tr>
</tbody>
</table>

a Enabling Act amended in 2019 to include a notification requirement, Bill 68, Comprehensive Ontario Police Services Act, 2019, Section 16(1).

b A 2019 legislative amendment changed the referral standard from the original standard which required the Chief Civilian Director to refer a case to Crown Counsel if "an officer may have committed an offense." Bill 31, 2019 Police Amendment Act (British Columbia).


d Information on use of seconded officers and civilians with no police experience was obtained from TULLOCH, supra note 50, § 4.724, ¶¶ 164–70.

Table 4. Regulations and MOUs of Canadian Agencies

<table>
<thead>
<tr>
<th>Agency</th>
<th>Regulations and MOUs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta ASIRT</td>
<td>Alberta Regulation 356/90; Police Act, Police Service Regulation, Sections 10.2 (Investigations by another police service or an integrated investigative unit), 10.3 (Segregation of police officers), 10.4 (Police officer’s notes), 10.5 (interview), 10.6 (Status of police officer)</td>
</tr>
<tr>
<td>Manitoba IIU</td>
<td>Police Services Act Independent Investigations Regulation 99/2015; Police Services Act Civilian Monitor Regulation 100/2015</td>
</tr>
<tr>
<td>Nova Scotia SiRT</td>
<td>Nova Scotia Regulations, Police Act 89/2012 [Serious Incident Response Team Regulations, Section 1 (Citations), Section 2 (Definitions), Section 3 (Communications from public), Section 4 (Securing Scene of Serious Incident), Section 5 (Segregating police officers during investigation), Section 6 (Police officer’s notes), Section 7 (Interviewing Police Officers), Section 8 (Changes of Status of Police Officer as Subject or Witness), Section 9 (Summary of Investigation), Section 10 (Annual Report to Minister), Section 11 (Oath of office for Director and Investigators)</td>
</tr>
<tr>
<td>Ontario SIU</td>
<td>Ontario Regulation 267/10 (Conduct and duties of police officers respecting investigations by the Special Investigations Unit); Definitions and interpretation; Designate of chief of Police; Notice to SIU; Securing the Scene; SIU as lead investigator; Interview of witness officers; Notes on Incident; Notice of whether subject officer or witness officer; Investigation caused by Chief of Police; Disclosure of Information; Public Statements. (Amended 2011—Ontario Regulation 283/11; Amended 2019—Ontario Regulation 466/18)</td>
</tr>
<tr>
<td>Québec BEI</td>
<td>Government of Québec O.C. 405-2016 (Regulation respecting the conduct of the investigations of the Bureau des Enquêtes Indépendantes). Division 1 (Obligations of Police Officer Involved or Witness Police Officer and of Director of Police Force Involved); Division II (Parallel Investigations); Division III (Obligations of the Bureau’s Director and Investigators); Division IV (Communications of the Director of the Bureau); Division V (Terms Governing the Provision of Support Services); Division VI (Final). Government of Québec O.C. 587-2014 (Regulation respecting the selection procedure and the training of investigators of the Bureau des Enquêtes Indépendantes)</td>
</tr>
</tbody>
</table>

* Prior to the enactment of the SIU regulations in 2010, the SIU operated based upon Memorandums of Understanding with Ontario police agencies (June 26, 2018, email from SIU Legal Counsel).
While the regulations vary in detail and content, all five regulations and the BC MOU include references to the following subjects: definition of subject officer and witness officer;\(^{191}\) requirement for notification of officer classification (subject or witness);\(^{192}\) requirement for notification of change of officer classification;\(^{193}\) description of the circumstances under which officers are required to be interviewed;\(^{194}\) description of the circumstances under which officer notes shall be prepared and turned over;\(^{195}\) and description of the requirements for the sequestration of officers.\(^{196}\)

Other common topics covered by the various regulations include requirements for audio and video recording interviews;\(^{197}\) requirements for police departments securing the scenes of critical incidents;\(^{198}\) circumstances under which notification must be made to


\(^{193}\) See Independent Investigations Regulation, Man. Reg. 99/2015, s. 14, par. (2) (Can.); Police Services Act, O. Reg. 267/10, s. 10 (Can.); Police Service Regulation, Alta. Reg. 356/1990, s. 10.6, paras. (2)–(3) (Can.); Police Act, C.Q.L.R., c P-13.1, ss 263 (Can. Que.); Serious Incident Response Team Regulations, N.S. Reg. 89/2012, s. 8, paras. (1)–(2) (Can.); Memorandum of Understanding, supra note 190 § 14.4.

\(^{194}\) See Independent Investigations Regulation, Man. Reg. 99/2015, s. 14, par. (2) (Can.); Police Services Act, O. Reg. 267/10, s. 8 (Can.); Police Service Regulation, Alta. Reg. 356/1990, s. 10.6, paras. (2)–(3) (Can.); Police Act, C.Q.L.R., c P-13.1, s 263 (Can. Que.); Serious Incident Response Team Regulations, N.S. Reg. 89/2012, s 8, paras. (1)–(2) (Can.); Memorandum of Understanding, supra note 190, §§ 18–19.

\(^{195}\) See Independent Investigations Regulation, Man. Reg. 99/2015, s. 11 (Can.); Police Services Act, O. Reg. 267/10, s. 9 (Can.); Police Service Regulation, Alta. Reg. 356/1990, s. 10.6, paras. (2)–(3) (Can.); Police Act, C.Q.L.R., c P-13.1, s 262 (Can. Que.); Serious Incident Response Team Regulations, N.S. Reg. 89/2012, s 6, paras. (1)–(2) (Can.); Memorandum of Understanding, supra note 190, § 17.1–4.


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ICIIAs; circumstances under which police departments can make public statements relating to incident.200

B. Comparison of U.K. and Ireland ICIIA Enabling Acts

The UK/Ireland ICIIA model operates with each agency being responsible for not only criminal, but also administrative investigations.201 These agencies have the specific authority to investigate not just police-related critical incidents and allegations of criminal conduct, but also public (administrative) complaints against the police. Unlike the Canadian model, the primary function of these agencies tends to be the taking of public complaints, with the critical-incident-investigation component serving as a secondary (but important and high profile) agency function.

Table 5. Enabling Statutes for U.K. and Ireland Agencies

<table>
<thead>
<tr>
<th>Agency</th>
<th>Enabling Statutes</th>
</tr>
</thead>
</table>
| England and Wales IOPC | - Police Reform Act 2002  
|              | - Police Reform and Social Responsibility Act 2011 (c 13): Schedule 7 (Regulations about complaints and conduct matters); Schedule 14 (Police: Complaints)  
|              | - Policing and Crime Act 2017                                       |
| Ireland GSOC | - Garda Síochána Act 2005, Part 3 (Establishment and Functions of Garda Síochána Ombudsman Commission)  
|              | - Garda Síochána (Amendment) Act 2015                               
|              | - Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015 |
|              | - Police (Northern Ireland) Act 2000, Chapter 32, Part VIII (The Police Ombudsman)  
|              | - Police (Northern Ireland) Act 2003, Chapter 6, Part 1 (Policing: The Police Ombudsman)  
|              | - Criminal Justice Act 2003, Chapter 44, Part 10 (Retrial for Serious Offences – Application to investigations by the Police Ombudsman)  
|              | - Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 |

199 See Police Services Act, C.C.S.M., c P.94.5, ss 65(1)–(4) (Can. Man.); Memorandum of Understanding, supra note 190, § 3.1–2.

200 See Memorandum of Understanding, supra note 190, § 6.1.

201 See statutes listed infra tbl.5.
The administrative duties of this model tend to include the receipt and handling of all complaints about the police force, the conduct of independent complaint investigations, the monitoring and supervision of complaint investigations conducted by police agencies, and review and comment on current police practices and policies. 202

1. U.K./Ireland ICIIA Regulations

Three of the four agencies have formal regulations in place to supplement the enabling legislation (Northern Ireland, England and Wales, and Scotland); two of the agencies have used Memorandums of Understanding to supplement (Scotland) or in lieu of (Ireland) formal regulations. 204

While the regulations vary in detail and content, agency regulations and MOU’s include references to the following subjects: conduct of officer interviews; police cooperation requirements; and police notification requirements.

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202 See supra tbl.5.
203 See infra tbl.7.
204 See infra tbl.7.
### Table 6. Comparisons of Enabling Statutes for U.K. and Ireland ICIIAs

<table>
<thead>
<tr>
<th>Statutory Issues</th>
<th>Northern Ireland PONI</th>
<th>England and Wales IOPC-IPCC</th>
<th>Ireland GOSC</th>
<th>Scotland PIRC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Operating Date</td>
<td>Nov. 2000</td>
<td>April 2004</td>
<td>May 2007</td>
<td>April 2013</td>
</tr>
<tr>
<td>Regulation or MOU</td>
<td>Statutory Rules</td>
<td>Statutory rules</td>
<td>MOU</td>
<td>MOU</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Statutory guidance by Agency to police</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Amendments of Regulations or MOU</td>
<td>2008, 2009</td>
<td>May 2015 (Statutory Guidance)</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Northern Ireland PONI</td>
<td>England and Wales IOPC-IPCC</td>
<td>Ireland GOSC</td>
<td>Scotland PIRC</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>--------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------</td>
<td>---------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Mandate</td>
<td>Complaints, misconduct, criminal offences, police-related deaths, investigations &quot;in the public interest&quot;: investigations into current police practices and policies</td>
<td>Complaints, administrative misconduct, criminal offences, police-related deaths and serious injuries, police policy</td>
<td>Complaints, administrative and criminal misconduct, any matter where the conduct of the police (or the Commissioner of Police) &quot;may have resulted in the death of, or serious harm to, a person&quot;; police practices, policies and procedures</td>
<td>Complaints, offenses by police, &quot;any death involving a person serving with the police,&quot; police-related deaths, serious injuries and firearms discharges, any relevant police matter in the public interest</td>
</tr>
<tr>
<td>Involvement in Administrative investigations or Police Discipline?</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Notification Requirements</td>
<td>“The Chief Constable shall refer to the Ombudsman any matter which appears to indicate that conduct of a [police officer] may have resulted in the death of some other person”</td>
<td>All death or serious injury matters must be referred to agency within period provided for by regulations issued by Secretary of State (&quot;without delay&quot;)</td>
<td>Police required to refer any matter &quot;as soon as practicable&quot; that appears to indicate that the conduct of a police officer may have resulted in the death of, or serious harm, to a person</td>
<td>By regulation, Scottish Commissioners may require the Chief Constable to refer matters to the Commissioner; timing not specified in regulations</td>
</tr>
<tr>
<td>Ability to Lay Charges?</td>
<td>Recommends charges to Director of Public Prosecutions.</td>
<td>Refers potential criminal charges to Crown Prosecution Service</td>
<td>Refers conduct that &quot;may constitute an offence&quot; to the Director of Public Prosecutions together with &quot;any recommendations that appear to . . . be appropriate&quot;</td>
<td>Investigations conducted under the supervision of Lord Advocate or Prosecutor Fiscal</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Northern Ireland PONI</td>
<td>England and Wales IOPC-IPCC</td>
<td>Ireland GOSC</td>
<td>Scotland PIRC</td>
</tr>
<tr>
<td>----------------------------------------</td>
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</tr>
<tr>
<td>Seconded Officers as Investigators?a</td>
<td>Permitted and currently serving</td>
<td>Permitted, but not currently serving</td>
<td>Permitted and currently serving</td>
<td>Permitted, but not currently serving</td>
</tr>
<tr>
<td>Civilians with No Police Experience as Investigators?b</td>
<td>No restriction; currently used</td>
<td>No restriction; currently used</td>
<td>No restriction</td>
<td>No restriction</td>
</tr>
<tr>
<td>Qualifications and Limitations for Director</td>
<td>None specified</td>
<td>May not have served as a law enforcement officer in the UK; may not have been imprisoned for more than 3 months in the last 5 years</td>
<td>May not have been a member of the Irish police; may not be a member of the legislature or the European Parliament or be a member of a local authority; a person holding judicial office may be appointed and subsequently not required to carry out judicial duties</td>
<td>May not have served in UK or European Parliament in the 3 years prior to appointment; may never have served as a UK police officer</td>
</tr>
<tr>
<td>Selection of Director</td>
<td>Secretary of State</td>
<td>&quot;Appointed by Her Majesty&quot;</td>
<td>Appointed by &quot;the Government&quot; after satisfaction that &quot;the person has the appropriate experience, qualifications, training or expertise&quot;</td>
<td>Appointed by the Scottish Ministers</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Northern Ireland PONI</td>
<td>England and Wales IOPC-IPCC</td>
<td>Ireland GOSC</td>
<td>Scotland PIRC</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>-----------------------</td>
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<td>--------------</td>
<td>---------------</td>
</tr>
<tr>
<td><strong>Director Term of Office</strong></td>
<td>Seven-year term; no reappointment permitted</td>
<td>A term not exceeding five years, with the possibility of reappointment</td>
<td>Exceeding 3 years, but not exceeding 6 years as determined by the government and eligible for reappointment for a second term</td>
<td>5-year term with potential for reappointment to one 3-year term</td>
</tr>
<tr>
<td><strong>Removal from Office</strong></td>
<td>Mandatory retirement at age 70; may be required to retire “in the interests of efficiency or effectiveness or if convicted of a criminal offence or becomes bankrupt”</td>
<td>May be removed from office if unfit, acted improperly in performance of duties, subjected to imprisonment, unable to perform duties for more than 3 months, suffered bankruptcy or sequestration of estate</td>
<td>The President may remove “only for stated misbehavior or for incapacity and then only on resolutions passed” by the National Parliament calling for removal</td>
<td>May be removed by the Scottish Ministers for cause (including failure to “carry out functions of the office,” acting “improperly” or is “otherwise unable or unfit to perform the person’s duties”)</td>
</tr>
<tr>
<td><strong>Director Chain of Command</strong></td>
<td>Serves as pleasure of Secretary of State</td>
<td>Reports to Secretary of State</td>
<td>Reports to The Minister for Justice, Equality and Law Reform</td>
<td>Reports to the Scottish Ministers</td>
</tr>
<tr>
<td><strong>Limitations on Hiring/Assignment of Investigators</strong></td>
<td>None specified</td>
<td>None specified</td>
<td>None specified</td>
<td>None specified</td>
</tr>
<tr>
<td><strong>Police Powers</strong></td>
<td>All powers and privileges of a constable</td>
<td>“All the powers and privileges of a constable . . . for the purposes of the carrying out of the investigation and all purposes connected with it”</td>
<td>“[A]ll the powers, immunities and privileges conferred and all the duties imposed on any member of the [Irish police] by or under any enactment or the common law”</td>
<td>All the powers and privileges of a constable</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Northern Ireland PONI</td>
<td>England and Wales IOPC-IPCC</td>
<td>Ireland GOSC</td>
<td>Scotland PIRC</td>
</tr>
<tr>
<td>------------------</td>
<td>-----------------------</td>
<td>----------------------------</td>
<td>-------------</td>
<td>---------------</td>
</tr>
<tr>
<td>Cooperation Requirements</td>
<td>None specified in legislation; directive from Chief Constable to officers only</td>
<td>Duty of the agency “to enter into arrangements with [the police] for the purpose of securing cooperation”; Officers required to submit to interviews, police required to permit inspection of police premises, Departments required to collect and preserve evidence</td>
<td>Police must “take any lawful measures that appear to them to be necessary or expedient for the purpose of obtaining and preserving evidence relating to the [police] conduct” under investigation; “[a]ny person who delays, obstructs or interferes with [an ombudsman criminal investigation] is guilty of an offence”</td>
<td>Chief Constable must provide agency head with all required information and documents; possible “contempt of court” action for any person obstructing an investigation</td>
</tr>
<tr>
<td>Independent Evaluation of Program</td>
<td>None specified</td>
<td>Triennial review of all non-departmental public bodies by Home Office</td>
<td>Accountable for the general administration of the office to a specially appointed committee of the Legislature and to the Committee of Public Accounts</td>
<td>None specified</td>
</tr>
</tbody>
</table>


* Information on use of seconded officers and civilians with no police experience was obtained from TULLOCH, supra note 50, § 4.724, ¶¶ 171-73.
Table 7. Critical Incident Relevant Regulations and MOUs for U.K./Ireland Agencies

<table>
<thead>
<tr>
<th>Agency</th>
<th>Regulations and MOUs</th>
</tr>
</thead>
</table>
| Northern Ireland PONI | - Royal Ulster Constabulary (Complaints etc.) Regulations 2000  
- The Police (Conduct) Regulations (Northern Ireland) 2016 |
| England and Wales IOPC | - The Police (Complaints and Misconduct) Regulations 2012  
- Statutory Guidance to the Police Service (Amended May 2015)  
- Statutory Guidance to the Police Force on Achieving Best Evidence in Death and Serious Injury Matter (January 2019) |
| Ireland GSOC | - GSOC MOU dated September 2013 |
| Scotland PIRC | - MOU between PIRC and the Police Service of Scotland and the Scottish Police Authority (dated October 2013)  
- The Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013  
- The Police Investigations and Review Commissioner (Application and Modification of the Criminal Justice (Scotland) Act 2016) Order 2017 |

C. Comparison of Other Global Agency Enabling Acts

The UK/Ireland ICIIA model is also used by the four ICIIA agencies operating outside of UK/Ireland and Canada. Three of the agencies operate on a national level, one on a municipal level. While the two pseudo-ICIIA agencies (Chicago and New Zealand) have minimal (if any) resources directed towards original critical incident investigations,205 Jamaica and South Africa are the two agencies in the world that are the most active in the filing of criminal charges against police officers, to include charges recommended or filed each year for critical-incident-related homicides.206

205 See infra tbl.9 (showing New Zealand and Chicago as the only ICIIA agencies where investigators have not been granted police powers by statute).
1. Other Global ICIIA Regulations

The COPA and Jamaica INDECOM have provisions in their enabling acts permitting them to create regulations independent of any other governmental agency.\(^{207}\) The South African IPID enabling act authorizes the Minister of Police to promulgate regulations on behalf of the IPID.\(^{208}\) The New Zealand enabling act has no provisions for the creation of regulations and it was verified that none exist;\(^{209}\) no regulations for INDECOM could be located.\(^{210}\)

### Table 8. Enabling Statutes for Other Agencies

<table>
<thead>
<tr>
<th>Agency</th>
<th>Enabling Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chicago COPA</td>
<td>Municipal Code of Chicago, Chapter 2-78 (Civilian Office of Police Accountability)</td>
</tr>
<tr>
<td>New Zealand IPCA</td>
<td>Independent Police Conduct Authority Act 1988; Independent Police Conduct Authority Amendment Act 2007</td>
</tr>
</tbody>
</table>

\(^{207}\) See Chl., Ill., Municipal Code § 2-78-120(r) (2019); The Independent Commission of Investigations Act 12 of 2010, part IV, s. 35 (Jam.). These provisions are similar to the England & Wales IPCC enabling statute. See Police Reform Act 2002, c. 30 § 22 (UK). In the case of Jamaica, the enabling statute for Jamaica’s ICIIA granted it the ability to enact regulations in support of its activities. See The Independent Commission of Investigations Act 12 of 2010, part IV, s. 35 (Jam.).

\(^{208}\) See Independent Police Investigative Directorate Act 1 of 2011 § 34 (S. Afr.).

\(^{209}\) See E-mail from Pieter Roozendaal, Corp. Manager, Indep. Police Conduct Auth., to Richard Rosenthal (July 15, 2018, 3:55 PT) (on file with author).

\(^{210}\) Just before press time of this Article, a representative of INDECOM communicated to the author that while the Jamaican Parliament did not ratify INDECOM regulations, INDECOM has been operating as if they had been passed, having promulgated the unratified regulations to police and incorporated them into the Force Orders.
Table 9. Comparisons of Enabling Statutes for Other Agencies

<table>
<thead>
<tr>
<th>Statutory Issues</th>
<th>Chicago COPA</th>
<th>New Zealand IPCA</th>
<th>Jamaica INDECOM</th>
<th>South Africa IPID</th>
</tr>
</thead>
<tbody>
<tr>
<td>Operating Date</td>
<td>Sept. 2017</td>
<td>2007</td>
<td>2010</td>
<td>2011</td>
</tr>
<tr>
<td>Amendments to Enabling Act</td>
<td>None</td>
<td>2008, 2012</td>
<td>None</td>
<td>2018 (pending)</td>
</tr>
<tr>
<td>Regulation or MOU</td>
<td>Agency developed regulations</td>
<td>None</td>
<td>None</td>
<td>Regulations</td>
</tr>
<tr>
<td>Date of Enaction of Regulations</td>
<td>April 2018</td>
<td>N/A</td>
<td>N/A</td>
<td>2011</td>
</tr>
<tr>
<td>Amendments of Regulations or MOU</td>
<td>None</td>
<td>N/A</td>
<td>N/A</td>
<td>2018</td>
</tr>
<tr>
<td>Mandate</td>
<td>Citizen complaints, criminal and administrative investigations of critical incidents; pattern and practice investigations</td>
<td>Citizen complaints; critical incidents, “on its own motion” where “there are reasonable grounds to carry out an investigation in the public interest”</td>
<td>Complaints regarding death or injury at the hands of the police, assault, sexual assault, property damage or an abuse of the rights of a citizen; investigations of incidents may be taken upon Commission’s own initiative, including any incident “likely to have a significant impact on public confidence” in the police</td>
<td>All complaints made against the police; must investigate any death in police custody, deaths as a result of police actions, complaints regarding the discharge of a firearm by an officer, rape by an on or off-duty officer, rape in custody, complaint of police torture or assault, corruption, and systemic corruption</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Chicago COPA</td>
<td>New Zealand IPCA</td>
<td>Jamaica INDECOM</td>
<td>South Africa IPID</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------------</td>
<td>--------------------------------------------------</td>
<td>--------------------------------------------------</td>
<td>-------------------------------------------------</td>
<td>-------------------------------------------------</td>
</tr>
<tr>
<td>Involvement in Administrative investigations or Police Discipline?</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Notification Requirements</td>
<td>Receives notifications from the Department related to incidents that fall within its investigatory jurisdiction</td>
<td>Police required to provide notification of critical incidents “as soon as practicable”</td>
<td>Police to provide notification to Commission within 24 hours of an incident falling within the jurisdiction of the Commission</td>
<td>Immediate notification and a written report within 24 hours of the incident</td>
</tr>
<tr>
<td>Ability to Lay Charges?</td>
<td>Refer to State Attorney</td>
<td>Makes recommendations to Commissioner of Police</td>
<td>Investigative report furnished to Director of Public Prosecutions</td>
<td>Referred to the National Prosecution Authority</td>
</tr>
<tr>
<td>Seconded Officers as Investigators?</td>
<td>Not permitted</td>
<td>Not specified; none used</td>
<td>Not specified; none used</td>
<td>Not specified; no indication of use</td>
</tr>
<tr>
<td>Civilians (No Police Experience) as Investigators?</td>
<td>Yes</td>
<td>Not specified; use investigators from police and non-police backgrounds</td>
<td>Not specified; staff described in annual report as “civilian”</td>
<td>Not specified</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Chicago COPA</td>
<td>New Zealand IPCA</td>
<td>Jamaica INDECOM</td>
<td>South Africa IPID</td>
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<tr>
<td>------------------</td>
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</tr>
<tr>
<td>Qualifications/Limitations for Director</td>
<td>An experienced attorney &quot;with knowledge of law enforcement&quot;; may never have been a city police officer or a non-sworn employee of the PD within the last 5 years or an employee of the State Attorney's Office within the last 5 years</td>
<td>Must be a judge or a retired judge</td>
<td>Must hold qualifications necessary to hold office as a Justice of the Supreme Court; may not be a member of Parliament; may not have declared bankruptcy or have been convicted of a crime involving dishonesty, or have an undisclosed contract with the government</td>
<td>“A suitably qualified person”</td>
</tr>
<tr>
<td>Section of Director</td>
<td>Selected by Mayor; approved by City Council</td>
<td>Appointed by Governor General on recommendation of House of Representatives</td>
<td>Appointed by Governor General on recommendation of Prime Minister after consultation with Opposition</td>
<td>Nominated by Minister and confirmed by Parliamentary Committee</td>
</tr>
<tr>
<td>Director Term of Office</td>
<td>Four years with potential for reappointment</td>
<td>Five-year term</td>
<td>Five-year term with potential for reappointment to additional terms not exceeding five years</td>
<td>Five-year term with potential for one additional five-year term</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Chicago COPA</td>
<td>New Zealand IPCA</td>
<td>Jamaica INDECOM</td>
<td>South Africa IPID</td>
</tr>
<tr>
<td>----------------------------------</td>
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<td>-------------------</td>
</tr>
<tr>
<td>Removal from Office</td>
<td>No provision</td>
<td>Removal only for conduct that would result in removal from judicial office</td>
<td>Removed only for “stated cause” by Governor General after recommendation by a tribunal appointed after a recommendation by Parliament; mandatory retirement at age 75, except where needed to complete an investigation</td>
<td>Removal only for misconduct, incapacity, or incompetence by a committee of the National Assembly upon adoption of a resolution of the National Assembly calling for the Director’s removal (by a 2/3 vote)³</td>
</tr>
<tr>
<td>Director Chain of Command</td>
<td>Reports to Mayor</td>
<td>Independent Crown entity “statutorily independent from government and the police”</td>
<td>An Independent Legislative Committee including the Speaker, the President of the Senate, the Leader of Government Business, the Leader of Opposition Business, and the Minister of the Public Service</td>
<td>Minister of Police and Parliament</td>
</tr>
<tr>
<td>Limitations on Hiring/Assignment of Investigators</td>
<td>May never have been a sworn member of the police within the last 5 years; investigative staff “with the requisite knowledge, skill, training, and ability”</td>
<td>None specified</td>
<td>None specified</td>
<td>Minimum Grade 12 education and “knowledge and relevant experience of criminal investigations or other relevant experience”; no conflict of interests permitted</td>
</tr>
<tr>
<td>Police Powers</td>
<td>Not specified</td>
<td>Not specified</td>
<td>“Like powers, authorities and privileges as are given by law to a constable”</td>
<td>“The powers . . . which are bestowed upon a peace officer or a police official”</td>
</tr>
<tr>
<td>Statutory Issues</td>
<td>Chicago COPA</td>
<td>New Zealand IPCA</td>
<td>Jamaica INDECOM</td>
<td>South Africa IPID</td>
</tr>
<tr>
<td>-------------------------</td>
<td>-------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Cooperation Requirements</td>
<td>Duty of all City employees to cooperate with agency, officers required to</td>
<td>Police required, upon request, to provide all &quot;information and assistance as is</td>
<td>Police must preserve the scene and evidence; it is a crime to obstruct the</td>
<td>“Full cooperation,” including arrangement of an “identification parade” within 48</td>
</tr>
<tr>
<td></td>
<td>participate in audio-recorded interviews</td>
<td>necessary&quot; in relation to the investigation of any complaint, incident, or other</td>
<td>commission</td>
<td>hours of a request, provision of all information and documentation required,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>matter</td>
<td></td>
<td>and availability of police to provide affidavits, give evidence, or produce</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>necessary documents.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Interference or obstruction of an investigation is an offense</td>
</tr>
<tr>
<td>Independent Evaluation</td>
<td>Subject to review and audit by Inspector General for Public Safety</td>
<td>None specified</td>
<td>Judicial review of decisions by complainants, police, and government officials</td>
<td>None specified</td>
</tr>
<tr>
<td>of Program</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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\(^b\) In 2016, the Constitutional Court of South Africa found invalid an action by the Minister of Police to suspend and institute disciplinary action against the Executive Director of the IPID based on allegations of corruption. The Court ruled that to the extent the IPID Act, the Public Service Act and IPID Regulations allowed the Minister “to suspend, remove or institute disciplinary proceedings against the Executive Director,” those provisions of law were "inoperative." *McBride v. Minister of Police and Another* 2016 (11) BCLR 1398 (CC) at para. 55 (S. Afr.). Specifically, the Court concluded that the IPID Act was unconstitutional to the extent that it gave the Minister the power to remove the Executive Director from his office without parliamentary oversight. “This is antithetical to the entrenched independence of IPID envisioned by the Constitution as it is tantamount to impermissible political management of IPID by the Minister [of police].” *Id.* para. 38.
The regulations that were located for Chicago and South Africa are fairly extensive. The Chicago regulations cover topics including: the mandate of the agency; expectations for qualifications of agency investigators; timeliness of investigations; the conduct of interviews of police and civilian witnesses; requirements for police cooperation with agency investigations; circumstances under which the agency would respond to the scene of critical incidents; the precedence of agency versus police department investigations; referrals of cases to prosecuting agencies; and maintaining confidentiality in investigations. The South African Regulations cover topics including: the manner of police notification of a critical incident to the agency; the mandate of the agency; expectations regarding thoroughness of investigation; securing of the incident scene; timeliness of investigations; maintaining confidentiality in investigations; investigative procedures; and ensuring police cooperation.

Overall, regulations and MOU’s of the aforementioned ICIIAs were similar in comparison with the ICIIAs operating in Canada and in the U.K./Ireland. The enactment of regulations and MOUs appears to be based on the specific historical and current experiences of each jurisdiction.

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211 See Civilian Office of Police Accountability Rules and Regulations, supra note 129.

212 See Independent Police Investigative Directorate Act 1 of 2011 § 34 (S. Afr.).
D. Amendments to Enabling Acts

As shown in tables 3, 6, and 9, it is common for jurisdictions to amend the enabling acts of ICIIAs after the agency has had some experience in conducting investigations.\textsuperscript{213} These amendments tend to be specific to the jurisdiction and based on the level of cooperation received from the police.

However, in some cases, recommendations for amendments to enabling acts have gone without action, or taken years to enact, often based on a lack of political will to put forward recommended amendments in the face of police opposition:

Table 11. Proposed Amendments

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Recommendations</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>British Columbia\textsuperscript{a}</td>
<td>- Amend Act to give the Director the discretion to appoint investigators who served as officers in British Columbia in the 5 years preceding their appointment*&lt;br&gt;- Require a comprehensive review of the program at least once every 5 years**&lt;br&gt;- Ensure reports of civilian monitors are public documents**</td>
<td>*Amendment not enacted until 2019&lt;br&gt;**Not enacted</td>
</tr>
<tr>
<td>Ontario\textsuperscript{b}</td>
<td>- Require the SIU to report publicly on investigative conclusions where no charges are laid against officers*&lt;br&gt;- Require the police to notify the SIU after all police-related critical incidents (including no-hit police shootings)*&lt;br&gt;- Provide the SIU with broader powers to lay charges against officers**</td>
<td>*Amendments enacted 2019&lt;br&gt;**Not enacted</td>
</tr>
<tr>
<td>South Africa\textsuperscript{c}</td>
<td>- Provide agency with the powers to institute its own prosecutions (independent from Attorney-General’s rights in that regard)&lt;br&gt;- Staff protection from civil liability&lt;br&gt;- Require the National Defense Force to cooperate with IPID investigations into police conduct&lt;br&gt;- Notification to IPID of all civil actions filed against the police&lt;br&gt;- Unrestricted access to police dockets and records</td>
<td>No amendments to date</td>
</tr>
</tbody>
</table>

\textsuperscript{213} See supra tbls.3, 6 & 9.
ICIIAs and Police Oversight 911

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Recommendations</th>
<th>Response</th>
</tr>
</thead>
</table>
| Jamaica      | - Amend language to ensure agency has the authority to investigate incidents without allegations of misconduct  
- Clarify agencies' ability to institute and undertake criminal proceedings  
- Clarify agency's ability to conduct its own forensic examinations  
- Ensure agency's ability to make recommendations on assignment of police based on results of investigations  
- Clarify the powers of an investigator under the Act  
- Clarify the agency's role at a crime scene  
- Allow the agency to seek the aid of the court in obtaining relevant records | No amendments to date |

Recommending Authorities

a Special Committee to Review the IIOBC, Feb. 2015.
b TULLOCH, supra note 50.
d JAMACIAN HOUSES OF PARLIAMENT, supra note 163.

V. DISCUSSION AND UNDERLYING RATIONALE FOR STATUTORY CHOICES MADE IN THE CREATION OF ICIIAS

A. Statutory Provisions Emphasizing Independence

The ICIIA model of civilian oversight of law enforcement is primarily intended to “produce bias-free investigations that enhance public trust in, and the legitimacy of, the government.” The key model concept is one of “independence,” although the various models differ in how much structural independence each agency actually has from the government-of-the day and to what extent current and former police officers serve as staff to each agency.

From a statutory perspective, agency enabling acts and concomitant regulations attempt to ensure independence through various means. Eight agencies of the fourteen, or 57%, limit the background of the agency director to persons not having ever served as a police officer. Chicago and three agencies in Canada limit the background of investigators to persons who are not currently serving as police officers. However, many agencies, even though permitted

214 Katz, supra note 21, at 235.
215 See CHI., ILL., MUNICIPAL CODE § 2-78-120(e) (2019).
216 See id. § 2-78-120(e) (2019).
to use “seconded” officers as investigators, have chosen not to do so (Manitoba, England and Wales, Scotland, New Zealand, Jamaica, and South Africa).  

Limitations on the ability to remove an agency director without cause have been enacted with respect to many of the agencies. South Africa and Ireland have the most noteworthy protections, allowing removal of the director only for cause and only after a vote of Parliament. England, Scotland, New Zealand, and Jamaica all require cause for the removal of their directors. Northern Ireland also requires cause, however, the director can be removed in the name of “efficiency.” With respect to the six Canadian agencies, only one (Manitoba) requires cause for the termination of the director, with all other directors serving “at [the] will” of the government of the day.

Although the vast majority of the agency directors report to the Attorney General or Solicitor General (Canadian agencies), Ministers (Scotland), Minister of Justice or Minister of Police (Ireland and South Africa), Secretary of State (Northern Ireland and England), or the mayor (Chicago), New Zealand and Jamaica have significantly more independence from government.

217 See supra tbl.9.
218 See supra tbl.9; see, e.g., Independent Police Investigative Directorate Act 1 of 2011 § 6 (S. Afr.).
219 See supra tbl.9.
220 See supra tbl.9.
222 Compare Police Services Act, C.C.S.M., c P.94.5, s 58(2) (Can. Man.) (noting that cause is required for termination), with Comprehensive Ontario Police Services Act, S.O. 2019, c 1, s 131(1) (indicating that the Law Enforcement Complaints Director is appointed at the will of the Lieutenant Governor in Council).
224 See About Us, supra note 95.
supervision. New Zealand’s IPRA reports itself to be “statutorily independent of government” and Jamaica’s INDECOM reports to a bi-partisan committee of Parliament.

Public reporting by civilian oversight agencies is commonly used as a method to ensure transparency and satisfy public concerns over issues of independence. Only one ICIIA agency, ASIRT (Alberta, CA) has no statutory provision requiring public reports. ASIRT has not publicly published an annual report on its website since 2014 but does generally provide public reports at the conclusion of its investigations.

In Canada, additional independence is provided for some ICIIAs by authorizing ICIIA Directors to directly lay criminal charges against police officers (Ontario, Manitoba, and Nova Scotia). In Jamaica, INDECOM was originally thought to have the authority not only to file criminal charges but to pursue them independently of the Director of Public Prosecutions (DPP). However, the courts have recently held that INDECOM does not have the authority to either lay charges or substitute its judgement for that of the DPP. Similarly, most ICIIA agencies, worldwide, are required to submit annual reports to the public. In Canada, the Ontario SIU’s legislation was only recently amended to require public reporting, the agency has issued annual reports and issued public statements on individual cases throughout its history. See, e.g., supra note 50, pt. 1 §§ 6.310, 6.320, resulting in a statutory amendment to the Ontario Police Act in 2019. See Wendy Gillis, What’s Changing in Ford’s New Police Oversight Law—and Why it Matters, STAR (Feb. 22, 2019), https://www.thestar.com/news/gta/2019/02/22/whats-changing-in-fords-new-police-oversight-law-and-why-it-matters.html [https://perma.cc/JBD4-2YLS].

See Police Act, R.S.A. 2000, c P-17, s 14 (Can. Alta.) (providing that annual reports are only required to be filed with the Minister, further lacking any explicit public reporting requirements).


See id. at [212].
their investigations to autonomous prosecutorial agencies for decisions as to whether criminal charges will be pursued.\textsuperscript{235} Even in Ontario, Manitoba, and Nova Scotia, Crown Counsel ultimately has the authority to pursue or dismiss criminal charges filed by ICIIA Directors.\textsuperscript{236}

\textbf{B. Independence and “Civilian-ness”}

After allegations were raised that the second Police Ombudsman for Northern Ireland had established too close a relationship between PONI and the Police Service of Northern Ireland,\textsuperscript{237} an inspection by “Criminal Justice Inspection Northern Ireland” made the following observation:

The term independent can be defined as ‘free from outside control’ or ‘not subject to another’s authority’. Independence is not an absolute. In the context of civilian oversight of the police, it is a complex and difficult area which can often be presented as a zero-sum position. Any movement along a continuum can be seen to either weaken or strengthen independence depending on viewpoint.\textsuperscript{238}

After conducting interviews with staff from ICIIAs in England, Northern Ireland and Ireland, Savage concluded that “independence, far from being simply an ontological state, a particular institutional form, is a site of complex, variable cultural notions and frameworks for action.”\textsuperscript{239} He concluded that “formal organizational ‘independence’ . . . are a necessary but not sufficient condition for realizing the objectives” of independent oversight agencies.\textsuperscript{240}

\footnotesize
\textsuperscript{235} See supra tbls 3, 6 & 9.  
\textsuperscript{236} See Criminal Code, R.S.C. 1985, c. C-46, s. 579.001, par. (1) (Can.); supra tbl.3.  
\textsuperscript{238} Id. at 4. The Police Ombudsman resigned from his position shortly after the release of the Maguire report and was subsequently replaced by the author of the report, the Chief Inspector of Criminal Justice in Northern Ireland. See Police Ombudsman to Resume RUC Misconduct Investigations, BBC News (Jan. 23, 2013), https://www.bbc.com/news/uk-northern-ireland-21152677 [https://perma.cc/6Y7L-M9BV]. One of the issues raised in the allegations against the Ombudsman was the assignment of former and seconded officers as investigators in cases wherein it was believed that there was a potential for bias. See Maguire, supra note 237, at 19.  
\textsuperscript{239} See Savage, Thinking Independence, supra note 24, at 110.  
\textsuperscript{240} Id.
The issue of agency independence has also been applied to the backgrounds of ICIIA investigators and the potential negative impact investigators with police backgrounds may have on the objectivity of ICIIA investigations. However, the issue of to what extent civilians without police experience can competently investigate police-involved critical incidents remains controversial. Confirming just how controversial “civilianization” of an ICIIA remains, only one ICIIA agency has statutory language that supports a goal of complete civilianization for its investigative staff.

This being said, it may very well be the culture of the organization and how it develops over time that has the most substantial impact on the objectivity, fairness and competency of each ICIIA, more so than the specific nature of the entity as created by statute or the background of its investigators. While it could certainly be argued that the more structural independence the better, the social, political and historical nature of the jurisdiction and the leadership of the involved government stakeholders appears more likely to have a meaningful impact on the actual independence of each agency.

C. Independence and Capture Theory

Capture theory has traditionally been used to discuss the relationship between regulators and those being regulated and emphasizes the role of interest groups in the formation and implementation of public policy. As described by Prenzler, “[c]apture theory explains poor performance in regulation with reference to techniques by which the group being regulated subverts the impartiality and zealfulness of the regulator,” and has been identified as “a central concern in police complaints research.”

Although there has been noteworthy research on civilian oversight of law enforcement dating back to the 1970s, only a few academics have specifically applied capture theory to the evaluation of police oversight mechanisms. The lack of a more robust application of

241 See Savage, Seeking ‘Civilianness’, supra note 24, at 897.
242 See Prenzler & Ronken, supra note 16, at 166.
244 See infra text accompanying notes 283–287.
246 See Prenzler, supra note 24, at 662.
247 See Savage, Thinking Independence, supra note 24, at 96.
248 See DE ANGELIS ET AL., supra note 3, at 5.
249 See, e.g., Prenzler, supra note 24, at 659.
capture theory to civilian oversight is surprising given the ongoing demands on oversight agencies to balance the expectations for independence against the need to “work ‘collaboratively and cooperatively’ with the police.” As such, these agencies have long faced both the perception and reality of “capture” by law enforcement agencies and police culture brought to the agency by current or former police. This is a challenge faced by all civilian oversight agencies, to include the ICIA model of oversight.

The first academic to discuss capture theory and apply it to civilian oversight of law enforcement was Prenzler in an article entitled “Civilian Oversight of the Police: A Test of Capture Theory.” Prenzler noted that “[a]lthough the term ‘capture’ has not been adopted in the literature on police oversight, the concept is implied in the issue of independence from police influence.” Prenzler went on to cite a 1991 Canadian study which concluded that a certain degree of “tension” was “inevitable” in the relationship between police agencies and the oversight agencies that monitored and reviewed their actions: “[c]o-option of the civilians by police is as certain a defeat as loss of mandate.” Prenzler also noted a 1991 study by Maguire which noted that although oversight agencies must “become thoroughly acquainted with their police organization and its culture...[t]hey also have to guard against the...danger of becoming ‘co-opted’ through overfamiliarity into police ways of thinking.”

Prenzler identified a number of circumstances which, he believed, increased the likelihood of regulatory capture of a civilian oversight agency. Specifically, he opined that the use of seconded police officers as investigators and the under-resourcing of an oversight agency (thereby forcing agency reliance on the police to provide support and assistance) were both significant factors in potential capture. In addition, Prenzler also identified the need of an agency to “survive” as having a potential impact on agency capture. In fact, there have been many examples of oversight mechanisms being

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250 See Rosenthal, supra note 1, at 440.
251 See id.; MARIN 2008 REPORT, supra note 33.
252 See Prenzler, supra note 24.
253 Id. at 663.
254 Id.
255 Id.
256 See id. at 664–65.
257 See id.
258 See id. at 662.
defunded as the result of a loss of support from government officials, often responding to police opposition to oversight.259

In 2013, in two essays published simultaneously and entitled: “Thinking Independence,”260 and “Seeking Civilianness,”261 capture theory was applied to an examination of the three ICIIA mechanisms in the United Kingdom (Northern Ireland PONI, England and Wales IPCC and Ireland’s GSOC).262 The author “present[ed] a picture” of these agencies having to deal with “a constant interaction between the aspirations of independence and the ever-present challenges of regulatory capture.”263

After interviewing ICIIA staff in England, Ireland and Northern Ireland, Savage noted that “elements of police attitudes and orientations . . . are inherited in part by oversight bodies, which, in aiming to exploit the benefits of police experience, ‘buy in’ [to] such attributes through the employment of former police officers as investigators.”264 Savage identified what he called “[t]he three most prominent working definitions of independence . . . impartiality, distance (from the police) and objectivity . . . .”265 He argued “that independent investigation of police complaints is a site of an interaction: a constant dialectic between the goals and aspirations of independent oversight and the contextual conditions within which it must operate.”266 Like Prenzler, Savage identified the “proximity to the police” and “reliance on police support” as two important indicators of a lack of independence on the part of oversight agencies responsible for investigating police officers.267 Savage concluded that regulatory capture may be seen not just as something that ‘is’ or ‘is not’ present, but rather as part of a relational interaction between parties and institutions which provides the environment within which regulatory governance must exist,

261 See id. at 887; Savage, Thinking Independence, supra note 24, at 95–96.
262 Savage, Thinking Independence, supra note 24, at 94.
263 Savage, Seeking ‘Civilianness’, supra note 24, at 902.
264 Savage, Thinking Independence, supra note 24, at 108.
265 Id. at 109.
266 See id.
and the outcome of which will determine the nature of ‘independence’ as delivered.\textsuperscript{268}

1. The Application of Capture Theory to the Two Models of ICIIAs of Canada

The two different models of ICIIA in Canada warrant a fuller discussion of capture theory as it relates to the use of police officers or civilians as ICIIA investigators. Although Prenzler and Savage both assert that there is an increased risk of “capture” for an oversight agency that is staffed with currently serving and retired police officers,\textsuperscript{269} many ICIIAs globally use “seconded” police staff and all ICIIA agencies currently use retired officers to fill their investigative ranks.\textsuperscript{270}

It should first be noted, however, that all models of citizen oversight of law enforcement are subject to accusations of police co-option.\textsuperscript{271} Review-focused agencies are sometimes perceived to be staffed by volunteer citizens who come from a “pro-police” orientation,\textsuperscript{272} and auditor/monitor focused agencies have often been criticized for being too cooperative and collaborative with the police.\textsuperscript{273}

As previously noted, in Canada, amongst the six oversight agencies in the country which conduct criminal use-of-force investigations, there are two different investigative models; one that permits the use of seconded officers and the other that does not.\textsuperscript{274} The first model argues in favor of independence from the police;\textsuperscript{275} the second model highlights the belief that competency can only be immediately achieved by using investigators with current policing experience—

\textsuperscript{268} Id.
\textsuperscript{269} See Prenzler, supra note 24, at 663, 671–72; Savage, Seeking ‘Civilianness’, supra note 24, at 898, 900.
\textsuperscript{270} See Savage, Seeking ‘Civilianness’, supra note 24, at 889–90.
\textsuperscript{271} The most recent classification schema developed to describe the different models of police oversight in existence in the United States “group[ed] oversight agencies into three categories based on the core agency functions: 1. Investigation-focused, 2. Review-focused, and 3. Auditor/monitor-focused.” DE ANGELIS ET AL., supra note 3, at 24.
\textsuperscript{272} See id. at 27, 28.
\textsuperscript{273} See id. at 31–32.
\textsuperscript{274} See supra text accompanying notes 167–168.
independence is instead sought through civilian leadership of the organization.276

While the current literature emphasizes the danger of a cultural form of capture in programs that use seconded and retired officers,277 the only public evidence of actual capture relates to the Ontario and B.C. programs which both forbid the use of seconded officers and have hired a substantial number of civilians without police experience as investigators.278 In both agencies, it was reported that police cultures developed that had a negative impact on the objectivity and thoroughness of investigations.279

The argument in favor of the use of seconded officers is based on the proposition that only police officers with current experience are capable of conducting criminal investigations into police-involved offences and critical incidents.280 Although not mentioned in the current literature, those arguing in favor of the secondment model could argue that capture may be more easily avoided by agencies using seconded officers because those officers are easier to replace then permanent staff. In the case of the Ontario SIU and the IIO-BC, all investigators (including retired officers) are protected as members of the Public Service.281 As such, they cannot be replaced without “cause.”282 With respect to seconded employees, however, they can be easily transferred back to their home agencies upon any indication of bias or insubordination, without any due process concerns, at the behest of a civilian director.283

The argument in favor of the use of retired officers also relies on the belief that only experienced police investigators have the

276 See Prenzler & Ronken, supra note 16, at 166, 167 tbl.3; supra text accompanying note 167; see, e.g., About SIRT: Mission & Mandate, N.S. SERIOUS INCIDENT RESPONSE TEAM, https://sirt.novascotia.ca/about [https://perma.cc/57NG-FY9G].
277 See MARIN 2008 REPORT, supra note 33, at 4; Prenzler, supra note 24, at 664–65; Savage, Thinking Independence, supra note 24, at 94.
278 See MARIN 2008 REPORT, supra note 33, at 4; IIOBC ANNUAL REPORT, supra note 275, at 4, 7.
279 See MARIN 2008 REPORT, supra note 33, at 6, 8; IIOBC ANNUAL REPORT, supra note 275, at 4, 5.
280 See Prenzler & Ronken, supra note 16, at 166, 167 tbl.3.
282 See Public Service Act, R.S.B.C. 1996, c 385, s 22 (Can. B.C.); Public Service of Ontario Act, S.O. 2006, c 35, s 34 (Can.).
283 See Arranging a Secondment: Practical and Legal Considerations, NET LAWMAN (Jan. 2020), https://www.netlawman.co.uk/ia/secondment-agreements (explaining that in a secondment employment arrangement, the secondee—in this case seconded police officers working for independent investigative agencies—remains employed by their original employer while temporarily assigned to work for another organization).
competency to conduct criminal investigations of the police. In fact, in British Columbia, in its 2015–2016 Annual Report, the Police Complaints Commissioner,284 noted that although “[r]ecent commissions of inquiry and review involving police incidents and oversight . . . have echoed a common theme: the importance of civilian participation in the oversight and investigation of police-involved incidents,” his office would “continue to rely upon the valuable contribution from former police officers to address its needs for expertise and knowledge in the field of policing.”285 Similar arguments were dealt with in 2012 by the Chair of the United Kingdom’s IPCC after it was noted that a noteworthy percentage of the commission’s investigators were former police officers.286 The Chair was quoted as saying that she believed that former police officers brought “essential forensic and investigative skills” to the IPCC.287 However, she acknowledged the importance of having an appropriate balance of staff and noted that the IPCC would be conducting “a recruitment drive targeting people from non-police backgrounds.”288

Upon the maturation of the newer ICIIA programs in Canada, it may be possible to compare statistics regarding the laying of charges in on-duty use-of-force cases to determine if any of the agencies may evidence indications of capture through a lack of pursuit of criminal charges when compared between models. In addition, comparison of the quality of critical incidents investigations conducted by the investigators from different backgrounds could provide further evidence against or in support of possible ICIIA agency capture.

D. Independence and Cost

As shown in table 12, the ICIIA model of oversight is quite expensive and, in fact, the independent investigation model of oversight is the most expensive and “organizationally complex” of all.289 As such, this model of oversight tends to be created only after

284 See OPCC ANNUAL REPORT, supra note 275, at 2. The OPCC’s primary authority consists of reviewing and monitoring municipal police administrative investigations. See Police Act, R.S.B.C. 1996, c 367, s 51.02 (Can. B.C.).
285 See OPCC ANNUAL REPORT, supra note 275, at 10.
287 Id.
288 See id.
289 See DE ANGELIS ET AL., supra note 3, at 26; infra tbl.12.
a jurisdiction has suffered major political or social upheaval resulting in overwhelmingly negative public perceptions of the police.\footnote{See Colleen Lewis, The Politics of Civilian Oversight: Serious Commitment or Lip Service?, in CIVILIAN OVERSIGHT OF POLICING, supra note 20, at 19, 22; Tim Prenzler, Scandal, Inquiry, and Reform: The Evolving Locus of Responsibility for Police Integrity, in CIVILIAN OVERSIGHT OF POLICE, supra note 20, at 3, 15–16. With the notable exceptions of Alberta and Scotland. See Ian D. Scott, Oversight Overview, in ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA 11, 20 (Ian D. Scott ed., 2014); Wood, supra note 9, at 85.}

The willingness of governments to create these agencies, even in the face of the minimal number of criminal charges that result from most ICIIA agency investigations,\footnote{See infra tbl.12. Jamaica, South Africa, and Northern Ireland are notable exceptions.} shows the importance that governments place in the public’s faith in the police and the lengths they are willing to go to alleviate public concerns over police accountability. However, as indicated above, full structural independence of these agencies is not a step that most governments (excluding New Zealand and Jamaica) have been willing to take in favor of potentially solidifying public faith in this model of oversight.

Table 12. Costs and Performance of ICIIAs

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Referrals for Prosecution</th>
<th>Source</th>
<th>Annual Budget (CAD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>England and Wales</td>
<td>590 independent investigations; results not reported</td>
<td>2016–2017 annual report</td>
<td>$126.8 million</td>
</tr>
<tr>
<td>South Africa</td>
<td>696 death investigations; 61 cases sent to prosecutor with recommendations; 17 convictions as a result of a death caused by police action.</td>
<td>2016–2017 annual report</td>
<td>$23.2 million</td>
</tr>
<tr>
<td>Chicago</td>
<td>37 notifications retained for investigation; 5 referrals to State’s Attorney’s Office</td>
<td>2017 annual report</td>
<td>$18.6 million</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>1,148 investigations - 24 recommended for prosecution.</td>
<td>2016–2017 annual report</td>
<td>$15.1 million</td>
</tr>
<tr>
<td>Ireland</td>
<td>51 death and serious injury referrals from police; 11 criminally investigated; 0 recommended for criminal prosecution</td>
<td>2016 annual report</td>
<td>$12.9 million</td>
</tr>
<tr>
<td>Ontario</td>
<td>17 charges filed out of 196 investigations</td>
<td>2016–2017 annual report</td>
<td>$9.2 million</td>
</tr>
<tr>
<td>British Columbia</td>
<td>18 investigations completed resulting in one criminal assault charge</td>
<td>2015–2016 annual report</td>
<td>$7.3 million</td>
</tr>
</tbody>
</table>

See infra tbl.12. Jamaica, South Africa, and Northern Ireland are notable exceptions.
Bias in internal police investigations has been identified in many forms, to include “half-hearted” investigations, officer interviews that are tainted by leading questions, and institutional failures of the police to address “grossly negligent conduct, tactics, or strategy.” Assuming these actions are taken as the result of institutional systemic bias, an independent agency approach to investigations of police-related critical incidents is sometimes perceived as the most appropriate solution, even in the face of significant expense. Even so,

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**Jurisdiction** | **Referrals for Prosecution** | **Source** | **Annual Budget (CAD)**
---|---|---|---
Scotland | 47 cases closed; 20 referred to Crown | 2016–2017 annual report and annual audit report | $5.3 million
Québec | No information published | 2015–2016 annual reporting period: no annual report available | $3.8 million
New Zealand | 9 shooting reports published; all justified | 2016–2017 annual report | $3.5 million
Alberta | 15 charges filed out of 248 investigations | 2014 annual report | $3.5 million
Jamaica | 167 fatal and nonfatal shootings investigated; 222 reports completed - with 30 recommendations for criminal prosecution | 2015 annual report and audited financial statements | $3.3 million
Manitoba | 8 investigations completed resulting in one criminal assault charge | 2015–2016 annual report | $1.7 million
Nova Scotia | 28 investigation completed resulting in 5 criminal charges | 2016–2017 annual report | $0.85 million

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ICIIAs and Police Oversight

ICIIA programs are notorious for receiving inadequate funding and having difficulty recruiting and retaining qualified staff.

E. Independence and Conflict of Interest

One of the more-weighty arguments in support of the creation of the ICIIA model of oversight is based on the concept of “conflict of interest.” It is an oft stated belief that there is bias in police investigations of the police: “Many members of the public perceive that the investigators may allow loyalty to fellow officers to interfere with the impartial investigative process. This perception, even if not justified in a given case, can lead to public distrust and an undermining of public confidence in the police.”

In addition, there are many cases wherein audits and reviews of controversial police internal investigations have found a lack of zeal in police investigations of other officers. This lack of zeal is usually attributed to the idea that police officers tend to be loyal to their own.

In cases involving police-related critical incidents, it has been suggested that a police investigator would, in fact, be in a relationship requiring him or her to exercise judgment on the behalf of other police officers and have an interest of loyalty which could

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293 See, e.g., Dep’t of Justice v. Bell [2017] NICA (Civ) 69 [35–36] (documenting funding challenges related to the work of the Northern Ireland Police Ombudsman in a challenge against the government for failure to adequately fund PONI to carry out its statutory obligations to investigate historical complaints). The court ultimately concluded, however, that there was no evidence that “PONI was being starved of funds . . . so as to deliberately frustrate Parliament’s avowed intention to establish that important office and to implement the duties arising therefrom.” Id. As such, the court declined to take further action on the applicant’s motion to require the Government to provide additional funding to PONI. Id.; Ian D. Scott, Development of Civilian Oversight in Ontario, in ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA 89, 108–09 (Ian D. Scott ed., 2014); Taryn Grant, Nova Scotia Police Watchdog Says Agency Strained by Lack of Resources, STAR (June 18, 2018), https://www.thestar.com/halifax/2018/06/18/nova-scotia-police-watchdog-says-agency-strained-by-lack-of-resources.html [https://perma.cc/7FHK-JECK].

294 See, e.g., TULLOCH, supra note 50, pt. 1 ¶ 22, § 4.730, ¶ 225 (noting Executive Summary, ¶ 22 and § 4.730, ¶ 225, which discuss challenges in the hiring of civilian investigators by the Ontario SIU); IPCC Wants More ‘Non-Police’ Investigators, supra note 286 (discussing England and Wales IPCC); Saltman, supra note 79 (discussing the British Columbia IOBC).

295 See, e.g., BRAIDWOOD, supra note 19, at 411; Bobb, supra note 292, at 156; Katz, supra note 21, at 238.

296 BRAIDWOOD, supra note 19, at 411.

297 See, e.g., Bobb, supra note 292, at 157; Katz, supra note 21, at 238–39.

298 See COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTICORRUPTION PROCEDURES OF THE POLICE DEPT., COMMISSION REPORT 52 (1994).
tend to interfere with the conduct of the investigation. It has been suggested that “[t]here are three usual methods of dealing with a conflict of interest: 1. Declare the conflict of interest. 2. Remove the conflict of interest. 3. Avoid the conflict of interest.” The concept of the ICIIA model of oversight involves removing and avoiding the conflict of interest with the intent to eliminate any public perception of bias impacting an investigation.

F. Confirmation Bias

The question of to what extent police agencies (or ICIIA agencies using current or former police officers as investigators) should investigate the police is often informed by the theory of “confirmation bias.” Confirmation bias, as the term is typically used in the psychological literature, connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.” With respect to policing, “[c]onfirmation bias leads to information that is consistent with expectations being sought and information that is contradictory being ignored or devalued.”

The belief that officers investigating fellow officers will engage in “a natural, predictable, human impulse . . . [by] saying at some level, ‘There but for the grace of God go I.’” is the forerunner to the conclusion that currently serving officers should not investigate fellow officers. That same concern is often extended to the argument that currently serving officers from other agencies should also not be investigating fellow officers, and even that former officers should not be investigating currently serving officers. However, the practical problems of staffing an ICIIA solely with civilian investigators with no police experience has proven itself to be a formidable barrier, with the result that there are no agencies in existence that currently refuse to use former police as investigators.

300 Stephen Coleman, Conflict of Interest and Police: An Unavoidable Problem, 24 CRIM. JUST. ETHICS 3, 6 (2005).
301 See Mark R. Kebbell et al., Understanding and Managing Bias, in DEALING WITH UNCERTAINTIES IN POLICING SERIOUS CRIME 87, 90, 95 (Gabriele Bammer ed., 2010).
302 Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 REV. GEN. PSYCHOL. 175, 175 (1998).
303 See Kebbell et al., supra note 301, at 90.
304 Bobb, supra note 292, at 157.
306 See BRAINTWOC, supra note 19, at 25, 418–19; TULLOCH, supra note 50, pt. 1 § 4.721.
and only one with a long-term, but as-of-yet unachieved goal of doing so (British Columbia).  

**G. Independence, Deterrence, and Police Resistance**

Another concept that can be applied to the creation of ICIIAs is the theory of deterrence: “[t]he traditional argument for citizen review is based on the familiar premises of all general deterrence or ‘rule enforcement’ models.” Advocates of civilian oversight have argued that the use of external oversight mechanisms (which are less biased than internal oversight mechanisms), will result in officers being held to account in a more systemic way, which would then deter police misconduct both by officers who are punished and officers who want to avoid punishment. It can be theorized that an officer who believes that an investigation conducted by fellow officers is not likely to lead to punishment for a criminal act is more likely to commit a criminal (or deviant) act, and that if an investigation into the officer’s conduct is conducted by an unbiased agency which is more likely to hold the officer accountable, the officer is less likely to commit the criminal (or deviant) act. Under this theory, the creation and implementation of a credible ICIIA mechanism investigating police-related critical incidents would potentially result in a reduction in excessive force by officers in that jurisdiction.

Unfortunately, in practice, the creation of independent investigation type agencies appears to often result in officer distrust as to the legitimacy of the agency. When a high level of distrust

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307 As an example of the difficulty of civilianization of agencies conducting criminal investigations of the police, Israel’s Police Internal Investigations Department (“Machash”) (which is charged with conducting investigations of criminal allegations against the police, but which does not automatically conduct critical incident investigations), publicly proclaimed an intent to civilianize in 2005. See Police Internal Investigations Department, MINISTRY OF JUSTICE, https://www.justice.gov.il/En/Units/PoliceInternalInvestigationsDepartment/Pages/default.aspx [https://perma.cc/V22W-P7AG]. As of 2019 (fourteen years later), however, civilianization has still not been achieved, with the website instead reporting that “[t]he civilianization program is currently in advanced stages of preparation.” Id.

308 Livingston, supra note 25, at 654.

309 See Walker, supra note 1, at 55.

310 See DANIEL S. NAGIN ET AL., DETERRENCE, CHOICE, AND CRIME: CONTEMPORARY PERSPECTIVES 22, 82 (2018). The classical theory of deterrence suggests that “[w]hen punishment is prompt and inevitable (certain) to all crimes, punishment is effective as a deterrent to crime.” Id. at 22. Perceptual deterrence theory suggests that “if deterrence works at all, it works as a social psychological process at the individual level between the perceptions of punishment certainty, severity, and celerity a person has and their involvement in crime.” Id. at 82. In other words, a person’s “actions are influenced by what they think to be the possible consequences should they commit crime and not the actual consequences.” Id. at 82–83.

exists, it appears that officers may be more inclined to lie about an incident after-the-fact, rather than be deterred from committing the act in the first place. In addition, police resistance to investigations conducted by oversight agencies has been evidenced by litigation initiated by police, or by or on behalf of ICIIAs documenting police attempts to limit the authority of the agency or by police acting in a manner which is intended to minimize the agency’s ability to investigate and bring charges against them.

In Canada, ICIIA-related litigation has most significantly involved officers refusing to cooperate with ICIIA directives or attempting to protect themselves against ICIIA investigations. In general, the

311 See, e.g., Livingston, supra note 25, at 659–61.
314 See, e.g., Wood v. Schaeffer, [2013] 3 S.C.R. 1053, para. 17 (Can.) (concluding that the SIU regulations could not be interpreted to permit officers to confer with counsel before they completed their police reports). The Court specifically noted that “consultation with counsel at the note-making stage is antithetical to the dominant purpose of the legislative scheme because it risks eroding the public confidence that the SIU process was meant to foster.” Id. at para. 47. “Without in any way impugning the integrity of counsel or police officers, even [a] perfunctory consultation . . . is liable to cause . . . [a] threat to public confidence.” Id. at para. 83.

In British Columbia, the IIOBC was forced to file a complaint with the BC Supreme Court when Vancouver police officers, who had been designated as witness officers in an in-custody death investigation, refused to attend interviews at the order of the IIOBC Director without first being provided the opportunity to review video of the incident. British Columbia (Indep. Investigations Office) v. Vancouver Police Dep’t, [2019] B.C.J. No. 868, paras. 1–3 (B.C. Ct.
Canadian courts have been supportive of the ICIIA agencies mandates and regulations. However, ICIIA-related case law appears to be the result of ICIIA agencies (or their allies) using the courts as a mechanism of last resort and only after regulations or MOU’s put into place to ensure police cooperation failed to obtain the level of cooperation anticipated and required to conduct independent and competent ICIIA investigations.

H. Independence and Risk Management Theory

The U.K./Ireland ICIIA model also has a basis in risk management theory. While the Canadian model is based on a more traditional “rule enforcement” approach to civilian oversight, the U.K./Ireland model often includes a mandate to review police policies, tactics and training in an effort to reduce the risk of critical incidents even taking place. Conducting policy reviews and updating police training and tactics to minimize risk has long been considered to be an effective tool for police oversight mechanisms.

CONCLUSION

Although there are many commonalities to ICIIAs worldwide, each is unique to its jurisdiction’s political, social, and cultural history.

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315 See supra note 314 and accompanying text.
316 See MARIN 2008 REPORT, supra note 33; ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, supra note 20, at 253; TULLOCH, supra note 50, pt. 1, § 5.300.
317 See supra tbl.3 (“Mandate”—Alberta ASIRT, British Columbia IIO-BC, and Manitoba IIU); supra tbl.6 (“Mandate”—England and Wales IOPC, Northern Ireland PONI, and Ireland GSOC).
318 See WALKER, supra note 1, at 100; SAMUEL WALKER & CAROL A. ARCHIBOLD, THE NEW WORLD OF POLICE ACCOUNTABILITY 211 (2014); Livingston, supra note 25, at 667.
Most agencies have been foisted upon the police, usually as the result of one or more controversial police incidents and, in some cases, a history of excessive force or criminality on the part of the jurisdiction’s police force. Even though, in some cases, the police have ultimately supported the creation of the agency, police opposition or concern about the existence of ICIIAs is clearly manifested in limitations to their statutory powers and structural independence as well as follow-up litigation wherein police either attempt to limit the authority of the agency or act in a manner which is intended to minimize the agency’s ability to investigate and bring charges against them.

While the ultimate issue of “independence” is the focus of all ICIIA statutes, only a few ICIIAs are truly independent of their government-of-the-day. This is indicative of legislative schemes intended to ensure some semblance of government control over these agencies. Agencies also tend, for the most part, to be staffed by former police officers (and in some cases, currently serving officers) and the issue of civilianization, while at the forefront of much public debate, has been minimized by concerns about the ultimate competency of civilian investigators with no police experience.

Based on the almost non-existent data-based research conducted to date, it is currently difficult to gauge levels of success amongst and between the various ICIIA agencies and models, and it is, therefore, difficult to identify specific “best practices” in the creation of ICIIA enabling statutes. Even so, it is arguable that the U.K. ICIIA model, which provides ICIIA jurisdiction over both the administrative and criminal aspects of police-related critical incidents, is a best practice when compared to the Canadian model which limits itself to the investigation and resolution of criminal investigations against the police. Even though the U.K. model is more complex and (generally more) expensive than the Canadian model, the ability of ICIIAs to engage in policy analysis and to be able to impact police discipline as opposed to only police criminality, gives the agencies the opportunity to engage in activities that may actually reduce the risk of police-related critical incidents and police deviance.

Most of the publicly available information with respect to ICIIA programs comes from agency annual reports. Although these reports contain helpful information, very few contain self-critical evaluations of the work of the agency and agency comments calling for amendments to statutes and regulations are generally rare. Interviews would need to be conducted with agency directors, agency staff and police and community stakeholders to determine to what
extent the general lack of structural independence may actually have
had negative impacts on agency decision-making.

In addition, in order to compare the efficacy of the different
programs, reviews of the critical incident investigations conducted by
the different agencies would need to be conducted, to include
comparing investigations conducted by investigators of different
backgrounds and agencies with different powers and authorities.
Police perspectives on ICIIA competency and fairness would also
have to be obtained and evaluated.

The use of capture theory to evaluate the risks associated with the
use of different ICIIA models has potential, but still requires the
collection of longitudinal data. Prior use of this theory has been too
simplistic, looking only at public perception and failing to closely
examine agency decision-making to determine to what extent an
agency may have truly evidenced “capture” as a result of police or
government pressure. This is due, in large part, to the fact that
capture theory has really only been applied to organizations involved
in administrative investigations and the application of police
discipline, and not considered with respect to ICIIA organizations
when they conduct criminal investigations of the police.

With recent worldwide attention directed towards police-related
critical incidents in the United States since the time of the
controversial police shooting of Michael Brown in Ferguson, Missouri
on August 9, 2014, the ICIIA model finally has the potential of
garnishing attention in the United States. As such, it will be
important to obtain additional data to determine to what extent the
use of currently serving police officers to conduct this important work
compares to the use of retired officers (who are generally considered
to be more removed from policing) and civilians without prior police
experience.

See, e.g., PRINCE, BALTIMORE (Universal Music Group, 2015) (“Does anybody hear us pray
for Michael Brown or Freddie Gray?”).