



## **“Oversight Unchanged”**

Submission to the  
Independent Police Oversight Review

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## Table of contents

Overview .....	3
Scope of Independent Police Oversight Review .....	3
The Ontario Ombudsman and police oversight.....	4
Ontario’s three police oversight bodies .....	4
Ombudsman oversight of police oversight bodies .....	5
Ombudsman oversight of police services boards .....	7
The bottom line.....	8
Enhancing transparency and accountability: SIU, OIPRD, OCPC .....	9
Ombudsman oversight .....	9
Public release of SIU reports .....	10
Officer and witness names .....	12
Past reports .....	12
Public release of other information .....	12
Former police officers working in police oversight.....	14
Clearer mandates through legislation .....	17
The SIU .....	18
Information sharing between oversight bodies.....	21
Collection of demographic information.....	23
Improving oversight of police services boards .....	24
Conclusion .....	25
Appendix: List of recommendations .....	27

## Overview

- 1 Since 1974, police oversight in Ontario has been the subject of more than a dozen reviews, generating hundreds of recommendations for reform. In response, successive governments have introduced legislative amendments aimed at enhancing independent oversight of police. However, finding the right balance between effective policing and public accountability has proven elusive. Today, Ontario’s oversight system continues to attract criticism that threatens to undermine public confidence in policing.
- 2 On July 5, 2015, Andrew Loku, a 45-year-old father of five who came to Canada as a refugee from South Sudan in 2004, was shot dead by Toronto police in his apartment building – a residence for individuals living with mental health challenges – after an incident in which he was wielding a small hammer. The Special Investigations Unit, Ontario’s civilian body for investigating police-involved deaths, determined that no criminal charges against the responsible officer were warranted.
- 3 Mr. Loku’s death and the officer’s perceived exoneration in the Special Investigations Unit’s “secret” report sparked outrage, including protests by the activist group Black Lives Matter. Reacting to public pressure, on April 29, 2016, the government released a heavily redacted version of the SIU’s report on its investigation of Mr. Loku’s death. The same day, the Ontario Cabinet appointed Ontario Court of Appeal Justice Michael Tulloch to lead another review of Ontario’s police oversight regime.

## Scope of Independent Police Oversight Review

- 4 Justice Tulloch’s Terms of Reference require that he consider how the province can:
  - Enhance the transparency and accountability of the police oversight bodies, while preserving fundamental rights;
  - Ensure the police oversight bodies are effective and have clear mandates; and
  - Reduce overlap and inefficiencies between these bodies.<sup>1</sup>

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<sup>1</sup> OC 629/2016, online: <<http://www.policeoversightreview.ca/oicreview.pdf>>.

- 5 In addition, he has been asked to address questions relating to publication of information about investigations, participation of former police officers in oversight, the legislative structure of oversight bodies, sharing of information between them, and the collection of demographic statistics.

## The Ontario Ombudsman and police oversight

- 6 My Office has the authority to independently and impartially investigate individual and systemic complaints about the administrative conduct of more than 1,000 public sector bodies at the provincial and local level. As Ombudsman, I have broad powers of investigation and can issue reports and recommendations promoting constructive reforms to legislation, policy, practices and procedures for the benefit of Ontarians.
- 7 However, my Office's jurisdiction with respect to police services and police oversight is fragmented. Thanks to recent amendments to the *Ombudsman Act* and related legislation, we now have authority over municipal government bodies. But despite this new authority, we still cannot consider public complaints about municipal police<sup>2</sup> or police services boards.<sup>3</sup> As well, although my Office can consider some issues relating to the Ontario Provincial Police<sup>4</sup>, we are prevented from addressing public complaints about this organization.

### Ontario's three police oversight bodies

- 8 In Ontario, responsibility for police oversight is shared between three independent, civilian bodies created under the *Police Services Act*: The Special Investigations Unit (SIU), the Office of the Independent Police Review Director (OIPRD), and the Ontario Civilian Police Commission (OCPC).
- 9 The **SIU**, established in 1990, investigates cases of serious injury and death resulting from police conduct. The SIU assesses whether involved officers have committed any criminal offences, and after completing an investigation, the SIU Director can lay criminal charges against the officer. The Director must report the

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<sup>2</sup> *Police Services Act*, RSO 1990, c P15, s 97.

<sup>3</sup> O Reg 114/15, s 1(4).

<sup>4</sup> See, for example, our 2012 systemic investigation report, *In the Line of Duty: Investigation into how the Ontario Provincial Police and the Ministry of Community Safety and Correctional Services have addressed operational stress injuries affecting police officers*, online: <<https://www.ombudsman.on.ca/Resources/Reports/In-the-Line-of-Duty.aspx>>.

results of the SIU's investigations to the Attorney General, including those in which no criminal culpability is found.

- 10 The **OIPRD**, established in 2007, is responsible for receiving, managing and overseeing all public complaints about police. The OIPRD accepts complaints about the conduct of individual police officers, as well as the general policies and services of police departments. Although it refers many complaints to police services, the OIPRD directly investigates certain conduct complaints. Public complaints, if supported, can lead to disciplinary proceedings under the *Police Services Act*.
- 11 The **OCPC**, also established in 2007, adjudicates various police-related matters, including appeals of police discipline decisions and budget disputes between police services and municipalities. In addition, the OCPC may investigate the conduct or work performance of certain individuals, including police officers.

#### Ombudsman oversight of police oversight bodies

- 12 My Office has the authority to address complaints about the administrative conduct of the SIU. However, our jurisdiction over the OCPC and the OIPRD is limited to matters outside of the public complaints and discipline process. Unsurprisingly, most complaints we receive about these bodies involve public complaints that we are unable to review. For instance, we have received several complaints about the quality of the OIPRD's investigations, its dismissal of complaints, and its practice of referring certain matters back to police services. We have also received complaints about lack of response during the OIPRD's intake process and general concerns about its independence.
- 13 Complaints to my Office about the SIU often involve allegations of pro-police bias and lack of transparency. We have conducted two systemic investigations of the SIU in the past decade, in which we identified serious structural and operational concerns. Our report on the first investigation, *Oversight Unseen* (2008), focused on the SIU's operational effectiveness and credibility, resulting in **46** recommendations to improve the system of police accountability in Ontario.<sup>5</sup> Our report on the second investigation, *Oversight Undermined* (2011), addressed the Ministry of the Attorney General's response to the first report and concluded it had failed to properly support the SIU in implementing reforms because of

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<sup>5</sup> Ontario Ombudsman, *Oversight Unseen: Investigation into the Special Investigations Unit's operational effectiveness and credibility*, 2008, online: <<https://www.ombudsman.on.ca/Resources/Reports/Oversight-Unseen.aspx>>.

concern about police resistance.<sup>6</sup> The second report made **16** recommendations to improve police oversight, 13 of which were repeated from the previous report.

- 14 Today, the recommendations we made to transform the SIU’s legislative authority remain unfulfilled, and the problems we first highlighted in 2008 continue to damage public trust in the SIU.
- 15 Our calls to reform the SIU were not the only ones that were overlooked. In late 2009, the Ministry of the Attorney General asked the Honourable Patrick Lesage to review issues with relations between police and the SIU, and committed to implementing his recommendations when they were released 15 months later. However, only three of these recommendations were ever implemented. The rest, including the recommendation that certain contentious SIU and policing issues be reviewed again by 2013, were not. Meanwhile, Ontario’s legislative framework for police oversight has remained unchanged.
- 16 Between April 1, 2012 and March 31, 2016, we received **184** complaints and inquiries relating to police oversight bodies in Ontario. During that same period, we also received **1,968** complaints and submissions about police.
- 17 Where appropriate, we refer complaints about policing to the OIPRD, the SIU, or the OCPC. Although my Office is precluded from investigating these concerns directly, they have given us insight into the public’s concerns about policing in Ontario and have informed my response to the consultation questions posed by Justice Tulloch.

<b>Complaints and inquiries about police/police oversight</b>	<b>2012-13</b>	<b>2013-14</b>	<b>2014-15</b>	<b>2015-16</b>
Special Investigations Unit (SIU)	4	13	18	8
Office of the Independent Police Review Director (OIPRD)	45	36	22	35
Ontario Civilian Police Commission (OCPC)	3	0	0	0
Police	365	538	358	284
Ontario Provincial Police (OPP)	101	111	101	110

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<sup>6</sup> Ontario Ombudsman, *Oversight Undermined: Investigation into the Ministry of the Attorney General’s implementation of recommendations concerning reform of the Special Investigations Unit*, 2011, online: <<https://www.ombudsman.on.ca/Resources/Reports/Oversight-Undermined.aspx>>.

18 My Office is ideally and uniquely positioned to receive and address complaints about the OIPRD and the OCPC. Having oversight of these two organizations – in addition to the SIU – would provide Ontarians with a trusted avenue for their concerns about police oversight. It would also enable my Office to review issues at a systemic level, promote consistency in the organizations’ practices, and enhance public confidence in police oversight.

Ombudsman oversight of police services boards

19 Police services boards are a significant part of the system for ensuring civilian oversight, accountability, and transparency in policing. My Office has consistently recognized the importance of robust police services boards and has taken steps to reach out to these vital oversight organizations.<sup>7</sup>

20 Under the *Police Services Act*, they are comprised of one or more members of municipal council, a non-council member appointed by council, and one or more members appointed by the Lieutenant Governor in Council.<sup>8</sup> Boards may have 3, 5 or 7 members depending on the size of the municipality and the majority of members must be municipal appointees. The Act sets out the duties of a board, which each relate to the provision of adequate and effective police services in the municipality.<sup>9</sup>

21 Over the past four years, my Office has received a range of complaints about police services boards. People have contacted us with concerns that their local police services board is not complying with the meeting requirements under the *Police Services Act*, while others have expressed general concerns about the management of the board.

Complaints and inquiries about police services boards	2012-13	2013-14	2014-15	2015-16
	7	3	5	5

<sup>7</sup> For instance, former Ombudsman Marin was invited to give a presentation to the Ontario Association of Police Services Boards’ annual convention in May 2015. A recording of this speech is available online: <<https://www.ombudsman.on.ca/Resources/Speeches/2015/Speech-to-Ontario-Association-of-Police-Services-B.aspx>>. Former Ombudsman Marin also spoke at the association’s 2012 and 2014 spring conferences. More information is available at: <[https://storify.com/Ont\\_Ombudsman/andre-marin-speech-to-ontario-assn-of-police-servi](https://storify.com/Ont_Ombudsman/andre-marin-speech-to-ontario-assn-of-police-servi)> and <<https://www.ombudsman.on.ca/Resources/Speeches/2014/Civilian-Oversight--Use-It-or-Lose-It.aspx>>.

<sup>8</sup> *Police Services Act*, RSO 1990 c P 15, s 27(4) to (9).

<sup>9</sup> *Police Services Act*, RSO 1990 c P 15, s 31(1).

- 22 At present, police services boards are exempt from my Office’s oversight. They are subject to some oversight through the OCPC, which can undertake certain inquiries related to a police services board’s or a board member’s conduct. The OCPC also has the ability in some cases to suspend or remove board members. However, oversight gaps remain, and there is no principled reason for limiting the public’s access to my Office when it comes to concerns about the administration of police services boards.

## The bottom line

- 23 I am encouraged by the government’s appointment of Justice Tulloch and renewed interest in reform of police oversight in Ontario. Our civilian oversight bodies represent critical checks and balances in our democracy. However, public trust depends on their effectiveness, and transformative change is required to foster confidence in policing in this province. I met with Justice Tulloch and senior members of his staff on October 3, 2016, to discuss my Office’s perspective on the issues he is considering.
- 24 I am making several recommendations to Justice Tulloch based on my Office’s experience with police oversight and our mission to instill positive change and enhance public confidence by promoting fairness, accountability and transparency in the public sector.
- 25 My focus is on two key concepts with regard to the provincial bodies that oversee police: First, my Office should have authority to review complaints about all three of Ontario’s police oversight bodies. The historic and arbitrary inconsistency applying to my oversight of the SIU, the OIPRD and the OCPC should be eliminated to enhance the administrative fairness, accountability and transparency of these bodies. Second, the remaining recommendations from *Oversight Unseen* and *Oversight Undermined* should be implemented for the SIU and used to guide recommendations for reforming the OIPRD and the OCPC. It has been more than eight years since these recommendations were first brought forward, and intervening events – including high-profile civilian deaths that have attracted public outcry – have provided further evidence of the need for rigorous and credible civilian oversight of police.
- 26 In addition, in the interest of consistent transparency and accountability in all areas of police oversight, I am making the case that my Office’s municipal oversight should include police services boards.



## Enhancing transparency and accountability: SIU, OIPRD, OCPC

### Ombudsman oversight

- 27 The SIU, the OIPRD and the OCPC are all provincial government organizations, similar to hundreds of agencies that my Office oversees. All three are involved in police oversight. However, only the SIU – which has the important task of conducting criminal investigations of incidents where police are involved in a death or serious injury – is subject to Ombudsman scrutiny.
- 28 There is no justification for limiting the public’s access to my Office for concerns about the administration of the OIPRD and the OCPC. When the Ombudsman’s Office was created in 1975 it had the authority to investigate the Ontario Police Commission, which among its responsibilities investigated police conduct. The provision in the *Police Services Act* that now prevents my Office from overseeing these bodies is an accident of history, carried over from when an independent civilian oversight body was created on a trial basis in 1981 for the Metropolitan Toronto Police. At that time, my Office did not have authority over municipalities, and the primary reason for excluding the Ombudsman was likely the municipal nature of the police force. The oversight body for the Metropolitan Toronto Police was made permanent in 1984. When this model for civilian oversight of police was extended throughout the province in 1990, the provision excluding the Ombudsman’s jurisdiction was simply replicated. It has continued to this day, through successive amendments to the Act.
- 29 The province should revisit and rectify this anachronism. My Office acts as a last resort and does not duplicate the work of public sector bodies. Our focus is not on re-examining, re-investigating or re-adjudicating, but on ensuring that administrative conduct is fair, accountable and transparent, and reflects administrative best practices. The time has come to jettison the historic jurisdictional anomaly that sets the OIPRD and the OCPC apart, and ensure that all three civilian oversight bodies are equally subject to Ombudsman review.
- 30 Many Ontarians do not know where to turn when they have an issue with police conduct or service. They do not know how or where to make a complaint, because police oversight bodies – and the different roles they play – are difficult to understand and not well publicized.
- 31 In contrast, the Ontario Ombudsman is a high-profile organization. When people have complaints about public sector organizations, they think of my Office. That helps explain why we receive hundreds of complaints about policing every year. Even though we do not have authority to review these complaints, we are able to

evaluate the substance of them, direct complainants to the appropriate oversight agency, and facilitate contact in certain instances. Having oversight of the OIPRD and the OCPC would enable my Office to follow up on these referrals, track complaint trends, and proactively address emerging systemic issues.

### **Recommendation 1**

To enhance transparency and accountability, the Office of the Independent Police Review Director and the Ontario Civilian Police Commission should be subject to the Ontario Ombudsman's oversight, as is currently the case with the Special Investigations Unit.

## Public release of SIU reports

- 32 Transparency is key to maintaining public confidence in civilian oversight of police. What people don't know, they will infer. As evidenced in the Andrew Loku case, failure to report the reasons why charges against a police officer have not been laid can – and frequently does – fuel speculation and suspicion about the competency and impartiality of SIU investigations.
- 33 To preserve the SIU's investigative integrity, regulations under the *Police Services Act* restrict the information that police services and the SIU can disclose while an SIU investigation is ongoing.<sup>10</sup> However, the Act and regulations are silent as to what information the SIU can or should disclose once the investigation has concluded and the SIU has reported the results to the Attorney General. Historically, reports on SIU investigations (generally known as "Director's reports," as they are issued by the SIU Director) have been shrouded in secrecy.
- 34 When my Office first investigated the SIU in 2008, it was reluctant to report publicly at the conclusion of its investigations. We found that the SIU was only issuing press releases in about one-third of its cases, and that the brief case summaries on its websites only included the barest details.<sup>11</sup>
- 35 The SIU told my Office that it strongly supported keeping its reports confidential, and claimed that mandatory disclosure would undermine its effectiveness. The then-Director of the SIU argued that releasing the reports could jeopardize the fairness of related investigations and proceedings, as well as have a chilling effect on potential witnesses (who could no longer be assured of confidentiality).

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<sup>10</sup> O Reg 267/10, s 13.

<sup>11</sup> *Oversight Unseen* at para 312.

He also said that editing reports to mitigate these consequences would require additional resources and that redacted reports might still put specific individuals' confidentiality at risk.<sup>12</sup>

- 36 Despite this reticence to report publicly, my Office found that it was not uncommon for SIU investigators to read investigative reports to affected civilians, editing out names or information that was considered particularly sensitive. Sometimes, the SIU investigator even determined that witness names could be safely disclosed.<sup>13</sup>
- 37 In *Oversight Unseen*, my Office acknowledged that the SIU's concerns had merit, but suggested that it could better balance the competing concerns of investigative integrity, personal privacy, and the public interest in an accountable and transparent police oversight regime. In light of the need for greater transparency and accountability for the SIU, we concluded that:

The public is entitled to more than a brief set of facts and a stark conclusion. The rationale for the Director's decision should also be apparent. This does not necessarily require full recitation of the evidence with reference to witness names, but it requires more than bare-bones disclosure.<sup>14</sup>

- 38 We recommended that the SIU "be legislatively required to publicly disclose Director's reports, in cases involving decisions not to charge, subject to the Director's discretion to withhold information on the basis that disclosure would involve a serious risk of harm." In response to this recommendation, the SIU took some steps to increase the amount of information it released about its cases; however, the government rejected our recommendation for legislative reform.
- 39 In our second report, *Oversight Undermined*, we repeated the call for disclosure of Director's reports in cases involving decisions not to charge, subject to the Director's discretion to withhold certain information. The government again declined to implement this recommendation.
- 40 In the case of the SIU's investigation of Andrew Loku's death, the government took the unprecedented step of releasing a partial, redacted version of the Director's report. Although some members of the public criticized the Ministry's decision to not release the full report, the fact that even a partial report was

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<sup>12</sup> *Oversight Unseen* at para 315.

<sup>13</sup> *Oversight Unseen* at para 307.

<sup>14</sup> *Oversight Unseen* at para 315.

released underscores that it is possible to provide more transparency and better balance the competing interests of investigative integrity, personal privacy, and public disclosure. Further, even when the SIU decides to not release certain details about police-civilian encounters, information related to its investigations often enters the public domain through other types of proceedings, such as criminal prosecutions, coroner's investigations, and civil litigation.

- 41 As my Office has repeatedly observed, transparency should be the default position with regard to police oversight. We remain of the view that the best way to enhance the transparency of SIU investigations while preserving fundamental rights is to release Director's reports publicly, subject to limited discretion to withhold sensitive information. For the third time, we make the following recommendation:

**Recommendation 2**

The Special Investigations Unit should be legislatively required to publicly disclose Director's reports, in cases involving decisions not to charge, subject to the Director's discretion to withhold information on the basis that disclosure would involve a serious risk of harm.

Officer and witness names

- 42 The SIU Director is best positioned to determine whether, in the particular circumstances of each case, the disclosure of names of police officers or witnesses would involve a serious risk of harm. I am confident that if the SIU Director were expressly granted discretion to provide more open disclosure, the various interests at stake could be appropriately balanced. When the Director exercises this discretion, a reason for not releasing the names should be provided.

Past reports

- 43 I see no reason to exclude past Director's reports from public disclosure, provided that the current Director has the discretion to withhold information to prevent the serious risk of harm. In determining whether a serious risk of harm was present, the Director could take into consideration any guarantees of witness confidentiality given at the time of the SIU's original investigation.

Public release of other information

- 44 Because the SIU conducts investigations throughout the province and amongst many police services, it has the opportunity to review police practices and trends

on a systemic level. In *Oversight Unseen*, we recommended that the SIU should report publicly on any significant concerns about policing practices that it identifies in the course of its investigations – e.g. use of Tasers, custodial practices.<sup>15</sup> In response to this recommendation, the SIU took steps to better share information relating to systemic policing issues. In *Oversight Undermined*, we reported that the Ministry of the Attorney General and the Ministry of Community Safety and Correctional Services had developed a protocol to discuss systemic issues affecting policing identified by the Director of the SIU.

- 45 In the interest of transparency, the SIU should continue to develop practices for making public significant concerns about police practices and trends.

### **Recommendation 3**

The SIU should make public significant concerns regarding policing practices and trends that it identifies during the course of its investigations.

- 46 Whenever an incident occurs that triggers the SIU's mandate, the chief of the involved police service is required by regulation to conduct a separate, internal investigation (in addition to the SIU's investigation).<sup>16</sup> Police services should be required by law to release these internal investigative reports publicly in cases where no charges are laid. Whether or not criminal charges are laid against police in cases involving serious injury or death of civilians, there is significant public interest in knowing if issues exist that relate to police conduct – e.g., potential policy issues, such as training, supervision or other areas that may have a systemic component.
- 47 As noted in my Office's previous reports, publicizing the outcome of administrative proceedings connected with SIU investigations would enhance the transparency of the police oversight process. Accordingly, I am reiterating this recommendation from *Oversight Unseen* and *Oversight Undermined*:

### **Recommendation 4**

The legislation should provide for public release of internal police investigative reports related to Special Investigations Unit investigations, in cases where no charges are laid, subject to the discretion to withhold information on the basis that disclosure would involve a serious risk of harm. Where charges against officers are pending as a result of internal investigations, the fact that charges have been laid should be publicized, as well as the eventual outcome.

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<sup>15</sup> *Oversight Unseen*, Recommendation 22.

<sup>16</sup> O Reg 267/10, s 11.

48 Ultimately, what was true in 2008 and 2011 remains true today: Increased public reporting of SIU investigations and related proceedings is in the interests of all involved, and will go a substantial way to building public confidence in the SIU's oversight of police.<sup>17</sup>

## Former police officers working in police oversight

49 Ontario's civilian police oversight regime differs from that of many other jurisdictions, where civilians are not entrusted to conduct independent criminal investigations of police, leaving police to investigate police.<sup>18</sup> However, the premise of civilian oversight has at times been marred, particularly in the case of the SIU, by the substantial role that former police officers play in carrying out the mandate of these "civilian" organizations. There is a widespread perception amongst some stakeholders that the SIU is merely ex-police investigating police.

50 The *Police Services Act* contains some provisions intended to mitigate police influence within police oversight bodies. The SIU Director cannot be a serving or former officer. Serving police officers cannot act as SIU investigators, and SIU investigators who are ex-police cannot participate in investigations related to their former services.<sup>19</sup> Similar legislative provisions exist for the OIPRD, although there is no prohibition against investigators reviewing complaints about a police service that previously employed them.<sup>20</sup> There are no legislative provisions preventing the employment of serving or former police officers at the OCPC.

51 Despite these legislative precautions, our 2008 investigation determined that the influence of police culture was pervasive at the SIU. At that time, the SIU investigative staff was made up primarily of former police officers, most of whom were retired white males in their 50s and older; every investigative manager fit this profile. This was in contrast to local police services, which had begun taking steps to reflect the racial and cultural diversity of their communities.

52 We also found that SIU investigators commonly displayed symbols of police fidelity, such as rings, watches, and ties displaying police insignia. Even the SIU's dress code essentially mirrored that of police detectives. Several SIU

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<sup>17</sup> *Oversight Unseen* at para 319 and *Oversight Undermined* at para 153.

<sup>18</sup> Christopher Murphy and Paul McKenna, *Police Investigating Police: A Critical Analysis of the Literature* (2014: Civilian Review and Complaints Commission for the RCMP), online: <<https://www.crc-cetp.gc.ca/en/police-investigating-police-critical-analysis-literature>>.

<sup>19</sup> *Police Services Act* at 113(3) and (6).

<sup>20</sup> *Police Services Act* at 26.1(2) and (5).

investigators told my Office that they had heard their ex-police colleagues making pro-police remarks or stressing their past police experience when dealing with police officials. As well, we found that derogatory language originating in the police community – such as describing those with criminal records as “shit rats” – had entered the SIU lexicon.

- 53 Public perception is critical to the credibility and effectiveness of police oversight bodies. While former officers investigating active officers might well be independent and impartial in their approach, the situation could still lead to public perception of improper influence. In addition, it is important that the SIU reflect the diversity of the community it serves. Ensuring community confidence requires that civilian oversight bodies take all reasonable steps to avoid organizational structures and practices that give rise to the spectre of bias.
- 54 Over the years, former police officers have provided valuable insights and skills to the SIU; it can be difficult, for example, to retain civilian staff who have similar technical abilities as former police forensic specialists. However, the SIU has also been successful in retaining competent civilian investigators, proving that a policing background is not mandatory to investigate police.
- 55 In *Oversight Unseen*, we observed that increasing civilian representation in the SIU’s investigative and management ranks, and taking additional steps to limit the influence of police culture and connections, could enhance public perceptions of the SIU’s independence and impartiality. Accordingly, we recommended that:
- The Special Investigations Unit should take immediate steps towards ensuring civilian representation within investigative management;
  - The Ministry of the Attorney General should immediately take steps to ensure that the Special Investigations Unit is provided with a classification system which enables it to recruit more civilian investigative staff;
  - The Special Investigations Unit should ensure that none of its investigative staff wear or otherwise display symbols suggesting that they identify with police or demonstrate their former police membership or status; and
  - The Special Investigations Unit should ensure that no former police officers, including the Executive Officer, are placed in a position in which they are dealing with cases involving their former force in any capacity.<sup>21</sup>

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<sup>21</sup> *Oversight Unseen*, Recommendations 9, 10, 11, and 28.

- 56 Since 2008, various changes at the SIU have only partially responded to these recommendations. For instance, the SIU developed a new investigator position intended to attract individuals from civilian backgrounds. In addition, it finalized a policy related to the legislative prohibition against staff participating in investigations involving their former police services, and more closely monitored staff displays of police symbols.
- 57 However, the concerns identified in *Oversight Unseen* regarding the influence of police culture at the SIU continue to be relevant today. They also apply generally to each of Ontario’s civilian oversight bodies, to the extent that they employ former police officers. Accordingly, we make the following recommendations to enhance the perceived and actual independence and credibility of Ontario’s police oversight bodies:

**Recommendation 5**

Ontario’s police oversight bodies should take immediate steps towards ensuring greater civilian representation within staff and management. Ontario’s police oversight bodies should ensure that their staff reflects the diversity of the communities they serve.

**Recommendation 6**

The Ministry of the Attorney General should ensure that police oversight bodies are provided with a job classification system which enables them to more effectively recruit civilian investigative staff.

**Recommendation 7**

Ontario’s police oversight bodies should ensure that none of their staff wear or otherwise display symbols suggesting that they identify with police or in other respects demonstrate former police membership or status.

**Recommendation 8**

Ontario’s police oversight bodies should ensure that no former police officers are placed in a position in which they are dealing with cases involving their former police service in any capacity.

- 58 These basic safeguards would bolster public confidence in the independence of police oversight. Civilian oversight of police was born out of public distrust of police investigating their own. It is critical that Ontario’s police oversight bodies take steps to ensure that they remain – in both appearance and actuality – a mechanism for civilian oversight of police.



## Clearer mandates through legislation

- 59 The *Police Services Act* is a testament to multitasking. In addition to setting out requirements for the operation and governance of municipal police services, the Ontario Provincial Police, and municipal police services boards, it also addresses discipline, labour relations, pensions, court security and creates three civilian police oversight bodies. It is accompanied by various regulations, covering issues ranging from how municipalities pay for police services to major case management to public complaint processes. Further, the *Police Services Act* covers areas of responsibility falling to two ministries. The Ministry of Community Safety and Correctional Services is accountable for policing in the province and therefore generally administers the Act; however, to reinforce their independence from police authorities, the police oversight bodies created in the Act report through the Ministry of the Attorney General.
- 60 Under these circumstances, there is a simple answer to the question of whether the mandates of the three oversight bodies should be set out in legislation separate from the *Police Services Act*: A resounding yes. At present, police oversight is overshadowed by the competing demands of the *Police Services Act*.
- 61 Since 1990, despite its critical mandate, the SIU's authority has been consigned to a single section of the *Police Services Act* – and later, one short regulation. In *Oversight Unseen* and *Oversight Undermined*, my Office determined that the legislative structure of the SIU perpetuated a state of identity crisis; it was (and is) neither fully operationally independent, nor an integral part of the Ministry of the Attorney General.<sup>22</sup> In both reports, we recommended that the SIU be reconstituted under its own legislation to address the many issues restricting its development into a fully mature oversight body. This recommendation reiterated previous calls – from the SIU's 2005 “action plan” as well a November 2005 Ministry briefing note – for the SIU to be provided with its own legislative foundation.<sup>23</sup>
- 62 The same logic applies to the OIPRD and the OCPC. As civilian oversight bodies, they are entitled to legislative independence from the statute that governs policing. They are entitled to their own constituting act. Accordingly, I am making the following recommendation:

### Recommendation 9

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<sup>22</sup> *Oversight Unseen* at para 367 and *Oversight Undermined* at para 174.

<sup>23</sup> *Oversight Unseen* at para 367.

Ontario's police oversight bodies should be reconstituted under new legislation dealing specifically with their mandates and investigative authorities.

- 63 Simply moving the existing legislative provisions for each oversight body from the *Police Services Act* to a standalone statute will be ineffective if their mandate and authority is not well defined and sufficiently robust. The new statutory structure should foster the independence, efficacy, transparency, and accountability of each oversight agency. For instance, my Office has commented repeatedly on the inadequacy of the legislative provisions governing the SIU.

### The SIU

- 64 In both *Oversight Unseen* and *Oversight Undermined*, we identified problems with the clarity of the SIU's mandate and its ability to effectively carry out that mandate.
- 65 The SIU's investigative authority is triggered by death or "serious injury." Yet the term "serious injury" is undefined. In most cases, the SIU relies on police services to notify it of incidents coming within its jurisdiction. The SIU has adopted its own definition of "serious injury," but it has not always been accepted and applied by police services. Our reports revealed cases where this lack of a clear and consistent definition contributed to delayed notification of the SIU – and some where it was never notified. As this undermines the effectiveness of the SIU, we twice recommended that the term "serious injury" be defined in legislation.
- 66 Similarly, we found that the Ontario Provincial Police at one point interposed an internal criminality assessment as a precondition to notifying the SIU. Essentially, the OPP conducted its own preliminary review of incidents before engaging the SIU. The determination of criminality is central to the SIU's mandate and the failure of the OPP to accede this point was deeply disturbing. We recommended that the SIU's governing legislation:

[S]pecify that the SIU has sole responsibility for assessing the criminality of incidents involving death or serious injuries of individuals as a result of contact with police.<sup>24</sup>

- 67 There were other areas of ambiguity that we found frustrated the SIU's efforts to carry out its mandate, including confusion over whether it could investigate an

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<sup>24</sup> *Oversight Unseen*, Recommendation 33 and *Oversight Undermined*, Recommendation 5.

incident where an officer (rather than a civilian) was injured or killed by another, as well as historical cases where an officer had retired. In the later situation, the Ontario Court of Appeal confirmed the SIU's authority to investigate.<sup>25</sup> However, we recommended that the legislation expressly set out the SIU's authority to investigate incidents of officers involved in serious injury or death of other officers, as well as historical incidents where subject officers have retired.

- 68 We were also concerned about the independence of the SIU Director's position from the Ministry. We recommended that the legislation require the SIU Director to be appointed on a five-year renewable term, with compensation established on an objective basis and not dependent on performance.
- 69 These recommendations remain unfulfilled, and I once again call on the province to provide Ontario's police oversight bodies with a solid legislative foundation.

#### **Recommendation 10**

When drafting the standalone statute for Ontario's police oversight bodies, the province should ensure that the new legislation contains provisions to foster the independence, efficacy, transparency, and accountability of each organization.

#### **Recommendation 11**

The revised statutory framework for the Special Investigations Unit should clearly set out the unit's mandate. To achieve this clarity, the province should implement the legislative changes recommended in *Oversight Unseen* and *Oversight Undermined*. Specifically, the new legislation should:

- Define the term "serious injury" and specify that the Special Investigations Unit has the sole responsibility for assessing the criminality of incidents involving death or serious as a result of contact with police;
- Clearly outline the Special Investigation Unit's investigation authority, including the authority to investigate where a fellow officer was injured as well as historical cases where the officer has retired; and
- Provide for the appointment of the SIU Director on a five-year renewable term, with compensation established on an objective basis and not dependent on performance.

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<sup>25</sup> *Peel Regional Police Service v Scott*, 2012 ONCA 292.

- 70 In addition to clarifying the SIU's mandate, the revised legislation should provide the foundation necessary to effectively carry out its strengthened mandate.
- 71 It is no secret that the relationship between police services and the SIU is often strained, and there have been several high-profile cases where police officers failed to co-operate with SIU investigations. In the 2014 fatal shooting of Jermaine Carby, a police officer removed a knife from the scene before SIU staff arrived. As the SIU Director noted in his report, this action was highly regrettable and "cast a pall over the integrity of the SIU's investigation".<sup>26</sup> In the case of Andrew Loku, a police officer improperly accessed videos related to the incident while the SIU investigation was in progress. The Director's report concluded that there was no adequate explanation for this conduct and noted that it detracted from community confidence in the SIU's investigation.<sup>27</sup> Despite the egregious misconduct of these police officers, the SIU Director had no formal mechanism for holding them accountable for their actions.
- 72 These situations were perhaps exceptional, but in *Oversight Unseen*, my Office found that SIU investigators and managers often expressed aggravation over their inability to compel police officers to co-operate with SIU investigations.<sup>28</sup> It was not uncommon for police officers who witnessed an incident to delay mandatory SIU interviews for months, even though the Act's regulation requires witness officers to submit to interviews immediately upon request (or within 24 hours where there are appropriate grounds for delay).<sup>29</sup>
- 73 In light of these concerns, my Office made recommendations for statutory reform directed at ensuring police compliance with SIU investigations and reinforcing the integrity of its process. We recommended that the statute clarify the SIU's authority to require disclosure of police notes, personnel records and police policies, create offences for obstruction and lack of co-operation, and reinforce requirements relating to separation of police witnesses. These recommendations were not implemented.
- 74 In *Oversight Undermined*, my Office again recommended that the province make changes to legislation to provide the SIU with enhanced powers to compel police compliance. Again, the recommendations were not implemented.

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<sup>26</sup> "SIU Concludes Shooting Death Investigation in Brampton", Special Investigations Unit (21 July 2015), online: <[http://www.siu.on.ca/en/news\\_template.php?nrid=2343](http://www.siu.on.ca/en/news_template.php?nrid=2343)>.

<sup>27</sup> "Director's Report – Andrew Loku", Special Investigations Unit (15 March 2016), online: <[https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/siu\\_loku\\_investigation/](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/siu_loku_investigation/)>.

<sup>28</sup> *Oversight Unseen*, para 221.

<sup>29</sup> O Reg 267/10 at s 8(1) and *Oversight Unseen*, para 175.

- 75 A lack of police co-operation undermines the ability of the SIU to efficiently and effectively carry out its oversight role. Five years later, I am once more calling on the province to implement recommendations that would ensure that the statutory framework of the SIU allows it to achieve its mandate, even in the face of police resistance.

**Recommendation 12**

The revised statutory framework for the Special Investigations Unit should ensure that the unit has the legislative tools necessary to accomplish its mandate, including the ability to respond to police non-compliance. As recommended in my previous reports, the new legislation should:

- Include a specific definition of police notes and an obligation on police to disclose relevant personnel records and police policies;
- Require civilian members of the Ontario Provincial Police to co-operate with Special Investigations Unit investigations; and
- Create an offence, punishable by fine or imprisonment, for police failure to co-operate with or obstruction of the Special Investigations Unit.

- 76 A comprehensive and well-defined statutory foundation is necessary to enable each oversight body to fulfill its mandate and serve the public interest. Establishing a separate, modern statutory framework for Ontario's oversight bodies will help ensure that the three organizations have the legislative infrastructure and resources necessary to be independent, effective, accountable, and transparent.

### Information sharing between oversight bodies

- 77 Under the current statutory framework, each police oversight body essentially operates in a silo; as soon as it becomes apparent that a particular matter does not fall within that organization's mandate, it ceases its review and is largely unable to provide evidence obtained during its investigation to the appropriate oversight body. This process is inefficient and can frustrate the public's perception of accountable oversight.
- 78 For instance, the SIU's review of an incident may determine that there was no criminal conduct, but the incident raised concerns that should be dealt with under a police service's disciplinary process. There is no legislated mechanism for making this referral or sharing evidence. During my Office's two systemic investigations, we found that the SIU Director often wrote letters to responsible

police chiefs identifying concerns about police officer conduct; however, police chiefs were often reluctant to respond to or take action in response to these letters.

- 79 In both *Oversight Unseen* and *Oversight Undermined*, my Office raised this lack of co-ordination and information sharing as a problem.<sup>30</sup> The SIU had no practical way to enforce police compliance with the regulation's requirement that police co-operate with investigations. Although the SIU Director could raise concerns with the heads of police services about officers' lack of co-operation, the entrenched culture of resistance to SIU oversight meant that this mechanism was largely ineffective.
- 80 To reinforce the need for police compliance with regulatory requirements, we recommended that the SIU Director have the discretion to formally refer instances of lack of co-operation to the OCPC for consideration under that body's discipline process.

**Recommendation 13**

The Director of the Special Investigations Unit should have the discretion to refer incidents of police breach of legislative and regulatory requirements relating to co-operation with the Unit's investigations directly to the Ontario Civilian Police Commission for consideration under the discipline process.

- 81 Similarly, other civilian oversight bodies should be empowered to refer matters to the appropriate organization once the need to do so becomes apparent. As this practice would improve accountability and reduce inefficiencies between the oversight bodies, I recommend that:

**Recommendation 14**

Each police oversight body should have the discretion to refer incidents falling outside their mandate to the appropriate police oversight body for consideration. The province should establish information-sharing protocols to facilitate this referral process amongst oversight bodies.

- 82 Of course, expanding my Office's jurisdiction to include oversight of all three organizations would allow us to monitor this referral process and ensure it is working properly and efficiently.
- 83 We acknowledge that the mandates of each organization give rise to different evidentiary considerations, and that in certain instances, the *Charter* may limit

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<sup>30</sup> *Oversight Unseen* at para 296, *Oversight Undermined* at para 134.

what evidence can be shared between them. However, there is a clearly an opportunity to improve information sharing, as well as efficiency, accountability, and transparency, within Ontario's oversight bodies.

## Collection of demographic information

- 84 The first step to solving a problem is often to measure it, and measuring a problem requires collecting data.
- 85 There is a public perception that individuals with certain demographic characteristics – e.g., racial background, mental health status – are more likely to be seriously injured or killed by police. For instance, the *Toronto Star* reported that since 1990, at least 35% of civilians fatally shot by police in Toronto were black men, even though only 9% of Toronto's population is black.<sup>31</sup>
- 86 Ontario's three police oversight bodies should collect and analyze demographic data regarding incidents between civilians and police coming within their respective mandates. Data collected and reviewed should include relevant demographic data, such as gender, age, ethnicity, mental health status, disability, and/or aboriginal status.
- 87 Tracking and monitoring of this information would allow each oversight body to identify trends in civilian-police interactions and develop best practices that could be shared with police services throughout the province.
- 88 Aggregate demographic statistics related to the incidents considered by police oversight bodies are of significant public interest and should be publicly reported each year.

### **Recommendation 15**

Each police oversight body should collect and analyze demographic data regarding incidents between civilians and police that fall within their mandate. This information, in aggregate, should be publicly reported each year and shared with police services throughout the province.

- 89 Measuring, analyzing, and publicizing demographic statistics related to civilians' interactions with police oversight bodies will help reinforce the public's confidence in policing and police oversight in the province.

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<sup>31</sup> Wendy Gillis, "How many black men have been killed by Toronto police? We can't know," *Toronto Star* (16 August 2015), online: <<https://www.thestar.com/news/crime/2015/08/16/how-many-black-men-have-been-killed-by-toronto-police-we-cant-know.html>>.

## Improving oversight of police services boards

- 90 Beginning on January 1, 2008, my Office was given authority to enforce provisions under the *Municipal Act* requiring municipalities and local boards to hold public meetings, subject to specific exceptions set out in the Act. Despite the fact that police services boards come within the Act's general definition of a local board, they were explicitly excluded from the Act's open meeting provisions and enforcement protocol.<sup>32</sup> Presumably, this exclusion was premised on the fact that, under the *Police Services Act*, police services boards were already required to hold public meetings in most circumstances.<sup>33</sup> However, unlike the *Municipal Act*, there is no method for enforcing these requirements; if a member of the public believes that a police services board improperly met in private, there is no recourse.
- 91 In addition, since January 1, 2016, my Office has had general jurisdiction to review complaints about the administrative conduct of municipalities and other municipal sector entities. Despite the fact that municipal councils appoint a majority of members to police services boards, the boards remain exempt from my Office's authority and other municipal oversight mechanisms.<sup>34</sup>
- 92 This exclusion is troubling, since there have historically been concerns about the degree of accountability and transparency within these boards. For example, in June 2012, the Honourable John W. Morden issued a report in which he criticized the Toronto Police Services Board's self-imposed restrictions on its role and confusion as to the distinction between operational versus non-operational matters.<sup>35</sup>
- 93 There is no explanation or purposive reason for exempting police services boards from my Office's authority. My Office has already demonstrated the value of our expertise and experience in reviewing policing-related matters at the provincial level: Most recently, we investigated the direction provided to police by the Ministry of Community Safety and Correctional Services for de-escalating conflict situations. Our investigation resulted in 22 recommendations to improve the Ministry's guidance on the use of force and de-escalation for police officers.<sup>36</sup> Previously, we have investigated how the

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<sup>32</sup> *Municipal Act, 2001*, SO 2001 c 25, s 238(1).

<sup>33</sup> *Police Services Act*, RSO 1990 c P 15, s 35(3).

<sup>34</sup> The Ontario Ombudsman is prevented from reviewing the administrative conduct of police services boards due to O Reg 114/15, s 1(4).

<sup>35</sup> John W Morden, *Independent Civilian Review into Matters Relating to the G20 Summit* (June 2012), online: <<http://www.tpsb.ca/q20/ICRG20Mordenreport.pdf>>.

<sup>36</sup> Ontario Ombudsman, *A Matter of Life and Death: Investigation into the direction provided by the Ministry of Community Safety and Correctional Services to Ontario's police services for de-escalation of*



Ministry and the OPP addressed operational stress injuries affecting police officers,<sup>37</sup> as well as the Ministry's role in the quiet promotion of a regulation that gave police extraordinary powers during the 2010 Toronto G20 summit.

- 94 Extending Ombudsman oversight to police services boards would allow my Office to help boards identify and resolve problems before they fester, develop better administrative practices, and ultimately bolster public confidence in policing.

**Recommendation 16**

To enhance transparency and accountability, police services boards should be subject to the Ontario Ombudsman's oversight.

## Conclusion

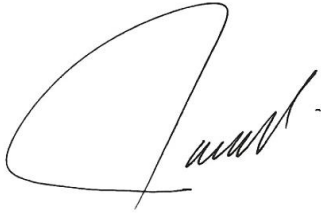
- 95 The full promise of credible and trustworthy civilian oversight of police has yet to be achieved in Ontario. Public perceptions that oversight bodies, particularly the SIU, are ineffective and subject to police influence continue to persist. Unless our oversight bodies have a clear and robust statutory framework that promotes their independence and impartiality from those they oversee, they will continue to attract public criticism.
- 96 The citizens of Ontario are entitled to police oversight bodies that are transparent, accountable, effective, and efficient. It is in the public interest to ensure that all three provincial bodies that oversee police are subject to Ombudsman scrutiny. Moreover, the public interest does not stop at the provincial level. To ensure the same transparency and accountability extends through to the community level, local police services boards should be subject to the same Ombudsman oversight as other local government bodies.

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*conflict situations*, 2016, online: <<https://www.ombudsman.on.ca/Resources/Reports/A-Matter-of-Life-and-Death.aspx>>.

<sup>37</sup> *In the Line of Duty*, supra note 4.

97 I commend the work of Justice Tulloch and his review team and hope that the recommendations in this submission will help achieve those objectives.



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Paul Dubé  
Ombudsman of Ontario

## **Appendix: List of recommendations**

### **Recommendation 1**

To enhance transparency and accountability, the Office of the Independent Police Review Director and the Ontario Civilian Police Commission should be subject to the Ontario Ombudsman's oversight, as is currently the case with the Special Investigations Unit.

### **Recommendation 2**

The Special Investigations Unit should be legislatively required to publicly disclose Director's reports, in cases involving decisions not to charge, subject to the Director's discretion to withhold information on the basis that disclosure would involve a serious risk of harm.

### **Recommendation 3**

The SIU should make public significant concerns regarding policing practices and trends that it identifies during the course of its investigations.

### **Recommendation 4**

The legislation should provide for public release of internal police investigative reports related to Special Investigations Unit investigations, in cases where no charges are laid, subject to the discretion to withhold information on the basis that disclosure would involve a serious risk of harm. Where charges against officers are pending as a result of internal investigations, the fact that charges have been laid should be publicized, as well as the eventual outcome.

### **Recommendation 5**

Ontario's police oversight bodies should take immediate steps towards ensuring greater civilian representation within staff and management. Ontario's police oversight bodies should ensure that their staff reflects the diversity of the communities they serve.

### **Recommendation 6**

The Ministry of the Attorney General should ensure that police oversight bodies are provided with a job classification system which enables them to more effectively recruit civilian investigative staff.

### **Recommendation 7**

Ontario's police oversight bodies should ensure that none of their staff wear or otherwise display symbols suggesting that they identify with police or in other respects demonstrate former police membership or status.

### **Recommendation 8**

Ontario's police oversight bodies should ensure that no former police officers are placed in a position in which they are dealing with cases involving their former police service in any capacity.

### **Recommendation 9**

Ontario's police oversight bodies should be reconstituted under new legislation dealing specifically with their mandates and investigative authorities.

### **Recommendation 10**

When drafting the standalone statute for Ontario's police oversight bodies, the province should ensure that the new legislation contains provisions to foster the independence, efficacy, transparency, and accountability of each organization.

### **Recommendation 11**

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