

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.

Table of Contents

Introduction	858
I. Independent Critical Incident Investigation Agencies	
World-Wide.....	860
II. The Academic Literature Relating to Independent Investigations of the Police	862
III. Summary of Agency Histories and Powers	865
A. ICIIAs of Canada.....	865
1. The Ontario SIU (Established 1990).....	866
2. The Alberta Serious Incident Response Team (ASIRT) (Established 2008)	868
3. The Nova Scotia Serious Incident Response Team (SiRT) (Established 2012).....	869
4. The British Columbia Independent Investigations Office (IIOBC) (Established 2012).....	870
5. The Manitoba Independent Investigations Unit (IIU) (Established 2015).....	872
6. The Québec Bureau des Enquêtes Indépendantes (BEI) (Established 2016).....	872
B. ICIIAs of the United Kingdom and Ireland	873
1. The Police Ombudsman for Northern Ireland (PONI) (Established 2000).....	873
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).....	874
3. The Garda Ombudsman Commission for the Republic of Ireland (GSOC) (Established 2007)	875
4. The Police Investigation and Review Commissioner (Scotland) (Established 2013).....	876
C. Other ICIIAs.....	877
1. The New Zealand Independent Police Conduct Authority (IPCA) (Established 2007)	878

2019/2020]	ICIAs and Police Oversight	857
	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).....	879
	3. The Independent Police Investigative Directorate (IPID) for South Africa; Formerly the Independent Complaints Directorate (ICD) (Originally Established 1995; Reconstituted 2012).....	880
	4. The Independent Commission on Investigations (INDECOM) for Jamaica; Formerly the Police Public Complaints Authority (Originally Established 1992; Reconstituted 2010).....	881
IV.	Comparing the Statutory Foundations of ICIAs Around the World	882
	A. Comparison of Canadian ICIA Agency Enabling Acts..	882
	1. Canadian ICIA Regulations	886
	B. Comparison of U.K. and Ireland ICIA Enabling Acts..	895
	1. U.K./Ireland ICIA Regulations	896
	C. Comparison of Other Global Agency Enabling Acts.....	902
	1. Other Global ICIA Regulations.....	903
	D. Amendments to Enabling Acts	910
V.	Discussion and Underlying Rationale for Statutory Choices Made in the Creation of ICIAs.....	911
	A. Statutory Provisions Emphasizing Independence.....	911
	B. Independence and “Civilian-ness”	914
	C. Independence and Capture Theory	915
	1. The Application of Capture Theory to the Two Models of ICIAs of Canada	918
	D. Independence and Cost	920
	E. Independence and Conflict of Interest	923
	F. Confirmation Bias	924
	G. Independence, Deterrence, and Police Resistance	925
	H. Independence and Risk Management Theory	927
	Conclusion	927

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

¹ See SAMUEL WALKER, *POLICE ACCOUNTABILITY: THE ROLE OF CIVILIAN OVERSIGHT* 4 (2001); Richard A. Rosenthal, *Perspectives of Directors of Civilian Oversight of Law Enforcement Agencies*, 41 *POLICING: AN INT'L J.* 435, 435 (2018).

² Rosenthal, *supra* note 1, at 435.

³ See JOSEPH DE ANGELIS ET AL., *NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF LAW ENFORCEMENT, CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: ASSESSING THE EVIDENCE* 5, 49 (2016); David MacAlister, *Policing the Police in Canada: Alternative Approaches to the Investigation of Serious Police Wrongdoing*, in *POLICE-INVOLVED DEATHS: THE NEED FOR REFORM* 158, 188 (David MacAlister ed., 2012), <https://bccla.org/wp-content/uploads/2012/03/2012-BCCLA-Report-Police-Involved-Deaths3.pdf> [<https://perma.cc/8AZB-4KRM>].

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 (ICIAs)⁶ to conduct criminal investigations against on or off-duty police officers.⁷

This Article examines and compares the statutory framework for ICIA agencies in the English-speaking world and examines theoretical best practices in this unique area of police oversight. ICIA agencies have been created, in large part, to improve public perceptions regarding the conduct of criminal investigations of police uses of force and police misconduct.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 ICIA 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 ICIA 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

⁶ The term: "Independent Critical Incident Investigation Agency" or "ICIA" used herein has not been previously used to describe a civilian oversight of law enforcement model. The term ICIA 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.

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 ICIA, however, the agency was not yet in place at the time of the writing of this Article.

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.⁹ Additional programs have also been created in Ireland, New Zealand, South Africa, and Jamaica.¹⁰ Only one such agency exists on a municipal level, located in the City of Chicago, Illinois, in the United States.¹¹

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.¹²

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.

2019/2020] ICIIAs and Police Oversight 861

The chronology for the establishment of the fourteen identified ICIIA (English-speaking) programs globally is provided in Table 1.¹³

Table 1. ICAAs World-Wide

Jurisdiction	Agency	Est.
Ontario (Can.)	Special Investigations Unit (SIU)	1990
Northern Ireland (U.K.)	Police Ombudsman for Northern Ireland (PONI)	2000
England and Wales (U.K.)	Independent Office for Police Conduct (IOPC); formerly the Independent Police Complaints Commission (IPCC)	2004
Ireland	Garda Ombudsman (GSOC)	2007
New Zealand	Independent Police Complaints Authority (IPCA); formerly the Police Complaint Authority (est. 1989)	2007
Chicago (U.S.)	Civilian Office of Police Accountability (COPA); formerly the Independent Police Review Authority (IPRA)	2007
Alberta (Can.)	Serious Incident Response Team (ASIRT)	2008
Jamaica	Independent Commission on Investigations (INDECOM); formerly the Police Public Complaints Authority (PPCA) (est. 1992)	2010
Nova Scotia (Can.)	Serious Incident Response Team (SiRT)	2012
British Columbia (Can.)	Independent Investigations Office (IIO)	2012
South Africa	Independent Police Investigative Directorate (IPID); formerly the Independent Complaints Directorate (ICD) (est. 1995)	2012
Scotland (U.K.)	Police Investigation and Review Commissioner (PIRC)	2013
Manitoba (Can.)	Independent Investigations Unit (IIU)	2015
Québec (Can.)	Bureau of Independent Investigations (BEI)	2016
Nova Scotia (Can.)	Serious Incident Response Team	2019 ^a

^a Pending.

¹³ ICIIA agencies exist in jurisdictions ranging in population from 923,600 (Nova Scotia) to 59.1 million (England and Wales) and in jurisdictions with geographic areas as small as 11,000 square kilometers (Jamaica) and as large as 1.4 million square kilometers (Québec). See *Canadian Provinces and Territories*, NATIONS ONLINE PROJECT, https://www.nationsonline.org/oneworld/countries_canada.htm#Quebec [https://perma.cc/J9YA-8RS4]; Daniel Clark, *Population of the United Kingdom (UK) 2018, by Country*, STATISTA (Aug. 9, 2019), <https://www.statista.com/statistics/294729/population-united-kingdom-uk-by-country/> [https://perma.cc/X7EY-AADJ]; *Jamaica*, NATIONS ONLINE PROJECT, <https://www.nationsonline.org/oneworld/jamaica.htm> [https://perma.cc/AT42-D87L]. Chicago Geographic Size retrieved from *Facts & Statistics*, CITY CHI., <https://www.cityofchicago.org/city/en/about/facts.html> [https://perma.cc/VQ69-5T82].

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

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 & SOC'Y 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.²⁰ However, only one published article has spoken specifically to the need to enhance accountability and trust through the creation of ICIAs in the United States.²¹ Katz used recent controversial police shootings in the United States to argue that the ICIA model of oversight as “adopted in the United Kingdom, Norway, and Canada” should be implemented in jurisdictions in the U.S.²² He opined that the ICIA model of oversight is “designed to produce bias-free investigations that enhance public trust in, and the legitimacy of, the government.”²³

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

FRANK PAUL (2009) (recommending 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 ICIA.

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 ICIAs and Québec BEL, 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.

²¹ See Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235, 235, 245 (2015).

²² *Id.* at 241.

²³ *Id.* at 235.

oversight, most of it relating to “capture theory”²⁴ and “deterrence theory.”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.”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.”²⁷

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

²⁴ See, e.g., Tim Prenzler, *Civilian Oversight of Police: A Test of Capture Theory*, 40 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, *Seeking ‘Civilianness’: Police Complaints and the Civilian Control Model of Oversight*, 53 BRIT. J. CRIMINOLOGY 886, 887 (2013) [hereinafter Savage, *Seeking ‘Civilianness’*] (analyzing empirical research related to the three ICIIA oversight bodies within the United Kingdom); Stephen P. Savage, *Thinking Independence: Calling the Police to Account through the Independent Investigation of Police Complaints*, 53 BRIT. J. CRIMINOLOGY 94, 95–96 (2013) [hereinafter Savage, *Thinking Independence*] (discussing how civilian oversight bodies can lead to potential issues of regulatory capture, in which the regulated subverts the impartiality and zealotness of the regulator). Each of these sources discuss the creation of ICIIA models of oversight with focus on capture theory.

²⁵ See WALKER, *supra* note 1, at 154–55; Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 654 (2004).

²⁶ Prenzler, *supra* note 24, at 659.

²⁷ See Savage, *Thinking Independence*, *supra* note 24, at 94; Savage, *Seeking ‘Civilianness’*, *supra* note 24, at 886.

²⁸ See WALKER, *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.” *Id.* at 155.

²⁹ See Livingston, *supra* note 25, at 653, 654–56.

³⁰ See CIVILIAN COMPLAINT REVIEW BD., CIVILIAN COMPLAINT REVIEW BOARD ISSUES 2017 ANNUAL REPORT (2018).

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 ICIA 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. *ICIAs of Canada*

The Canadian ICIA 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 ICIA 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 (2006); *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 ICIA. See DE ANGELIS ET AL., *supra* note 3, at 25 n.18.

serving as agency investigators.³⁵ As of 2016, 92.6% of Canada's population was served by an ICIIA.³⁶

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.³⁷ 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."³⁸ 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.³⁹

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.⁴⁰ In its formative years, the SIU was severely

³⁵ See WORTLEY, *supra* note 33, at 28.

³⁶ According to Statistics Canada, the 2016 population for Canada was 35,151,728. See *Population and Dwelling Count Highlight Tables, 2016 Census*, STAT. CAN., <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/pd-pl/Table.cfm?Lang=Eng&T=01&S=50&O=A> [<https://perma.cc/Y8BW-RY7B>]. The combined population of the provinces which have created Independent Investigation Agencies (Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, and Québec) was reported as 32,565,922. See *id.* The population of Yukon at 35,874 has also been included due to an agreement between that government and the Alberta Serious Incident Response Team (ASIRT) to provide additional coverage for that territory. See *id.*; Press Release, Gov't of Yukon, Yukon Signs Agreement with Alberta Serious Incident Response Team (Dec. 15, 2011), http://www.gov.yk.ca/news/11-180.html#_wMxBRh23I [<https://perma.cc/J47Y-6SAJ>]. With the addition of a new Serious Incident Response Team for the province of Newfoundland and Labrador, an additional population of 519,716 will be added to the population served by ICIIAs in Canada. See Press Release, Nfld. Just. & Pub. Safety, Province Government to Establish Stand-Alone Serious Incident Response Team (Jan. 31, 2019), <https://www.releases.gov.nl.ca/releases/2019/just/0131n01.aspx> [<https://perma.cc/T6U7-PXXE>]; *Population and Dwelling Count Highlight Tables, supra* note 36. The Province had, in the past, relied on the Nova Scotia SIRT and the Alberta SIRT to conduct critical incident investigations on its behalf. See David Maher, *Atlantic Canada-Wide Police Watchdog not an Option: SIRT Director*, GUARDIAN (Feb. 4, 2019, 3:43 PM), <https://www.theguardian.pe.ca/news/provincial/atlantic-canada-wide-police-watchdog-not-an-option-sirt-director-281064/> [<https://perma.cc/Q5K3-6JVJ>].

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.⁴¹

The SIU has been the subject of multiple reports on its operations over the last twenty-five years.⁴² In 1993, as the result of the “Stephen Lewis Report on Race Relations in Ontario,”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.”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.⁴⁵ As a result of yet another public report (the 1998 Adams Report),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.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.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.⁴⁹

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

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].

⁴² See *Special Reports*, SIU, https://www.siu.on.ca/en/special_reports.php [<https://perma.cc/473Z-SX6L>].

⁴³ See STEPHEN LEWIS, REPORT ON RACE RELATIONS IN ONTARIO (1992).

⁴⁴ ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, *supra* note 20, at 100.

⁴⁵ See *id.*; REPORT OF THE COMMISSION ON SYSTEMATIC RACISM IN THE ONTARIO CRIMINAL JUSTICE SYSTEM, *supra* note 41, at 381.

⁴⁶ See GEORGE W. ADAMS, CONSULTATION REPORT OF THE HONOURABLE GEORGE W. ADAMS, Q.C. TO THE ATTORNEY GENERAL AND SOLICITOR GENERAL CONCERNING POLICE COOPERATION WITH THE SPECIAL INVESTIGATIONS UNIT (1998); ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, *supra* note 20, at 101.

⁴⁷ See ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, *supra* note 20, at 101.

⁴⁸ See MARIN 2008 REPORT, *supra* note 33, at 44, 76, 88–89.

⁴⁹ See ANDRÉ 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.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.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.”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.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.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,⁵⁵ the ASIRT model called for the use of “seconded” police officers as investigators.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”).⁵⁷ The seconded officers were to be assigned to

⁵⁰ HON. MICHAEL H. TULLOCH, REPORT OF THE INDEPENDENT POLICE OVERSIGHT REVIEW pt. I, ¶¶ 1–3 (2017).

⁵¹ See *id.* pt. 1 § 5.210, ¶¶ 34, 42; *id.* § 5.230, ¶ 64; *id.* § 5.240, ¶ 69; *id.* § 5.300, ¶ 120; *id.* § 6.300, ¶ 66.

⁵² *Id.* pt. I, ¶ 22.

⁵³ Explanatory Note, Comprehensive Ontario Police Services Act, S.O. 2019, c 1 (Can.).

⁵⁴ See, e.g., *id.* The “Investigations” portion of the Police Services Act provides specific provisions for the SIU.

⁵⁵ See ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, *supra* note 20, at 29.

⁵⁶ *Id.* at 20–21.

⁵⁷ See *id.* at 11, 20.

ASIRT and answerable to the civilian director of the agency.⁵⁸ 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.⁵⁹

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,⁶⁰ ASIRT obtains its jurisdiction as the result of an order from the Solicitor General to conduct an investigation in appropriate cases;⁶¹ to include officer-involved shootings, in-custody deaths, investigations involving allegations of corruption and other allegations of criminality against an officer.⁶²

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.⁶³

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

The SiRT was created by Legislation introduced in 2010 and became operational in 2012.⁶⁴ 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 2009.⁶⁵ The SiRT model adopted the Alberta model of using seconded police officers as investigators, under the supervision of a civilian Director.⁶⁶

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

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.

⁶³ Jonny Wakefield, *ASIRT, Alberta Cops Keeping Close Eye on B.C. and Ontario Oversight Fights*, EDMONTON SUN (May 15, 2017, 6:09 AM), <https://edmontonsun.com/2017/05/14/asirt-alberta-cops-keeping-close-eye-on-bc-and-ontario-oversight-fights/wcm/9aefb822-07db-4008-84c2-835e354be846> [<https://perma.cc/W5NG-XSH7>].

⁶⁴ See Police Act, S.N.S. 2010, c 68 (Can. N.S.); *Serious Incident Response Team Director Appointed*, GOV'T OF N.S. (Mar. 7, 2018, 9:44 AM), <https://novascotia.ca/news/release/?id=20180307001> [<https://perma.cc/86FL-T8G4>].

⁶⁵ See ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, *supra* note 20, at 35.

⁶⁶ See *id.*

4. The British Columbia Independent Investigations Office (IIOBC) (Established 2012)

The IIOBC became operational in 2012, as the result of the recommendations of two public inquiries.⁶⁷ 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”).⁶⁸ The Davies Inquiry noted substantial investigative failures which led to a lack of accountability for the officers involved in the incident.⁶⁹ 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, 2007.⁷⁰ 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.⁷¹

Both inquiry reports recommended the creation of an “independent investigation office” to investigate police related deaths.⁷² 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.”⁷³ It was further recommended that the agency be completely civilianized within five years, and that the use of “seconded” officers as investigators be prohibited.⁷⁴

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.⁷⁵ 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 ICIA world-wide).⁷⁶

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

⁷⁶ See Police Act, R.S.B.C. 1996, c 367, s 38.13, para. (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).

⁸⁰ See Police Services Act, R.S.O. 1990, c P.15, s 113, para. 5 (Can. Ont.); *What We Do*, IIOBC, <https://iiobc.ca/about-us/what-we-do/> [<https://perma.cc/T3BR-SYUB>].

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.⁸³ The Inquiry report was published in 2008,⁸⁴ and amendments to the Police Act received Royal Assent in 2009.⁸⁵ It took another four years, however, (until 2013) for a civilian director to be appointed and the unit became operational in 2015.⁸⁶ 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.⁸⁷

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.⁸⁸ In response, the Québec government introduced legislation which was passed in 2013 creating the Bureau des Enquêtes Indépendantes (BEI).⁸⁹ The BEI, however, did not begin operations until 2016.⁹⁰ 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.⁹¹ However, the BEI follows the Ontario and British Columbia models in that none of its investigators are currently serving police officers.⁹²

⁸³ See SALHANY, *supra* note 19, at 139; *Our History*, INDEP. INVESTIGATION UNIT MAN., <http://www.iimanitoba.ca/history.html> [<https://perma.cc/335B-54PG>]; Cameron MacLean, *Repeat of Botched Crystal Taman-Police Crash Case 'Virtually Impossible,' Criminologists Say*, CBC (Oct. 14, 2017, 4:00 AM), <https://www.cbc.ca/news/canada/manitoba/iiu-investigation-repeat-taman-case-virtually-impossible-1.4353329> [<https://perma.cc/VN5W-SXG3>].

⁸⁴ See SALHANY, *supra* note 19.

⁸⁵ See ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, *supra* note 20, at 26.

⁸⁶ See *id.*; *FAQ*, INDEP. INVESTIGATION UNIT MAN., <http://www.iimanitoba.ca/faqs.html> [<https://perma.cc/V92E-XU9G>].

⁸⁷ See ISSUES IN CIVILIAN OVERSIGHT OF POLICING IN CANADA, *supra* note 20, at 25–26.

⁸⁸ See *History*, BUREAU DES ENQUÊTES INDÉPENDANTES, <https://www.bei.gouv.qc.ca/home/organization/history.html> [<https://perma.cc/LAN7-XKZP>].

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See Police Act, C.Q.L.R., c P-13.1, ss 286, 289.1, 289.6.

⁹² See TULLOCH, *supra* note 50, pt. 1 §§ 4.722 ¶ 146, 4.724 ¶ 169; *Profile and Selection*, BUREAU DES ENQUÊTES INDÉPENDANTES, <https://www.bei.gouv.qc.ca/home/investigators/profile-and-selection.html> [<https://perma.cc/WY4S-WGYC>].

B. ICIAs of the United Kingdom and Ireland

Four ICIA agencies currently exist in the United Kingdom and Ireland, with the first being created in Northern Ireland in 2000,⁹³ followed by England and Wales in 2004⁹⁴ (the most populous jurisdiction with an ICIA), Ireland in 2007, and Scotland in 2013.⁹⁵ Unlike the Canadian ICIA 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.⁹⁶ With the creation of Scotland's ICIA, the entirety of the U.K. and Ireland are now served by ICIA agencies.⁹⁷

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.⁹⁸

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.’”⁹⁹ 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.¹⁰⁰

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

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.scot/about-us/> [<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.”¹⁰¹ 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.”¹⁰²

In addition to conducting independent investigations of police complaints,¹⁰³ the office was also given the jurisdiction to investigate police-related critical incidents,¹⁰⁴ 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 1988).”¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷

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

¹⁰¹ *History of the Office*, POLICE OMBUDSMAN FOR NORTHERN IR., <https://www.policeombudsman.org/About-Us/History-of-the-Office> [<https://perma.cc/WBZ7-3NK2>].

¹⁰² *Id.*

¹⁰³ *See About Us*, POLICE OMBUDSMAN FOR NORTHERN IR., <https://www.policeombudsman.org/About-Us> [<https://perma.cc/LLZ6-YKCJ>].

¹⁰⁴ *See Historical Investigations*, POLICE OMBUDSMAN FOR NORTHERN IR., <https://www.policeombudsman.org/About-Us/Historical-Investigations> [<https://perma.cc/5JG9-SR9W>].

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); *Criminal Investigations*, POLICE OMBUDSMAN FOR NORTHERN IR., <https://www.policeombudsman.org/Information-for-Police-Officers/Criminal-investigations> [<https://perma.cc/784J-J79U>].

¹⁰⁷ *See* Police (Northern Ireland) Act, 1998, c. 32, § 55 (U.K.).

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.”¹⁰⁸

The IPCC had the authority to manage or supervise police investigations into complaints¹⁰⁹ 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).¹¹⁰ 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.¹¹¹ The IPCC was overseen by a Chair, two Deputy Chairs and ten Commissioners.¹¹²

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.¹¹³ 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.”¹¹⁴

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.¹¹⁵ 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

¹⁰⁸ Wood, *supra* note 9, at 78.

¹⁰⁹ *See id.* at 81.

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² *See id.* at 80.

¹¹³ *Independent Office for Police Conduct Launches*, GOV.UK (Jan. 8, 2018), <https://www.gov.uk/government/news/independent-office-for-police-conduct-launches-today> [<https://perma.cc/DQ3C-6KPX>].

¹¹⁴ *Id.*

¹¹⁵ *See* Vicky Conway, *A Sheep in Wolf’s Clothing?: Evaluating the Impact of the Garda Síochána Ombudsman Commission*, 43 IRISH JURIST 109, 110 (2008).

academics.¹¹⁶ “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.”¹¹⁷

The Garda Síochána Ombudsman Commission (GSOC) is a three-member body charged with providing oversight of policing in Ireland.¹¹⁸ The Commission was established by the Garda Síochána Act 2005 and began operations in 2007.¹¹⁹ The Commission’s “main area of responsibility is to deal with complaints concerning garda [police] conduct.”¹²⁰ 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.”¹²¹ Such incidents are referred to the GSOC by the Garda Síochána (the police force of the Republic of Ireland).¹²²

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.’”¹²³ 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.¹²⁴

The PIRC was introduced in 2013 at the same time as the single Police Service of Scotland was established.¹²⁵ At that time, the remit of the Police Complaints Commissioner for Scotland was expanded to include investigations into police-related critical incidents.¹²⁶ To

¹¹⁶ See *id.* at 110–12.

¹¹⁷ *Id.* at 111.

¹¹⁸ See *id.* at 112; *About GSOC*, GARDA OMBUDSMAN, <https://www.gardaombudsman.ie/about-gsoc/> [https://perma.cc/45J9-KJJG].

¹¹⁹ See *About GSOC*, *supra* note 118.

¹²⁰ *GSOC’s Functions*, GARDA OMBUDSMAN, <https://www.gardaombudsman.ie/about-gsoc/gsoc-functions/> [https://perma.cc/2KX5-4CF8].

¹²¹ *Id.*

¹²² See *id.*

¹²³ Wood, *supra* note 9, at 85.

¹²⁴ See Daniel Donnelly & Kenneth Scott, *Policing in Scotland*, in HANDBOOK OF POLICING 182, 199 (Tim Newburn ed., 2008).

¹²⁵ See *About Us*, *supra* note 95.

¹²⁶ See *Investigations*, POLICE INVESTIGATIONS & REV. COMMISSIONER, <https://pirc.scot/investigations/> [https://perma.cc/MN95-4XGU].

reflect that change, the agency was renamed as the Police Investigations and Review Commissioner (PIRC).¹²⁷

C. *Other ICIAs*

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).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.¹²⁹ The New Zealand and Chicago models, however, are a pseudo-ICIA 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.¹³⁰

¹²⁷ See *About Us*, *supra* note 95.

¹²⁸ See *Commission*, INDEP. COMMISSION INVESTIGATIONS, <https://www.indecom.gov.jm/about-us/commission> [<https://perma.cc/Q5BY-T8J3>] (Jamaica); *Organizational Development*, CIVILIAN OFF. POLICE ACCOUNTABILITY, <https://www.chicagocopa.org/about-copa/organizational-development/> [<https://perma.cc/CXV5-3RYT>] (Chicago); *Vision and Mission*, INDEP. POLICE INVESTIGATIVE DIRECTORATE, <http://www.ipid.gov.za/node/8> [<https://perma.cc/G4NS-NRQV>] (South Africa); *What We Do*, INDEP. POLICE CONDUCT AUTHORITY, <https://www.ipca.govt.nz/Site/about-us/What-we-do.aspx> [<https://perma.cc/5ST5-W9NJ>] (New Zealand).

¹²⁹ See CITY OF CHICAGO, CIVILIAN OFFICE OF POLICE ACCOUNTABILITY RULES AND REGULATIONS (2018) [hereinafter CIVILIAN OFFICE OF POLICE ACCOUNTABILITY RULES AND REGULATIONS], <http://www.chicagocopa.org/wp-content/uploads/2018/04/Final-COPA-Rules-and-Regulations-April-2018.pdf> [<https://perma.cc/XK4B-VSE9>]; Independent Police Investigative Directorate Act 1 of 2011 ch. 1 § 2; *Commission*, INDEP. COMMISSION INVESTIGATIONS, *supra* note 128; *What We Do*, INDEP. POLICE CONDUCT AUTHORITY, *supra* note 128.

¹³⁰ See CIVILIAN OFFICE OF POLICE ACCOUNTABILITY RULES AND REGULATIONS, *supra* note 129; *What You Can Complain About*, INDEP. POLICE CONDUCT AUTHORITY, <https://www.ipca.govt.nz/Site/complaints/what-you-can-complain-about.aspx> [<https://perma.cc/7B9B-QSGG>].

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.”¹³¹ The 1981 Springbok Tour involved a tour of the South African rugby team through New Zealand.¹³² Over the course of that tour, which took place from July through September 1981, New Zealand suffered that largest civil disturbance seen in decades.¹³³ “More than 150,000 people took part in over 200 demonstrations in 28 centres, and 1500 were charged with offences stemming from these protests.”¹³⁴

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.¹³⁵ A 2004 Commission of Inquiry followed after a scandal involving how allegations of sexual assault were handled by the national police.¹³⁶ 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.¹³⁷

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.¹³⁸ However, in practice, independent IPCA investigations of police-related critical incidents are supplemental and subsequent to New Zealand State Police investigations.¹³⁹

¹³¹ *History*, INDEP. POLICE CONDUCT AUTHORITY, <https://www.ipca.govt.nz/Site/about-us/History.aspx> [<https://perma.cc/4HTG-TDJR>].

¹³² *See 1981 Springbok Tour*, N.Z. HIST., <https://nzhistory.govt.nz/culture/1981-springbok-tour> [<https://perma.cc/9KGW-F7BP>].

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.¹⁴⁰ In addition, almost all large cities in the United States had implemented some form of oversight.¹⁴¹ Thirty-four of those agencies were identified as “investigation-focused” and were responsible for conducting independent investigations of police conduct.¹⁴² 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 2007.¹⁴³ 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.¹⁴⁴

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.¹⁴⁵

Th[e] 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.¹⁴⁶

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.

¹⁴⁴ See CHI., ILL., CODE OF ORDINANCES § 2-57-040 (2007); ROSENZWEIG, *supra* note 11, at 1; U.S. DEPT OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY’S OFFICE, N. DIST. OF N.Y., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 56–57 (2017) [hereinafter INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT].

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].”¹⁴⁷

During the course of the DOJ investigation and based on a report issued by a task force created by the City,¹⁴⁸ the City replaced the IPRA with a new agency, the Civilian Office of Police Accountability (COPA).¹⁴⁹ That office was given additional authority to take charge of critical incident scenes and submit potential criminal charges to the state prosecutor’s office.¹⁵⁰ 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.¹⁵¹

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.”¹⁵² 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.¹⁵³

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.

¹⁴⁹ See *Our History*, CIVILIAN OFF. POLICE ACCOUNTABILITY, <https://www.chicagocopa.org/about-copa/our-history/> [<https://perma.cc/LK8A-YLF3>].

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.

¹⁵² Bronwen Manby, *The South African Independent Complaints Directorate*, in CIVILIAN OVERSIGHT OF POLICING, *supra* note 20, at 195, 195.

¹⁵³ *Id.*

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

¹⁵⁴ See *id.* at 196–197.

¹⁵⁵ *Id.* at 199, 201.

¹⁵⁶ See South African Police Service Act 68 of 1995 § 53(1)(a) (S. Afr.).

¹⁵⁷ See REPUBLIC OF S. AFR. INDEP. POLICE INVESTIGATIVE DIRECTORATE, INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPID) STRATEGIC PLAN 2013–2018 3 (2013).

¹⁵⁸ Julie Berg & Simon Howell, *Civilian Oversight of Police in Africa: Trends and Challenges*, in CIVILIAN OVERSIGHT OF POLICE, *supra* note 20, at 121, 124.

¹⁵⁹ See *The World Factbook: Central America: Jamaica*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/jm.html> [<https://perma.cc/T3CE-V2DH>].

¹⁶⁰ Rachel Neild, *Confronting a Culture of Impunity: The Promise and Pitfalls of Civilian Review of Police in Latin America*, in CIVILIAN OVERSIGHT OF POLICING, *supra* note 20, at 223, 230.

¹⁶¹ See *Gerville Williams v. Commissioner of the Independent Commission of Investigations*, Sup. Ct. of Judicature of Jamaica, Claim No. 2011 HCV06344 ¶ 132 (2012).

¹⁶² Sandra Laville, *Jamaica’s Police at Last Being Called to Account for Killings of Civilians*, GUARDIAN (Dec. 2, 2015, 5:00 AM), <https://www.theguardian.com/world/2015/dec/02/jamaica-police-killings-akieem-stewart-independent-investigators> [<https://perma.cc/3VFV-XVGW>].

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 ICIAs AROUND THE WORLD

A review of the enabling statutes and ordinances for the aforementioned ICIAs 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 ICIa 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 ICIa program.

A. *Comparison of Canadian ICIa Agency Enabling Acts*

The Canadian ICIa 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 ICIa model exist in Canada: one that allows for the use of “seconded” police officers as agency investigators (Alberta, Manitoba, and Nova

¹⁶³ See JAMAICAN HOUSES OF PARLIAMENT, REPORT OF THE JOINT SELECT COMMITTEE OF PARLIAMENT ON THE REVIEW OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS ACT 3 (2015).

¹⁶⁴ *Id.*

¹⁶⁵ See The Independent Commission of Investigations Act 12 of 2010, part III, s. 10 (Jam.).

¹⁶⁶ See *Who Polices the Police?: Civilian Police Oversight in Canada*, CAN. CIV. LIBERTIES ASS'N (Mar. 20, 2017), <https://ccla.org/polices-police-civilian-police-oversight-canada/> [https://perma.cc/8WM5-QAKY].

Scotia),¹⁶⁷ the other which prohibits currently serving officers from serving as ICIA investigators (British Columbia, Ontario and Québec).¹⁶⁸ In addition, three agency statutes specifically provide for the hiring of civilians without police experience (British Columbia, Manitoba, and Québec),¹⁶⁹ while the other agencies have no statutory provisions one way or the other.¹⁷⁰ Only one agency has a statutory goal in favor of civilianization of its ICIA work force (British Columbia).¹⁷¹ 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.¹⁷²

Table 2. Enabling Statutes for Canadian Agencies

Agency	Enabling Statutes
Alberta ASIRT	Alberta Police Act, Part 5, Sections 46.1 (Serious Incidents and Complaints) and (Integrated Investigative Unit)
British Columbia IIO	BC Police Act, Part 7.1, Sections 38.01–38.13
Manitoba IIU	Manitoba Police Services Act, Part 7, Division 1 (Independent Investigation Unit) Sections 56(1)–64(2); Division 2 [Mandatory Investigations by the Independent Investigation Unit] Sections 65(1)–72; Division 3 (Investigations by Police Services into Police Officer Conduct) Sections 73(1)–76.
Nova Scotia SiRT	Nova Scotia Police Act, Chapter 31, Sections 26A–26N
Ontario SIU	Ontario Police Services Act, Chapter 15, Part VII (Special Investigations), Section 113

¹⁶⁷ See Police Act, R.S.A. 2000, c P-17, s 46.1, para. (2) (Can. Alta.); Police Services Act, C.C.S.M., c P.94.5, s 60 (Can. Man.); Police Act, S.N.S. 2004, c 31, s 26F, paras. (1)–(3) (Can. N.S.).

¹⁶⁸ See Police Act, R.S.B.C. 1996, c 367, s 38.06, para. (3) (Can. B.C.); Police Services Act, R.S.O. 1990, c P.15, s 113, para. (3) (Can. Ont.); Police Act, C.Q.L.R., c P-13.1, s 289.11, (Can. Que.).

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”).

¹⁷² See Police Act, S.N.S. 2004, c 31, s 26F, para. (4) (Can. N.S.); Police Services Act, R.S.O. 1990, c P.15, s 113, para. (6) (Can. Ont.); Police Act, C.Q.L.R., c P-13.1, s 289.19 (Can. Que.).

Agency	Enabling Statutes
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.

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.¹⁷³ That model is followed by British Columbia and Québec.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.¹⁷⁵ The ASIRT model is followed by Manitoba and Nova Scotia.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).¹⁷⁷ Only one agency has a

¹⁷³ See Police Services Act, R.S.O. 1990, c P.15, s 113, para. (5) (Can. Ont.). The Ontario SIU has interpreted sexual assault committed under the color of authority to be included in its definition of “serious harm.” See *Frequently Asked Questions*, SPECIAL INVESTIGATION UNIT, <https://www.siu.on.ca/en/faq.php> [<https://perma.cc/P2GR-9YJ5>] [hereinafter SIU]. Sexual assault is specifically included in the Nova Scotia definition of “serious incident.” See Police Act, S.N.S. 2004, c 31, s 2, para. (l) (Can. N.S.). The Québec Police Act requires police agencies to notify the BEI whenever there is an allegation concerning “a criminal offence of a sexual nature committed in the performance of duties.” Police Act, C.Q.L.R., c P-13.1, s 289.1 (Can. Que.). In British Columbia, sexual assault is not included in the definition of “serious harm.” See Police Act, R.S.B.C. 1996, c 367, s 76, para (1) (Can. B.C.).

¹⁷⁴ 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.).

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

¹⁷⁶ 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 26I, para. (1), subparas. (a)–(b) (Can. N.S.).

¹⁷⁷ 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 26I, 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.

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).¹⁷⁸

Four of the agencies prohibit the Director from ever having served as a police officer (British Columbia, Manitoba, Nova Scotia, and Québec);¹⁷⁹ 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.¹⁸⁰

Canadian ICIA agencies are equally divided between those that have the authority to lay charges directly against police officers (Ontario, Nova Scotia, and Manitoba)¹⁸¹ and those that are required to refer their cases to an independent prosecutorial authority for a charging decision (Alberta, British Columbia, and Québec).¹⁸² Even in those provinces where the ICIA agency can lay charges, however, Crown Counsel has the discretion to pursue or stay those charges.¹⁸³ No research has been conducted, to date, on the actual impact, of the ability of an ICIA Director to independently lay charges, on charging practices against police officers.

Although arguments have been made for ICIAs to report to all-party committees of the Legislature,¹⁸⁴ all Canadian agencies are part of their respective Ministries of Justice, generally reporting to the Attorney General of the Province.¹⁸⁵ Three agency statutes provide for some form of oversight over ICIA investigations. In British Columbia, the Director is specifically authorized to appoint a “civilian monitor” to review specific investigations and the IIOBC 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*, INDEP. INVESTIGATION UNIT OF MAN., <http://www.iiumanitoba.ca/Terminologies.html> [<https://perma.cc/H88Z-DCXA>] (defining serious injury to include injury from a firearm).

¹⁷⁸ See Police Act, S.N.S. 2004, c 31, s 26I, para. (1), subpara. (b) (Can. N.S.).

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.).

¹⁸³ See *Relationship Between Crown Counsel and Investigative Agencies*, PUB. PROSECUTION SERV. CAN. (Mar. 1, 2014), <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch07.html> [<https://perma.cc/KNM3-8BLY>].

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

¹⁸⁵ *Organization of the Department of Justice*, GOV'T CAN., <https://www.justice.gc.ca/eng/abt-apt/org.html> [<https://perma.cc/U4UD-3S7B>].

required to undergo a review by a legislative committee within three years of its creation.¹⁸⁶ In Manitoba, the IIU Director is required to appoint a civilian monitor to monitor IIU investigations relating to police-involved fatalities.¹⁸⁷ 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.”¹⁸⁸

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;¹⁸⁹ the sixth agency, British Columbia, uses a memorandum of understanding with all British Columbia police agencies in lieu of the enactment of formal regulations.¹⁹⁰

¹⁸⁶ See Police Act, R.S.B.C. 1996, c 367, ss 38.08, 38.13 (Can. B.C.).

¹⁸⁷ See Police Services Act, C.C.S.M., c P.94.5, s 70(1) (Can. Man.).

¹⁸⁸ Police Act, S.N.S. 2004, c 31, s 26I, par. (3), subpara. (f) (Can. N.S.).

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).

¹⁹⁰ See Memorandum of Understanding Respecting Investigations between Indep. Investigations Office of B.C. (I.I.O.) & Royal Canadian Mounted Police (R.C.M.P.), the Municipal Police Dep'ts of B.C., S. Coast B.C. Transp. Auth. Police Serv. & the St'l'atl'imx Tribal Police (Feb. 12, 2013) [hereinafter Memorandum of Understanding], https://iiobc.ca/app/uploads/sites/472/2019/02/MOU_Police.pdf [https://perma.cc/2LHU-EB9K].

Table 3. Comparison of Enabling Statutes for Canadian ICIIAs

Statutory Issues	Canadian ICIIAs					
	Ontario SIU	Alberta ASIRT	Nova Scotia SiRT	British Columbia IIO-BC	Manitoba IIU	Québec BEI
Operating Date	Sept. 1990	Jan. 2008	April 2012	Sept. 2012	June 2015	June 2016
Date of Enabling Act	1990	2005	Dec. 2011	June 2011	2009	May 2013
Amendments to Enabling Act	2006, 2009, 2010, 2019	2007, 2010, 2013	May 2014	June 2012, 2019	None	Feb. 2018
Regulation or MOU	Regulations only	Regulations only	Regulations and confidential MOUs	MOUs in lieu of regulations	Regulations only	Regulations only
Date of Enaction of Regulations or MOU	1999	2008	April 2012	August 2012	June 2015	June 2014; June 2016
Amendments of Regulations or MOU	2011; 2019	2011; 2014	None	Feb. 2013	None	None

Statutory Issues	Canadian ICIIAs					
	Ontario SIU	Alberta ASIRT	Nova Scotia SiRT	British Columbia IIO-BC	Manitoba IIU	Québec BEI
Mandate	On duty or related to duties; incidents resulting in death or "serious harm" (to include sexual assault)	On and off duty as assigned by Solicitor General	On and off duty "[s]erious Incidents involving the police" including incidents involving death, injury, and sexual assault, and "where in the public interest"	On and off duty incidents resulting in death or "serious harm"	On and off duty incidents involving death, serious injury or any crime	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
Involvement in Administrative investigations or Police Discipline?	No	No	No	No	No	No
Notification Requirements	Police "shall immediately notify" the SIU of an incident falling within its jurisdiction ^a	"As soon as practicable"	"As soon as practicable"	"Immediate" notification required	"Immediate" notification required	Notification "without delay"

Statutory Issues	Canadian ICIIAs					
	Ontario SIU	Alberta ASIRT	Nova Scotia SiRT	British Columbia IIO-BC	Manitoba IIU	Québec BEI
Ability to Lay Charges?	Yes, and referred to the Crown Attorney for prosecution	Referral to Minister of Justice if "of the opinion that . . . the actions . . . constitute an offense"	Yes	Referral to Crown Counsel if the director "considers that there are reasonable grounds to believe that an officer may have committed an offence" ^b	Yes	Referral to Director of Criminal and Penal Prosecutions
Seconded officers as investigators? ^c	Not permitted	Yes, and serving	Yes, and serving	Not permitted	Permissible, but none serving	Not permitted
Civilians with No Police Experience used as Investigators ^d	No statutory reference, but currently used.	No statutory reference, but currently used	No statutory reference, but only current and former officers used.	Yes, if they have "investigative experience"; currently used	Yes, if they have "investigative experience"; currently used (1)	Yes, by government regulation; currently used

Statutory Issues	Canadian ICIIAs					
	Ontario SIU	Alberta ASIRT	Nova Scotia SiRT	British Columbia IIO-BC	Manitoba IIU	Québec BEI
Qualifications or Limitations for Director	No limits specified	No limits specified	Cannot have been a former or current police officer	May never have been a police officer	May never have been a police officer	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
Selection of Director	Appointed by Lieutenant Governor upon recommendation of Solicitor General	Designated by the Minister of Justice	Appointed by Governor in Council	Appointed by Lieutenant Governor by Order-in-Council	Appointed by Lieutenant Governor in Council	Three finalists chosen by a selection committee and forwarded to the Justice Minister
Director Term of Office	No term specified	No term specified	Five-year term with potential for second term only	Five-year term with potential for second term only	Five-year term with potential for second term only	Fixed term of five years or less; serve until reappointed or replaced
Director Removal from Office	No removal terms specified	No removal terms specified	No removal terms specified	No removal terms specified	Termination for cause only	No removal terms specified

Statutory Issues	Canadian ICIIAs					
	Ontario SIU	Alberta ASIRT	Nova Scotia SIRT	British Columbia IIO-BC	Manitoba IIU	Québec BEI
Director Chain of Command	Unit within Ministry of Solicitor General	Director reports to Minister of Justice	Director reports to Minister of Justice	Director is a Deputy Minister of Justice ^e	Director reports to Minister	Director reports to Minister
Limitations on Investigator Hiring or Assignments	An investigator shall not participate in an investigation that relates to members of a police force of which he or she was a member	No limitation on investigator assignments	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	No limitation on investigator assignments	No limitation on investigator assignments	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
Police Powers	Director and investigators are "peace officers"	Director "deemed to be Chief of Police"; investigators "deemed to be police officers"	Director and investigators are "peace officers" with "all of the powers, authority, privileges, [and] immunities"	Director and investigators have all powers, duties, and immunities of a peace officer and constable at common law	Investigators have "all the powers, duties, privileges and protections of a peace officer and constable at common law"	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

Statutory Issues	Canadian ICIIAs					
	Ontario SIU	Alberta ASIRT	Nova Scotia SIRT	British Columbia IIO-BC	Manitoba IIU	Québec BEI
Cooperation Requirements	All members of police forces and “appointing officials” shall cooperate	Not specified; Lieutenant Governor may make regulations regarding conduct of investigations	Not specified	Officers must “cooperate fully” with the Director and investigators	Not specified	Not specified; to be determined by regulations
Independent Evaluation of Program	None specified, but within the jurisdiction of the provincial ombudsman	None specified	Director may appoint “civilian liaison or observer to work with the team in the course of an investigation”	Director may appoint “civilian monitor” to audit an investigation; 3-year special committee evaluation of program	Civilian monitor required in police-related fatality; civilian monitor at discretion of director in all other cases	None specified

^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).

^c See ALTA. SERIOUS INCIDENT RESPONSE TEAM, ANNUAL REPORT 2014, at 33, <https://solgps.alberta.ca/asirt/publications/Documents/ASIRT%202014%20Annual%20Report.pdf> [<https://perma.cc/M6GQ-VMX4>]; IND. INVESTIGATION UNIT OF MAN., 2015–2016 ANNUAL REPORT, at 2, http://www.iiumanitoba.ca/pdf/iiu_2015_2016_annual_report.pdf [<https://perma.cc/J5PV-DC8Y>]; *About SIRT: Mission & Mandate*, *infra* note 276 (N.S.).

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

^e In practice, however, the IIOBC Chief Civilian Director directly reports to a public servant, the Deputy Attorney General, and to Ministry of Justice Assistant Deputy Ministers for purposes of budget, policy and legislative matters. See Letter of Expectations from Richard J.M. Frye, Deputy Attorney Gen., to Richard Rosenthal, Chief Civilian Dir., Indep. Investigations Office (Mar. 7, 2013), <http://www.lbc.leg.bc.ca/public/pubdocs/bcdocs2016/599233/loe.pdf> [<https://perma.cc/M5NZ-4VMR>].

2019/2020]

ICIAs and Police Oversight

893

Table 4. Regulations and MOUs of Canadian Agencies

Agency	Regulations and MOUs
Alberta ASIRT	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)
British Columbia IIO	MOU Respecting Investigations between Independent Investigations Office of British Columbia and Royal Canadian Mounted Police and the Municipal Police Departments of British Columbia and the Organized Crime Agency of British Columbia and the South Coast British Columbia Transportation Authority Police Service and the Stl'at'imx Tribal Police, February 12, 2013
Manitoba IIU	Police Services Act Independent Investigations Regulation 99/2015; Police Services Act Civilian Monitor Regulation 100/2015
Nova Scotia SiRT	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)
Ontario SIU	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. ^a (Amended 2011—Ontario Regulation 283/11; Amended 2019—Ontario Regulation 466/18)
Québec BEI	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)

^a 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

¹⁹¹ See Independent Investigations Regulation, Man. Reg. 99/2015, s. 1 (Can.); Police Services Act, O. Reg. 267/10, s. 1, par. (1) (Can.); Police Service Regulation, Alta. Reg. 356/1990, s. 10.4, par. (1) (Can.); Police Act, C.Q.L.R., c P-13.1, ss 260–62 (Can. Que.); Serious Incident Response Team Regulations, N.S. Reg. 89/2012, s. 2, par. (1) (Can.); Memorandum of Understanding, *supra* note 190, §§ 1.1, 14.2–3.

¹⁹² See Independent Investigations Regulation, Man. Reg. 99/2015, s. 14, par. (1) (Can.); Police Services Act, O. Reg. 267/10, s. 10 (Can.); Police Service Regulation, Alta. Reg. 356/1990, s. 10.6, par. (1) (Can.); Police Act, C.Q.L.R., c P-13.1, ss 262–63 (Can. Que.); Serious Incident Response Team Regulations, N.S. Reg. 89/2012, s. 7, para. (1) (Can.); Memorandum of Understanding, *supra* note 190, § 14.1.

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.

¹⁹⁶ See Independent Investigations Regulation, Man. Reg. 99/2015, s. 9 (Can.); Police Services Act, O. Reg. 267/10, s. 6 (Can.); Police Service Regulation, Alta. Reg. 356/1990, s. 10.3 (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. 5 (Can.); Memorandum of Understanding, *supra* note 190, § 15.

¹⁹⁷ See Police Act, S.N.S. 2004, c 31, s 7, para. (3) (Can. N.S.); Police Service Regulation, Alta. Reg. 356/1990, s. 10.2, paras. (4)–(5) (Can.); Memorandum of Understanding, *supra* note 190, §§ 18.5, 19.3.

¹⁹⁸ See, e.g., Police Act, S.N.S. 2004, c 31, s 9, paras. (1)–(3) (Can.); Police Service Regulation, Alta. Reg. 356/1990, s. 10.2 (Can.); Memorandum of Understanding, *supra* note 190, § 7.

2019/2020]

ICIAs and Police Oversight

895

ICIA;¹⁹⁹ circumstances under which police departments can make public statements relating to incident.²⁰⁰

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

The UK/Ireland ICIA 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

Agency	Enabling Statutes
England and Wales IOPC	<ul style="list-style-type: none"> - 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	<ul style="list-style-type: none"> - 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
Northern Ireland PONI	<ul style="list-style-type: none"> - Police (Northern Ireland) Act 1998, Chapter 32, Part VII (Police Complaints and Disciplinary Proceedings) - 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.

Agency	Enabling Statutes
Scotland PIRC	- Police, Public Order and Criminal Justice (Scotland) Act 2006. - Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016

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 ICIA Regulations

Three of the four agencies have formal regulations in place to supplement the enabling legislation (Northern Ireland, England and Wales, and Scotland);²⁰³ 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.

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

Statutory Issues	U.K./Ireland ICIIAs			
	Northern Ireland PONI	England and Wales IOPC-IPCC	Ireland GOSC	Scotland PIRC
Operating Date	Nov. 2000	April 2004	May 2007	April 2013
Date of Enabling Act	1998	2002	2005	2013
Amendments to Enabling Act	2000, 2001, 2003, 2005, 2006, 2010, 2014, 2018	2011, 2017	2015	2016
Regulation or MOU	Statutory Rules	Statutory rules Statutory guidance by Agency to police	MOU	MOU
Date of Enaction of Regulations or MOU	2000	April 2010 (Statutory Guidance) November 2012 (Regulations)	Sept. 2013	Dec. 2014
Amendments of Regulations or MOU	2008, 2009	May 2015 (Statutory Guidance)	N/A	N/A

Statutory Issues	U.K./Ireland ICIIAs			
	Northern Ireland PONI	England and Wales IOPC-IPCC	Ireland GOSC	Scotland PIRC
Mandate	Complaints, misconduct, criminal offences, police-related deaths, investigations “in the public interest”; investigations into current police practices and policies	Complaints, administrative misconduct, criminal offences, police-related deaths and serious injuries, police policy	Complaints, administrative and criminal misconduct, any matter where the conduct of the police (or the Commissioner of Police) “may have resulted in the death of, or serious harm to, a person”; police practices, policies and procedures	Complaints, offenses by police, “any death involving a person serving with the police,” police-related deaths, serious injuries and firearms discharges, any relevant police matter in the public interest
Involvement in Administrative investigations or Police Discipline?	Yes	Yes	Yes	Yes
Notification Requirements	“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”	All death or serious injury matters must be referred to agency within period provided for by regulations issued by Secretary of State (“without delay”)	Police required to refer any matter “as soon as practicable” that appears to indicate that the conduct of a police officer may have resulted in the death of, or serious harm, to a person	By regulation, Scottish Commissioners may require the Chief Constable to refer matters to the Commissioner; timing not specified in regulations
Ability to Lay Charges?	Recommends charges to Director of Public Prosecutions.	Refers potential criminal charges to Crown Prosecution Service	Refers conduct that “may constitute an offence” to the Director of Public Prosecutions together with “any recommendations that appear to . . . be appropriate”	Investigations conducted under the supervision of Lord Advocate or Prosecutor Fiscal

Statutory Issues	U.K./Ireland ICIIAs			
	Northern Ireland PONI	England and Wales IOPC-IPCC	Ireland GOSC	Scotland PIRC
Seconded Officers as Investigators? ^a	Permitted and currently serving	Permitted, but not currently serving	Permitted and currently serving	Permitted, but not currently serving
Civilians with No Police Experience as Investigators? ^b	No restriction; currently used	No restriction; currently used	No restriction	No restriction
Qualifications and Limitations for Director	None specified	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	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	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
Selection of Director	Secretary of State	"Appointed by Her Majesty"	Appointed by "the Government" after satisfaction that "the person has the appropriate experience, qualifications, training or expertise"	Appointed by the Scottish Ministers

Statutory Issues	U.K./Ireland ICIIAs			
	Northern Ireland PONI	England and Wales IOPC-IPCC	Ireland GOSC	Scotland PIRC
Director Term of Office	Seven-year term; no reappointment permitted	A term not exceeding five years, with the possibility of reappointment	Exceeding 3 years, but not exceeding 6 years as determined by the government and eligible for reappointment for a second term	5-year term with potential for reappointment to one 3-year term
Removal from Office	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	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	The President may remove "only for stated misbehavior or for incapacity and then only on resolutions passed" by the National Parliament calling for removal	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"
Director Chain of Command	Serves as pleasure of Secretary of State	Reports to Secretary of State	Reports to The Minister for Justice, Equality and Law Reform	Reports to the Scottish Ministers
Limitations on Hiring/ Assignment of Investigators	None specified	None specified	None specified	None specified
Police Powers	All powers and privileges of a constable	"All the powers and privileges of a constable . . . for the purposes of the carrying out of the investigation and all purposes connected with it"	"[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"	All the powers and privileges of a constable

Statutory Issues	U.K./Ireland ICIIAs			
	Northern Ireland PONI	England and Wales IOPC-IPCC	Ireland GOSC	Scotland PIRC
Cooperation Requirements	None specified in legislation; directive from Chief Constable to officers only	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	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”	Chief Constable must provide agency head with all required information and documents; possible “contempt of court” action for any person obstructing an investigation
Independent Evaluation of Program	None specified	Triennial review of all non- departmental public bodies by Home Office	Accountable for the general administration of the office to a specially appointed committee of the Legislature and to the Committee of Public Accounts	None specified

^a N. IR. POLICE OMBUDSMAN, ANNUAL REPORT & ACCOUNTS 58 (2017), <https://www.policeombudsman.org/PONI/files/59/59a07a61-6d31-4190-b639-6d4333ca7dd0.pdf> [<https://perma.cc/XU2Y-BT3U>]; INDEP. POLICE COMPLAINTS COMM’N, ANNUAL REPORT AND STATEMENT OF ACCOUNTS 2015/16, at 85 (2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/599417/HC_450_IPCC_AnnualReportAccounts_2015_16_WEB.pdf [<https://perma.cc/R2DH-ZHJF>]; GARDA SIOCHÁNA OMBUDSMAN COMM’N, 2016 ANNUAL REPORT, § 8 (2017) (Ireland); *Staff Composition of the PIRC*, POLICE INVESTIGATIONS & REV. COMMISSIONER, <https://pirc.scot/about-us/who-we-are/staff-composition-of-the-pirc/> [<https://perma.cc/R49K-UEJM>].

^b 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

Agency	Regulations and MOUs
Northern Ireland PONI	<ul style="list-style-type: none"> - Royal Ulster Constabulary (Complaints etc.) Regulations 2000 - The Police (Conduct) Regulations (Northern Ireland) 2016
England and Wales IOPC	<ul style="list-style-type: none"> - 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	<ul style="list-style-type: none"> - GSOC MOU dated September 2013
Scotland PIRC	<ul style="list-style-type: none"> - 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).

²⁰⁶ See INDEP. POLICE INVESTIGATIVE DIRECTORATE, ANNUAL REPORT 2016/2017, tbl.26(a) (2017) [hereinafter SOUTH AFRICA IPID ANNUAL REPORT 2016/2017], https://www.gov.za/sites/default/files/geis_document/201710/ipidannualreportsannualreports201617cdfilea.pdf [<https://perma.cc/6TDJ-VAXE>] (reporting on criminal recommendations referred including 61 involving police-related deaths); INDEP. POLICE INVESTIGATIVE DIRECTORATE, ANNUAL REPORT 2017/2018, tbl.26(a) (2018) [hereinafter SOUTH AFRICA IPID ANNUAL REPORT 2017/2018], http://www.ipid.gov.za/sites/default/files/documents/IPID_AR_2017_WEB_0.pdf [<https://perma.cc/PSF8-ZP2Z>] (reporting on criminal recommendations referred including 122 involving police-related deaths and 1,428 overall); *infra* tbl.12.

2019/2020] ICIIAs and Police Oversight 903

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

Agency	Enabling Statutes
Chicago COPA	Municipal Code of Chicago, Chapter 2-78 (Civilian Office of Police Accountability)
New Zealand IPCA	Independent Police Conduct Authority Act 1988; Independent Police Conduct Authority Amendment Act 2007
Jamaica INDECOM	The Independent Commission of Investigations Act, 2010 (Act 12 of 2010)
South Africa IPID	South African Police Act (1995); Independent Police Investigative Directorate Act, 2011; Independent Police Investigative Directorate Amendment Act 2018 (pending passage)

²⁰⁷ See CHI., 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

Statutory Issues	Other ICIIAs			
	Chicago COPA	New Zealand IPCA	Jamaica INDECOM	South Africa IPID
Operating Date	Sept. 2017	2007	2010	2011
Date of Enabling Act	Sept. 2007	Nov. 2007	Aug. 2010	April 2012
Amendments to Enabling Act	None	2008, 2012	None	2018 (pending)
Regulation or MOU	Agency developed regulations	None	None	Regulations
Date of Enaction of Regulations	April 2018	N/A	N/A	2011
Amendments of Regulations or MOU	None	N/A	N/A	2018
Mandate	Citizen complaints, criminal and administrative investigations of critical incidents; pattern and practice investigations	Citizen complaints; critical incidents, "on its own motion" where "there are reasonable grounds to carry out an investigation in the public interest"	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	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

Statutory Issues	Other ICIIAs			
	Chicago COPA	New Zealand IPCA	Jamaica INDECOM	South Africa IPID
Involvement in Administrative investigations or Police Discipline?	Yes	Yes	Yes	Yes
Notification Requirements	Receives notifications from the Department related to incidents that fall within its investigatory jurisdiction	Police required to provide notification of critical incidents "as soon as practicable"	Police to provide notification to Commission within 24 hours of an incident falling within the jurisdiction of the Commission	Immediate notification and a written report within 24 hours of the incident
Ability to Lay Charges?	Refer to State Attorney	Makes recommendations to Commissioner of Police	Investigative report furnished to Director of Public Prosecutions	Referred to the National Prosecution Authority
Seconded Officers as Investigators? ^a	Not permitted	Not specified; none used	Not specified; none used	Not specified; no indication of use
Civilians (No Police Experience) as Investigators?	Yes	Not specified; use investigators from police and non-police backgrounds	Not specified; staff described in annual report as "civilian"	Not specified

Statutory Issues	Other ICIIAs			
	Chicago COPA	New Zealand IPCA	Jamaica INDECOM	South Africa IPID
Qualifications/Limitations for Director	An experienced attorney "with knowledge of law enforcement"; 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	Must be a judge or a retired judge	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	"A suitably qualified person"
Section of Director	Selected by Mayor; approved by City Council	Appointed by Governor General on recommendation of House of Representatives	Appointed by Governor General on recommendation of Prime Minister after consultation with Opposition	Nominated by Minister and confirmed by Parliamentary Committee
Director Term of Office	Four years with potential for reappointment	Five-year term	Five-year term with potential for reappointment to additional terms not exceeding five years	Five-year term with potential for one additional five-year term

Statutory Issues	Other ICIAs			
	Chicago COPA	New Zealand IPCA	Jamaica INDECOM	South Africa IPID
Removal from Office	No provision	Removal only for conduct that would result in removal from judicial office	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	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) ^b
Director Chain of Command	Reports to Mayor	Independent Crown entity "[s]tatutorily independent from government and the police"	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	Minister of Police and Parliament
Limitations on Hiring/Assignment of Investigators	May never have been be a sworn member of the police within the last 5 years; investigative staff "with the requisite knowledge, skill, training, and ability"	None specified	None specified	Minimum Grade 12 education and "knowledge and relevant experience of criminal investigations or other relevant experience"; no conflict of interests permitted
Police Powers	Not specified	Not specified	"Like powers, authorities and privileges as are given by law to a constable"	"The powers . . . which are bestowed upon a peace officer or a police official"

Statutory Issues	Other ICIIAs			
	Chicago COPA	New Zealand IPCA	Jamaica INDECOM	South Africa IPID
Cooperation Requirements	Duty of all City employees to cooperate with agency, officers required to participate in audio-recorded interviews	Police required, upon request, to provide all “information and assistance as is necessary” in relation to the investigation of any complaint, incident, or other matter	Police must preserve the scene and evidence; it is a crime to obstruct the commission	“Full cooperation,” including arrangement of an “identification parade” within 48 hours of a request, provision of all information and documentation required, and availability of police to provide affidavits, give evidence, or produce necessary documents. Interference or obstruction of an investigation is an offense
Independent Evaluation of Program	Subject to review and audit by Inspector General for Public Safety	None specified	Judicial review of decisions by complainants, police, and government officials	None specified

^a INDEP. POLICE CONDUCT AUTH., ANNUAL REPORT 2016–2017, at 10 [hereinafter NEW ZEALAND IPCA ANNUAL REPORT 2016–2017], <https://www.ipca.govt.nz/includes/download.ashx?ID=150434> [<https://perma.cc/T999-J8A7>]; JAMAICAN HOUSES OF PARLIAMENT, *supra* note 163, ch.1; SOUTH AFRICA IPID ANNUAL REPORT 2016/2017, *supra* note 206.

^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.

2019/2020]

ICIAs and Police Oversight

909

Table 10. Critical Incident Related Regulations and MOUs for Other Agencies

Agency	Regulations and MOUs
Chicago COPA	Civilian Office of Police Accountability Rules and Regulations (Effective April 13, 2018)
Jamaica INDECOM	None
South Africa IPID	IPID Regulations for the Operation of the Independent Police Investigative Directorate (GNR98 of Government Gazette 35018 of 10 February 2012), IPID Regulations
New Zealand IPCA	None

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.²¹¹ 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.²¹²

Overall, regulations and MOU's of the aforementioned ICIAs were similar in comparison with the ICIAs 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.

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 ICIAs after the agency has had some experience in conducting investigations.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

Jurisdiction	Recommendations	Response
British Columbia ^a	<ul style="list-style-type: none"> - 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* - Require a comprehensive review of the program at least once every 5 years** - Ensure reports of civilian monitors are public documents** 	<ul style="list-style-type: none"> *Amendment not enacted until 2019 **Not enacted
Ontario ^b	<ul style="list-style-type: none"> - Require the SIU to report publicly on investigative conclusions where no charges are laid against officers* - Require the police to notify the SIU after all police-related critical incidents (including no-hit police shootings)* - Provide the SIU with broader powers to lay charges against officers** 	<ul style="list-style-type: none"> *Amendments enacted 2019 **Not enacted
South Africa ^c	<ul style="list-style-type: none"> - Provide agency with the powers to institute its own prosecutions (independent from Attorney-General's rights in that regard) - Staff protection from civil liability - Require the National Defense Force to cooperate with IPID investigations into police conduct - Notification to IPID of all civil actions filed against the police - Unrestricted access to police dockets and records 	No amendments to date

²¹³ See *supra* tbls.3, 6 & 9.

2019/2020] ICIIAs and Police Oversight 911

Jurisdiction	Recommendations	Response
Jamaica ^d	<ul style="list-style-type: none"> - 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.

^c IPID First Annual Report 1996–1997.

^d JAMAICAN 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.”²¹⁴ 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.²¹⁵ Chicago and three agencies in Canada limit the background of investigators to persons who are not currently serving as police officers.²¹⁶ However, many agencies, even though permitted

²¹⁴ Katz, *supra* note 21, at 235.

²¹⁵ See CHI., ILL., MUNICIPAL CODE § 2-78-120(s) (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).²¹⁷

Limitations on the ability to remove an agency director without cause have been enacted with respect to many of the agencies.²¹⁸ South Africa and Ireland have the most noteworthy protections, allowing removal of the director only for cause and only after a vote of Parliament.²¹⁹ England, Scotland, New Zealand, and Jamaica all require cause for the removal of their directors.²²⁰ Northern Ireland also requires cause, however, the director can be removed in the name of “efficiency.”²²¹ 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.²²²

Although the vast majority of the agency directors report to the Attorney General or Solicitor General (Canadian agencies),²²³ Ministers (Scotland),²²⁴ Minister of Justice or Minister of Police (Ireland and South Africa),²²⁵ Secretary of State (Northern Ireland and England),²²⁶ or the mayor (Chicago),²²⁷ 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.

²²¹ See, e.g., Police (Northern Ireland) Act, 1998, c. 32, § 1 (U.K.).

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).

²²³ See Police Services Act, R.S.O. 1990, c P.15, s 113 (Can. Ont.); Police Act, S.N.S. 2004, c 31, s 26D (Can. N.S.); Police Service Regulation, Alta. Reg. 356/1990, s. 2, (Can.); *About the IIU*, INDEP. INVESTIGATION UNIT MAN., <http://iiumanitoba.ca/history.html> [https://perma.cc/M2A2-5JWZ]; *Mandate and Powers*, BUREAU DES ENQUÊTES INDÉPENDANTES, <https://www.bei.gouv.qc.ca/home/organization/mandate-and-powers.html> [https://perma.cc/32S2-FGCR]; *Who We Are*, INDEP. INVESTIGATIONS OFF. B.C., <https://iiobc.ca/about-us/who-we-are/> [https://perma.cc/GW7M-TVEM].

²²⁴ See *About Us*, *supra* note 95.

²²⁵ See *Garda Oversight*, GARDA OMBUDSMAN, <https://www.gardaombudsman.ie/about-gsoc/garda-oversight/> [https://perma.cc/V9HW-E6K4]; *Office Bearers/Management*, INDEP. POLICE INVESTIGATIVE DIRECTORATE, <https://nationalgovernment.co.za/units/management/20/independent-police-investigative-directorate-ipid> [https://perma.cc/A5KT-DKHQ].

²²⁶ See *Corporate Governance*, POLICE OMBUDSMAN FOR N. IR., <https://www.policeombudsman.org/Media-Releases/2015/Police-Ombudsman%E2%80%99s-role-extended> [https://perma.cc/S9LG-G6SP]; *IOPC Publishes Draft Guidance on Police Processes After a Death*, INDEP. OFF. FOR POLICE CONDUCT (Oct. 12, 2018), <https://policeconduct.gov.uk/news/iopc-publishes-draft-guidance-police-processes-after-death> [https://perma.cc/QN97-MM5P].

²²⁷ See *Annual Reports*, CIVILIAN OFF. POLICE ACCOUNTABILITY, <https://www.chicagocopa.org/news-publications/publications/annual-reports/> [https://perma.cc/J9BR-7GTL].

supervision. New Zealand's IPRA reports itself to be "statutorily independent [of] government"²²⁸ 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.²²⁹ Only one ICIA agency, ASIRT (Alberta, CA) has no statutory provision requiring public reports.²³⁰ 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.²³¹

In Canada, additional independence is provided for some ICIAs by authorizing ICIA Directors to directly lay criminal charges against police officers (Ontario, Manitoba, and Nova Scotia).²³² 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).²³³ 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.²³⁴ Similarly, most ICIA agencies, worldwide, are required to submit

²²⁸ See *Independence*, INDEP. POLICE CONDUCT AUTHORITY, <https://www.ipca.govt.nz/Site/about-us/Independence> [<https://perma.cc/J9BR-7GTL>].

²²⁹ Although 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 *Annual Reports*, SPECIAL INVESTIGATIONS UNIT, https://www.siu.on.ca/en/annual_reports.php [<https://perma.cc/8NAA-FSQY>]; *Media Centre*, SPECIAL INVESTIGATIONS UNIT, https://www.siu.on.ca/en/media_center.php [<https://perma.cc/J8ZK-ND9K>]. The original SIU enabling statute only required that the Director provide a final report of an investigation to the Attorney General and did not require that such report be made public. In lieu of public reports, the SIU instead issued press releases in approximately twenty-five percent of its cases, providing summary and conclusory statements regarding investigative findings. The failure of the SIU to make its Director's reports public was an issue of public debate and was criticized in a recent report reviewing civilian oversight in Ontario, see TULLOCH, *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>].

²³⁰ 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).

²³¹ See ASIRT, *Sharing Information with the Public*, ALTA., <https://open.alberta.ca/dataset/2952b11f-884f-461b-885c-81797af443f3/resource/d7d7225a-0371-4811-8312-859fe6772421/download/jsg-asirt-sharing-information-public.pdf> [<https://perma.cc/WQ57-LE59>].

²³² See *Police Services Act*, C.C.S.M., c P.94.5, s 67, 68 (Can. Man.); *Police Services Act*, R.S.O. 1990, c P.15, s 113 (Can. Ont.); *Police Act*, S.N.S. 2004, c 31, s 26K (Can. N.S.).

²³³ See, e.g., *Police Fed'n v. Comm'r of the Indep. Comm'n of Investigations*, [2018] JMCA Civ 10 [4].

²³⁴ See *id.* at [212].

their investigations to autonomous prosecutorial agencies for decisions as to whether criminal charges will be pursued.²³⁵ Even in Ontario, Manitoba, and Nova Scotia, Crown Counsel ultimately has the authority to pursue or dismiss criminal charges filed by ICIIA Directors.²³⁶

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,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.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.”²³⁹ He concluded that “formal organizational ‘independence’ . . . are a necessary but not sufficient condition for realizing the objectives” of independent oversight agencies.²⁴⁰

²³⁵ See *supra* tbls.3, 6 & 9.

²³⁶ See Criminal Code, R.S.C. 1985, c. C-46, s. 579.001, par. (1) (Can.); *supra* tbl.3.

²³⁷ See MICHAEL MAGUIRE, AN INSPECTION INTO THE INDEPENDENCE OF THE OFFICE OF THE POLICE OMBUDSMAN FOR NORTHERN IRELAND 3 (2011), <http://www.cjini.org/getattachment/fee7c8c8-4e16-4492-ba70-febfaf39427f/picture.aspx> [<https://perma.cc/AS8V-R66V>].

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.

²³⁹ See Savage, *Thinking Independence*, *supra* note 24, at 110.

²⁴⁰ *Id.*

The issue of agency independence has also been applied to the backgrounds of ICIA investigators and the potential negative impact investigators with police backgrounds may have on the objectivity of ICIA investigations.²⁴¹ However, the issue of to what extent civilians without police experience can competently investigate police-involved critical incidents remains controversial.²⁴² Confirming just how controversial “civilianization” of an ICIA remains, only one ICIA agency has statutory language that supports a goal of complete civilianization for its investigative staff.²⁴³

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 ICIA, 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.²⁴⁴

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.²⁴⁵ 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 zealotry of the regulator,”²⁴⁶ and has been identified as “a central concern in police complaints research.”²⁴⁷

Although there has been noteworthy research on civilian oversight of law enforcement dating back to the 1970s,²⁴⁸ only a few academics have specifically applied capture theory to the evaluation of police oversight mechanisms.²⁴⁹ 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.

²⁴³ See Police Act, R.S.B.C. 1996, c 367, s 38.13 (Can. B.C.).

²⁴⁴ See *infra* text accompanying notes 283–287.

²⁴⁵ See Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECONOMICS 1089, 1089–90 (1991).

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.”²⁵⁰ 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.²⁵¹ This is a challenge faced by all civilian oversight agencies, to include the ICIIA 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.”²⁵² 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.”²⁵³ 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-optation of the civilians by police is as certain a defeat as loss of mandate.”²⁵⁴ 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.”²⁵⁵

Prenzler identified a number of circumstances which, he believed, increased the likelihood of regulatory capture of a civilian oversight agency.²⁵⁶ 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.²⁵⁷ In addition, Prenzler also identified the need of an agency to “survive” as having a potential impact on agency capture.²⁵⁸ In fact, there have been many examples of oversight mechanisms being

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,

²⁵⁹ See David H. Bayley, *Preface*, in COMPLAINTS AGAINST THE POLICE (Andrew J. Goldsmith ed., 1991); Ferdik et al., *supra* note 15, at 106; Ian Freckelton, *Shooting the Messenger: The Trial and Execution of the Victorian Police Complaints Authority*, in COMPLAINTS AGAINST THE POLICE 80 (Andrew J. Goldsmith ed., 1991); WALKER, *supra* note 1, at 31.

²⁶⁰ See Savage, *Thinking Independence*, *supra* note 24.

²⁶¹ See Savage, *Seeking ‘Civilianness’*, *supra* note 24.

²⁶² See *id.* at 887; Savage, *Thinking Independence*, *supra* note 24, at 95–96.

²⁶³ Savage, *Thinking Independence*, *supra* note 24, at 94.

²⁶⁴ Savage, *Seeking ‘Civilianness’*, *supra* note 24, at 902.

²⁶⁵ Savage, *Thinking Independence*, *supra* note 24, at 108.

²⁶⁶ *Id.* at 109.

²⁶⁷ See *id.*

and the outcome of which will determine the nature of ‘independence’ as delivered.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,²⁶⁹ many ICIIAs globally use “seconded” police staff and all ICIIA agencies currently use retired officers to fill their investigative ranks.²⁷⁰

It should first be noted, however, that all models of citizen oversight of law enforcement are subject to accusations of police co-optation.²⁷¹ Review-focused agencies are sometimes perceived to be staffed by volunteer citizens who come from a “pro-police” orientation,²⁷² and auditor/monitor focused agencies have often been criticized for being too cooperative and collaborative with the police.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.²⁷⁴ The first model argues in favor of independence from the police;²⁷⁵ the second model highlights the belief that competency can only be immediately achieved by using investigators with current policing experience—

²⁶⁸ *Id.*

²⁶⁹ See Prenzler, *supra* note 24, at 663, 671–72; Savage, *Seeking ‘Civilianness’*, *supra* note 24, at 898, 900.

²⁷⁰ See Savage, *Seeking ‘Civilianness’*, *supra* note 24, at 889–90.

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.

²⁷² See *id.* at 27, 28.

²⁷³ See *id.* at 31–32.

²⁷⁴ See *supra* text accompanying notes 167–168.

²⁷⁵ See INDEP. INVESTIGATIONS OFFICE OF B.C., ANNUAL REPORT 4 (2006) [hereinafter IIOBC ANNUAL REPORT]; OFFICE OF THE POLICE COMPLAINT COMM’R B.C., ANNUAL REPORT 2 (2016) [hereinafter OPCC ANNUAL REPORT]; *supra* text accompanying notes 168–169.

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 than 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.

²⁸¹ See Police Act, R.S.B.C. 1996, c 367, s 38.06 (Can. B.C.); Police Services Act, R.S.O. 1990, c P.15, s. 113 (Can. Ont.); Public Service of Ontario Act, S.O. 2006, c 35, ss 2, 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> [<https://perma.cc/H5FM-G9FP>] (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.

²⁸⁶ See IPCC Wants More ‘Non-Police’ Investigators, BBC NEWS (July 4, 2012), <http://www.bbc.com/news/uk-18700216> [<https://perma.cc/WNW7-PGY3>].

²⁸⁷ *Id.*

²⁸⁸ See *id.*

²⁸⁹ See DE ANGELIS ET AL., *supra* note 3, at 26; *infra* tbl.12.

2019/2020]

ICIAs and Police Oversight

921

a jurisdiction has suffered major political or social upheaval resulting in overwhelmingly negative public perceptions of the police.²⁹⁰

The willingness of governments to create these agencies, even in the face of the minimal number of criminal charges that result from most ICIA agency investigations,²⁹¹ 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

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

²⁹⁰ 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.

²⁹¹ See *infra* tbl.12. Jamaica, South Africa, and Northern Ireland are notable exceptions.

922

Albany Law Review

[Vol. 83.3

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

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.”²⁹² 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,

²⁹² See Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151, 156–57 (2003); Katz, *supra* note 21, at 238.

2019/2020]

ICIAs and Police Oversight

923

ICIA programs are notorious for receiving inadequate funding²⁹³ and having difficulty recruiting and retaining qualified staff.²⁹⁴

E. Independence and Conflict of Interest

One of the more-weighty arguments in support of the creation of the ICIA 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:²⁹⁵ “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.”²⁹⁶

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.²⁹⁷ This lack of zeal is usually attributed to the idea that police officers tend to be loyal to their own.²⁹⁸

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

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 IIOBC).

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 ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, COMMISSION REPORT 52 (1994).

tend to interfere with the conduct of the investigation.²⁹⁹ 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.”³⁰⁰ 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.”³⁰¹ “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.”³⁰² 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.”³⁰³

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.’”³⁰⁴ 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,³⁰⁵ and even that former officers should not be investigating currently serving officers.³⁰⁶ 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

²⁹⁹ MICHAEL W. QUINN, *WALKING WITH THE DEVIL: WHAT BAD COPS DON’T WANT YOU TO KNOW AND GOOD COPS WON’T TELL YOU* 6 (2005).

³⁰⁰ Stephen Coleman, *Conflict of Interest and Police: An Unavoidable Problem*, 24 CRIM. JUST. ETHICS 3, 6 (2005).

³⁰¹ See Mark R. Keibell 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 Keibell et al., *supra* note 301, at 90.

³⁰⁴ Bobb, *supra* note 292, at 157.

³⁰⁵ See, e.g., Comm’n for Pub. Complaints Against the Royal Canadian Mounted Police, *Police Investigating Police: Final Public Report VI* (2009).

³⁰⁶ See BRAIDWOOD, *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).³⁰⁷

G. Independence, Deterrence, and Police Resistance

Another concept that can be applied to the creation of ICIAs 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.”³⁰⁸ 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.³⁰⁹ 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.³¹⁰ Under this theory, the creation and implementation of a credible ICIA 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

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.³¹¹ 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 agency³¹² or by police acting in a manner which is intended to minimize the agency's ability to investigate and bring charges against them.³¹³

In Canada, ICIIA-related litigation has most significantly involved officers refusing to cooperate with ICIIA directives or attempting to protect themselves against ICIIA investigations.³¹⁴ In general, the

³¹¹ See, e.g., Livingston, *supra* note 25, at 659–61.

³¹² See, e.g., Peel Police v. Ontario (2012), 110 O.R. 3d 536 (Can. Ont. C.A.) (lawsuit by Chief of Police to limit Ontario SIU jurisdiction over historical sexual assault investigation); R. v. Ottawa (City) Police Serv., [2015] O.J. No. 1648, para. 12–19 (Can. Ont. Sup. Ct. J.) (QL) (officer-initiated lawsuit against SIU policy of requiring officers to attend SIU office for booking and fingerprinting); R. v. Indep. Police Complaints Comm'n, 2015 EWCA (Civ) 1248, para. 45 (Can.) (court finding that IPCC had authority to reopen a use-of-force investigation where there was a “compelling reason” to do so); R. v. Indep. Police Complaints Comm'n, 2016 EWHC 2993 (Can.) (affirming jurisdiction of IPCC to re-consider and re-open an investigation at the conclusion of a Coroner's Inquest); *Police Fed'n v. Comm'r of the Indep. Comm'n of Investigations*, [2018] JMCA Civ 10 [109] (officer-initiated lawsuit to limit power of INDECOM to arrest, charge or prosecute independent of the Director of Public Prosecutions).

³¹³ See, e.g., Wood v. Schaeffer, [2013] 3 S.C.R. 1053, para. 17 (Can.) (family-initiated lawsuit against police refusal to write critical incident reports without conferring with lawyers); Wiche v. Ontario, [2001] O.J. No. 1850 (QL) (Can. Ont. Sup. Ct. J.); Thomson v. Ontario, [2001] O.J. No. 3347, para. 43 (Can. Ont. Sup. Ct. J.) (QL) (officer-initiated lawsuits for malicious prosecution brought against SIU Director); *In re Taggart* [2003] NI 108 (QB) (Northern Ireland—officers required to attend PONI interviews at time and place of investigator's choosing); R. v. Indep. Police Complaints Comm'n, 2008 EWHC 2372 (Can.); R. v. Chief Constable of Leicestershire Constabulary [2014] EWCA (Civ) 1635 (Can.) (court findings acknowledging police failures to segregate officers prior to writing reports and being interviewed by IPCC investigators); Evans v. Chicago, 2017 U.S. Dis. LEXIS 71814 (N.D. Ill. 2017) (officer-initiated lawsuit alleging malicious prosecution); *Williams v. Comm'r of the Indep. Comm'n of Investigations*, [2012] JMFC Full 1 (confirming INDECOM right to compel cooperation of officers in investigations); *Comm'r of the Indep. Comm'n of Investigations v. Comm'r of Jam. Constabulary Force*, [2016] JMSC Civ 20 [124] (confirming right of INDECOM to obtain relevant operational plans, administrative reviews, reports and supporting documents as well as disciplinary records); *In re Tabannah*, [2016] JMSC Civ 101 (officer-initiated lawsuit to obtain pre-charging disclosure from INDECOM).

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 ICIA agencies mandates and regulations.³¹⁵ However, ICIA-related case law appears to be the result of ICIA 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 ICIA investigations.³¹⁶

H. *Independence and Risk Management Theory*

The U.K./Ireland ICIA 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.³¹⁷ 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.³¹⁸

CONCLUSION

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

App.) (QL). The court ultimately concluded that 1) the officers had a duty to cooperate fully under the Police Act, which included the duty to attend for interviews as and when directed; 2) that attendance of counsel or union representatives is at the discretion of the IIO; 3) that pre-interview disclosure was at the discretion of the IIO; and 4) that the officers have failed to comply with their statutory duty to cooperate. *Id.* para. 6.

As an example of police resistance to Ontario SIU investigations, the first ICIA case to be heard by the Supreme Court of Canada arose out of a civil suit for damages against the police as the result of a 1997 officer-involved shooting involving the Toronto Police. *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, paras. 1–4 (Can.). In addition to alleging a wrongful death claim, the family also sought damages for “misfeasance in a public office” as the result of the failure of the officers and the police department to comply with the SIU investigation. *Id.* The Supreme Court ultimately found that the claims for misfeasance in public office against the officers and the Chief Constable would be allowed to proceed. *Id.* at para. 42. Specifically, the Court ruled that that failure of a public officer to perform a statutory duty can constitute misfeasance in public office and that the circumstances of the case raised a *prima facie* duty of care owed by the Chief to the plaintiffs. *Id.* at para. 59.

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 IIO); *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

2019/2020]

ICIAs and Police Oversight

929

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 ICIA 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 ICIA 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 ICIA 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, 2014,³¹⁹ the ICIA 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.

³¹⁹ See, e.g., PRINCE, BALTIMORE (Universal Music Group, 2015) (“Does anybody hear us pray for Michael Brown or Freddie Gray?”).