

## SUBMISSIONS OF THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS TO THE INDEPENDENT CIVILIAN REVIEW INTO MISSING PERSON INVESTIGATIONS

July 30, 2020

### Immigration Status & the Toronto Police Service: Time For A Comprehensive “Don’t Ask, Don’t Tell” Policy

Despite policies requiring the provision of services regardless of immigration status,<sup>1</sup> victims and witnesses with precarious or no status<sup>2</sup> fear arrest, detention and removal from Canada if they engage with the Toronto Police Service (TPS). The Canadian Association of Refugee Lawyers (CARL)<sup>3</sup> submits that the TPS should adopt and implement a meaningful “Don’t Ask, Don’t Tell” (DADT)<sup>4</sup> policy with respect to immigration status.

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<sup>1</sup> City of Toronto, item adopted, CD29.11, *Access to City Services for Undocumented Torontonians (Access T.O.)*, June 10, 2014.

<sup>2</sup> In these submissions, we will refer to immigration status as “status”. We will refer to individuals who do not have status as “non-status”. The *Immigration and Refugee Protection Act (IRPA)* sets the requirements under which an individual can enter or remain in Canada. If an individual is not authorized to enter Canada or loses their right to remain or live in Canada, they are considered non-status.

Background resources: Graham Hudson, Idil Atak, Michelle Manocchi, & Charity-Ann Hannan, “(No) Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto, Canada,” (2017) RCIS Working Paper No. 2017/1 9 at 14; Lilian Magalhaes, Christine Carrasco, & Denise Gastaldo, “Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions,” (2010) 12:1 J Immigration Minor Health 132 at 133; Community Legal Education Ontario (CLEO), “Steps to Justice: Immigration and refugee”, online: [https://www.cleo.on.ca/en/resources-and-publications/pubs?language=en&field\\_legal\\_topic\\_tid\\_i18n=91](https://www.cleo.on.ca/en/resources-and-publications/pubs?language=en&field_legal_topic_tid_i18n=91); Peter Nyers, “The Regularization of Non-Status Immigrants in Canada: Limits and Prospects,” (2005) 55 *Canadian Review of Social Policy* 109.

<sup>3</sup> The Canadian Association of Refugee Lawyers (CARL) is a national organization advocating on legal issues relating to refugees, refugee claimants and the rights of other vulnerable migrants. CARL’s membership includes nearly 400 lawyers, academics, articling students and law students. For more information: <https://carl-acaadr.ca/>

<sup>4</sup> In these submissions, we make a distinction between “Don’t Ask”, “Don’t Tell” and “Don’t Ask, Don’t Tell” policies. A comprehensive “Don’t Ask, Don’t Tell” (DADT) policy is distinct from the individual “Don’t Ask” and “Don’t Tell” policies referred to in these submissions. “Don’t Ask” policies, such as the one implemented by the TPS in relation to victims and witnesses in 2006, refer to a practice of not requesting information on an individual’s status or requiring the divulgence of immigration status on forms. “Don’t Tell” refers to a practice of prohibiting the sharing of information relating to an individual’s status to other government agencies, even if a city worker or TPS officer becomes aware of a lack of status. DADT policies combine the two components outlined above to ensure that non-status individuals are able to fully access services without fear that they will be asked about their status and without fear that, should their status become known to an officer in any way, they will not be reported to the CBSA.

These submissions<sup>5</sup> will: 1) examine how, in the case of victims of Bruce McArthur who were known to have precarious or no status, fears of immigration consequences inhibited family and friends from reporting these victims missing; 2) discuss the relevant policies relating to access to social services for non-status individuals and TPS's misapprehensions concerning its legal obligations to report status; and 3) conclude that the TPS can and should adopt and implement a meaningful DADT policy, especially in light of the new *Community Safety and Policing Act, 2019 (CSPA)*.<sup>6</sup>

### **Fear of Immigration Consequences Inhibited Reporting By Victims' Families**

Six of Bruce McArthur's eight victims were migrants to Canada and people of colour. Two of the men were refugee claimants living without status or with precarious status in Canada. Kirushna Kumar Kanagaratnam's claim<sup>7</sup> for refugee protection was rejected. Skandaraj Navaratnam was also a Tamil refugee from Sri Lanka. Mr. Navaratnam's specific immigration status is unclear but reporting from the investigation and trial make it clear his status was not secure.

The victim impact statements made in relation to Skandaraj Navaratnam and Kirushna Kumar Kanagaratnam, who were both living in Canada with precarious or no status, can be contrasted with those made in relation to Andrew Kinsman, a white Canadian citizen, to highlight the differences in the ways missing persons are reported to the police when the missing person does not have status as compared to when they do.

Skandaraj Navaratnam was reported missing by a friend on September 16, 2010. His status was a cause of concern to himself and his family. In a victim impact statement, his brother, Navaseelan Navaratnam, states "Since his status in Canada may have been a challenge for him we lived in hope that he may have gone into hiding and may appear once his status was restored. As a family, we lived in desperate, perilous times for close to a decade with the pain of not knowing his whereabouts."<sup>8</sup> Thus, even when Mr. Navaratnam stopped contacting his family after previously having kept in touch from time to time, his family did not report him missing. His family did not get answers until 2018, when Mr. Navaratnam's remains were found.

Kirushna Kumar Kanagaratnam was never reported missing. Even when his family in Sri Lanka stopped getting daily calls from Mr. Kanagaratnam, they believed he was in hiding and made the hopeful assumption that he would reappear when it was safe for him to do so. They never reported him missing because they were scared that Canadian authorities would send him back to Sri Lanka. Mr. Kanagaratnam's friend, Piranavan Thangavel in his victim impact statement states: "Krishnakumar [sic], who was a refugee like us, an [sic] living in fear and uncertainty of his status, disappeared in 2015, but it was only in 2018 that it was discovered that he was dead. This has reminded many like us of the uncertainty, insecurity and fear that we still live with here in Canada. This really could have been any one of us or other refugees who live in fear in Canada."<sup>9</sup>

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<sup>5</sup> Research and writing by Maddie Andrew-Gee, Rachel Bryce, Alexa Cheung, Thien Thuong Hoang, Jessica Kim, Raoof Zamanifar, Law Students and Prasanna Balasundaram, Staff Lawyer at Downtown Legal Services: <http://downtownlegalservices.ca/>

<sup>6</sup> Bill 68, *An Act with respect to community safety and policing*, Ontario, 2019 (assented to March 26 2019), c 7, s 52 [CSPA].

<sup>7</sup> For more information about the refugees who arrived on the MV. Sun Sea see: Canadian Council of Refugees, *Sun Sea: Five years later* (August 2015), online: Canadian Council of Refugees <<https://ccrweb.ca/sites/ccrweb.ca/files/sun-sea-five-years-later.pdf>>; Lobat Sadrehashemi, "The MV Sun Sea: A Case Study on the Need for Greater Accountability Mechanisms at Canada Border Services Agency" (2019) 42:1 Dalhousie LJ 213; Sunny Dhillon, *Sun Sea anniversary highlights Canada's treatment of refugees* (August 2015), online: The Globe And Mail <<https://www.theglobeandmail.com/news/british-columbia/sun-sea-anniversary-highlights-canadas-treatment-of-refugees/article25900878/>>.

<sup>8</sup> *R v Bruce McArthur*, Crown Book of Victim and Community Impact Statements, Exhibit 5, Tab 1, Navaseelan Navaratnam at 2.

<sup>9</sup> *R v Bruce McArthur*, Crown Book of Victim and Community Impact Statements, Exhibit 5, Tab 11, Piranavan Thangavel at 2.

Andrew Kinsman, in contrast, was very well known in the community through his work as an LGBTQ activist, his role as a superintendent of a building and a volunteer at the Toronto People with AIDS Foundation. His disappearance was reported within 72 hours by a tenant in his building and within days, his friends had plastered posters all over the city. Mr. Kinsman's friend, Meaghan Jeannine Marian states in her victim impact statement: "I am grateful to the police who investigated Andrew's disappearance. I am grateful to the investigators who first heard me: Andrew is missing, I beg you, help me. I am grateful to whomever connected Andrew's disappearance to those of the other men. I am grateful to the members of Project Houston who lived so many years with the dark mystery. I am grateful to the members of Project Prism. I know many of you, but not all."<sup>10</sup>

There is a stark difference in the tone of the first two victim impact statements as compared to the third. The first two statements reflect a sense of apprehension and fear around reporting Mr. Navaratnam and Mr. Kanagaratnam missing, because of concerns that alerting the authorities and enlisting their help to find these individuals may jeopardize their status in Canada. There is no trace of this sort of apprehension in the third statement. On the contrary, it reflects a sense of gratitude and trust in the local authorities. For Mr. Kinsman's friends and family, there was no reason to hesitate in approaching the police, at least in part, because status was not an issue.

The victim impact statements demonstrate that status impacted the police investigation even before it formally began. Mr. Navaratnam and Mr. Kanagaratnam's family and friends assumed that they had gone underground to elude removal from Canada. Thus, they delayed or did not report their loved ones as missing in fear of jeopardizing their status. This is an impossible situation and not one any family or friend ought to be forced to make in the context of a potential missing person. In addition, the fear surrounding status also effectively undermined the efficacy of the investigation. Since the families feared deportation if they reporting the victims missing, it also prevented the police from conducting an in-depth investigation and ultimately delayed the identification of McArthur as the killer.

Notably, academic literature and organizational reports broadly affirm the fears underlying Navaseelan Navaratnam and Piranavan Thangavel's statements. A number of research reports indicate that non-status individuals go underground because they "live in constant fear of detention, deportation, and surveillance by the authorities."<sup>11</sup> The reluctance for non-status individuals to contact the police when they are the victim or witness to a crime could be attributed to a history of victims being placed in immigration detention centres after contacting police services.<sup>12</sup> In fact, such occurrences are well-documented in academic literature, interviews and reports from activist groups, and news articles. According to Hudson et al, "media reports and research show that the Toronto Police Service (TPS)," has "actively inquired into immigration status, engaged in unsolicited sharing of personal information with the Canadian Border Services Agency (CBSA), and arrested and transferred non-status persons to the CBSA."<sup>13</sup> The 2015 No One Is Illegal – Toronto (NOIIT) report analyzed CBSA data from November 4, 2014 to June 28, 2015, obtained through Access to Information requests.<sup>14</sup> This analysis of CBSA data demonstrated that the TPS continues to "inquire into Torontonians' immigration status, in contravention of their own "Don't Ask" commitment."<sup>15</sup>

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<sup>10</sup> *R v Bruce McArthur*, Crown Book of Victim and Community Impact Statements, Exhibit 5, Tab 25, Meaghan Jeannie Marian.

<sup>11</sup> Nyers, *supra* note 2.

<sup>12</sup> No One Is Illegal – Toronto [NOIIT], *Often Asking, Always Telling: The Toronto Police Service and the Sanctuary City Policy* (November 2015), online: No One Is Illegal – Toronto <HYPERLINK "<https://drive.google.com/file/d/0B440cApr61JCVTNxYk5UMjhoUW96Y21iMW9ZeIVxN1dRcWJF/view>"> <https://drive.google.com/file/d/0B440cApr61JCVTNxYk5UMjhoUW96Y21iMW9ZeIVxN1dRcWJF/view>> at 6.

<sup>13</sup> Graham Hudson, Idil Atak, Michelle Manocchi, & Charity-Ann Hannan, "(No) Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto, Canada," (2017) RCIS Working Paper No. 2017/1 9 at 6.

<sup>14</sup> *Supra* note 11 at 21.

<sup>15</sup> *Supra* note 11 at 5.

Moreover, the TPS has maintained over the years that TPS police officers have a positive legal duty to notify the CBSA, if it becomes known to them during the course of an investigation that an individual does not have status.<sup>16</sup> As a result, non-status individuals who are “already vulnerable to abuse... cannot report crimes to police due to fear of deportation, which dissuades many from seeking police assistance.”<sup>17</sup> This pattern is reaffirmed in a report by the Rights of Non-Status Women Network, a grassroots organization in Toronto, which indicates that people without status “cannot call the police in an emergency without putting themselves at risk of deportation.”<sup>18</sup>

### **Addressing Barriers: Toronto’s Sanctuary City Policy and Its Limitations**

In June 2014 the City of Toronto implemented a formal sanctuary city<sup>19</sup> policy called Access T.O.<sup>20</sup> The Toronto City Council decision directed that immigration and citizenship information only be collected where specifically required by provincial or federal legislation, policies or agreements.<sup>21</sup> The Access T.O. policy is meant to ensure that undocumented Torontonians can access city services without the fear of being asked about their immigration status or reported to the CBSA if their status becomes known. Yet, despite the City’s clear position on this issue, the TPS, one of the City’s most integral services, has opposed Access T.O. directions and refused to implement a comprehensive “Don’t Ask, Don’t Tell” policy. This refusal to bring TPS policy in line with the broader Toronto policy appears to have been based on a misapprehension on TPS’s part about their legal duty to report and police immigration status.

- a. TPS had a misapprehension about their legal duty to report immigration status from the outset

As part of the adoption of the Access T.O. policy, Toronto City Council adopted several motions relating to the commitment of providing access to city services for non-status or precarious status Torontonians. One motion clarified that “immigration/citizenship information [will] only be collected where specifically required by either provincial or federal legislation, policies or agreements.”<sup>22</sup> A second motion adopted in June 2014 directed the Toronto Police Services Board (TPSB) to work with the Chief of the TPS “to review existing policies to ensure the TPS complies with” the City’s policy to ensure non-status Torontonians have full access to city services.<sup>23</sup>

On January 19, 2015, Chief Blair provided the TPSB with a report on the TPS’s existing policies with respect to non-status individuals, in response to City Council’s June 2014 request. In this 2015 report, the TPS

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<sup>16</sup> TPSB, *Toronto Police Service: Response to City Council Motions – Access to City Services for Undocumented Torontonians* (February 2017), online: TPSB Agenda March 23 <[https://www.tpsb.ca/images/agenda\\_mar23\\_public\\_main2.pdf](https://www.tpsb.ca/images/agenda_mar23_public_main2.pdf)> at 10 (235 of the PDF).

<sup>17</sup> *Supra* note 12 at 6.

<sup>18</sup> Rights of Non-Status Women Network, *Non-Status Women in Canada: Fact Sheet* (2007), online <[https://www.springtideresources.org/sites/all/files/Non-status\\_Women\\_in\\_Canada-English.pdf](https://www.springtideresources.org/sites/all/files/Non-status_Women_in_Canada-English.pdf)> at 2.

<sup>19</sup> For more information about sanctuary cities see: Canadian Labour Congress, *Sanctuary Cities* (June 2017), online: Canadian Labour Congress <<https://canadianlabour.ca/uncategorized/sanctuary-cities/>>; West Coast LEAF, *Position Paper: Sanctuary City Policy* (2015), online: West Coast LEAF <<http://www.westcoastleaf.org/wp-content/uploads/2015/01/WCL-Position-Paper-Sanctuary-City.pdf>>; Council of Agencies Serving South Asians, *City of Toronto, A Sanctuary City* (2020), online: A Guidebook on Transitional Issues for Refugee Youth <<http://www.cassa.on.ca/toolkit/toronto-sanctuary-city/>>.

<sup>20</sup> City of Toronto, item adopted, CD29.11, *Access to City Services for Undocumented Torontonians (Access T.O.)*, June 10 2014.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid* at para 1.

<sup>23</sup> *Ibid* at para 12.

misapprehended the regulations under the *Police Services Act (PSA)*<sup>24</sup> in stating that police officers were *compelled* to report immigration violations to the CBSA under “subsection 5(1) of Ontario Regulation 265/98 entitled Disclosure of Personal Information.”<sup>25</sup>

Notably, the regulation cited in the 2015 report merely imposes upon officers a discretion, rather than a compelled duty to report immigration violations under the *Immigration and Refugee Protection Act (IRPA)*<sup>26</sup>.

5(1) A chief of police or his or her designate **may** disclose any personal information about an individual **if the individual is under investigation of, is charged with or is convicted or found guilty of an offence** under the Criminal Code (Canada), the Controlled Drugs and Substances Act (Canada) or any other federal or provincial Act to,

- (a) any police force in Canada;
- (b) any correctional or parole authority in Canada; or
- (c) any person or agency engaged in the protection of the public, the administration of justice or the enforcement of or compliance with any federal or provincial Act, regulation or government program.<sup>27</sup>

[Emphasis Added]

In addition, as noted by the Immigration Legal Committee<sup>28</sup> in their report to the TPSB, it is unlikely that an investigation into an individual’s immigration status falls within the scope of investigation duties of a TPS officer.<sup>29</sup> This is because:

“s. 13(1) of the *PSA*’s Adequacy and Effectiveness of Police Services Regulation states that police chiefs must “develop and maintain procedures on processes for undertaking and managing general criminal investigations and investigations into 22 enumerated areas, but immigration does not appear on this list.”<sup>30</sup>

In the TPS’s 2015 report, there was an acknowledgment that “the agency responsible” for the enforcement of the *IRPA* “is the Canada Border Services Agency [CBSA].”<sup>31</sup> This statement is a recognition that the TPS is not

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<sup>24</sup> *Police Services Act*, R.S.O. 1990, c. P.15 (repealed 2020, c. 6, Sched. 5).

<sup>25</sup> TPSB, *Toronto Police Service: Service Governance Pertaining to the Access to Police Services for Undocumented Torontonians* (March 2015), online: TPSB communication to the CDRC <<https://www.toronto.ca/legdocs/mmis/2015/cd/bgrd/backgroundfile-79357.pdf>> at 6.

<sup>26</sup> *Immigration and Refugee Protection Act (IRPA)*, RSC 2001, c 27.

<sup>27</sup> *Police Services Act*, R.S.O. 1990, c. P.15, O. Reg. 265/98: Disclosure of Personal Information at s 5 (1).

<sup>28</sup> The Immigration Legal Committee was a joint project of the University of Toronto International Human Rights Program, No One Is Illegal – Toronto, and the Law Union of Ontario.

<sup>29</sup> Immigration Legal Committee, *Police Services: Safe Access for All* (May 2008), online: Immigration Legal Committee <<http://toronto.nooneisillegal.org/sites/default/files/Immigration%20Legal%20Committee%20Report%20Re%20Toronto%20Police%20November%202008.pdf>> at 16.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Supra* note 24 at 5.

responsible for the enforcement of immigration regulations under the *IRPA*, except under s. 142 of the *IRPA*, when a police officer is directed to execute a warrant under the *IRPA*.<sup>32</sup>

b. *TPS has a continuing misapprehension about its legal duty and role in reporting and policing status*

On December 9 and 10, 2015, Toronto City Council further several adopted motions directing the TPS to review and clarify its policies with respect to non-status individuals.<sup>33</sup> On February 8, 2017, Chief Saunders provided a report to the TPSB in response to the Toronto City Council motions.<sup>34</sup> In this report, it was stated that the TPS is “duty-bound to notify the CBSA,” once it becomes known to the police agency through a data check on the Canadian Police Information Centre (CPIC), that an *IRPA* warrant has been issued by the CBSA for a person whom the police agency has made contact with.<sup>35</sup> The 2017 report also stated that TPS officers “may contact the CBSA to obtain immigration information,” when “immigration details arise through the lawful course of an investigation.”<sup>36</sup>

In the 2017 report, regulations under the *PSA* and the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*,<sup>37</sup> which govern the sharing of information between the TPS and the CBSA, were cited to support the TPS’s conclusions. Like in the 2015 report, the new report included citations of subsection 5(1) of Ontario Regulation Disclosure of Personal Information under the *PSA* which, as previously mentioned, imposes a discretion rather than a duty to disclose personal information to the CBSA, if an individual has violated the *IRPA*. In fact, the 2017 report even acknowledged that the sections that were cited from the *PSA* and the *MFIPPA* “permits disclosure of personal information between police and the CBSA.”<sup>38</sup> [Emphasis added]

The language in ss. 32(f) and (g) of the *MFIPPA*, also cited in the 2017 report, gives officers the permission to disclose personal information to the CBSA, rather than impose upon officers a positive duty to do so:

### **32. Where disclosure permitted**

An institution shall not disclose personal information in its custody or under its control except,

(f) if disclosure is by a law enforcement institution,

(i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or

(ii) to another law enforcement agency in Canada;

(g) if disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;<sup>39</sup>

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<sup>32</sup> *Supra* note 25 at s 142

<sup>33</sup> TPSB, *Toronto Police Service: Response to City Council Motions – Access to City Services for Undocumented Torontonians* (February 2017), online: TPSB Agenda March 23 < [https://www.tpsb.ca/images/agenda\\_mar23\\_public\\_main2.pdf](https://www.tpsb.ca/images/agenda_mar23_public_main2.pdf) > at 239.

<sup>34</sup> *Ibid* at 1 (235 of the PDF).

<sup>35</sup> *Ibid* at 10.

<sup>36</sup> *Ibid* at 7.

<sup>37</sup> *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, R.S.O. 1990, c. M.56.

<sup>38</sup> *Supra* note 32 at 7-8.

<sup>39</sup> *Supra* note 36 at s 32 (f) (g).

The 2017 report also cites several provisions of the *IRPA* (s. 82.2, s. 142, and s. 143)<sup>40</sup> which “governs when police officers are legally obliged to act as peace officers under the Act.”<sup>41</sup>

However, none of the *IRPA* provisions cited in the 2017 report impose upon police officers a positive duty or obligation to report information relating to immigration violations under the *IRPA*. Of the *IRPA* provisions cited, only s. 142 of the *IRPA*, according to regulations, imposes a positive duty on police officers to, “when so directed by [a CBSA] officer, execute any warrant or written order issued under this Act for the arrest, detention or removal from Canada of any permanent resident or foreign national.” [Emphasis added]<sup>42</sup> Thus, TPS officers only have a positive duty to arrest an individual pursuant to a warrant under the *IRPA*, when directed by CBSA to do so. Other regulations under the *IRPA*,<sup>43</sup> simply grant police officers the authorization – but not a duty – to arrest a foreign national, without a warrant, “who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal under by the Minister.”<sup>44</sup>

The role of the TPS in policing immigration status was further justified in the 2017 report, by stating that the *IRPA* “provides the fact basis for those persons who might be found inadmissible to Canada.”<sup>45</sup> Inadmissibility to Canada refers to specified grounds in the *IRPA* that may lead to a claimant’s unsuccessful application and eventual removal order. CBSA officers first raise inadmissibility concerns to the Minister of Public Safety and Emergency Preparedness or their Delegate. The Minister or Minister’s Delegate may then refer an inadmissibility report to the Immigration Division of the Immigration and Refugee Board, who then may hold an inadmissibility hearing and possibly order the claimant’s removal from Canada. In the 2017 report, it is noted that the TPS “is interested and responsive to the following reasons for inadmissibility detailed in the *IRPA* (ss. 34-37): security; human or international rights violations, serious criminality; organized criminality.”<sup>46</sup>

Yet, police officers are not delegated authorities under the *IRPA* to “form an opinion that a permanent resident or a foreign national is inadmissible on grounds of” security, human rights violations, organized criminality,<sup>47</sup> or any other grounds under the *IRPA*.<sup>48</sup> Individuals without immigration status would only be inadmissible under grounds of security (s. 34), human rights violations (s. 35), serious criminality (s. 36), or organized criminality (s. 37), if they engaged in the prohibited activity enumerated in those sections of the *IRPA*. Thus, it is unclear why the TPS would insist that they cannot implement a “Don’t Tell” policy when it comes to their attention that a victim, witness, or an

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<sup>40</sup> *Immigration and Refugee Protection Act (IRPA)*, RSC 2001, c 27, at ss 82 (2), 142, 143.

<sup>41</sup> *Supra* note 32 at 8.

<sup>42</sup> *Immigration and Refugee Protection Act (IRPA)*, RSC 2001, c 27, at s 142.

<sup>43</sup> *Immigration and Refugee Protection Act (IRPA)*, RSC 2001, c 27, at ss 82 (2), 143.

<sup>44</sup> *Immigration and Refugee Protection Act (IRPA)*, RSC 2001, c 27, at s 55(2).

<sup>45</sup> *Supra* note 32 at 9.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ministerial instructions, Delegation of Authority and Designations of Officers by the Minister of Public Safety and Emergency Preparedness under the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations*, Item 209 A44(1), online: <<https://www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/delegation/irpa-lipr-2019-06-1-eng.html>>

<sup>48</sup> *Ministerial instructions, Delegation of Authority and Designations of Officers by the Minister of Public Safety and Emergency Preparedness under the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations*, Item 213, A44(1) R3(1)(b)(ii), online: <<https://www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/delegation/irpa-lipr-2019-06-1-eng.html>>

uninvolved person does not have immigration status. While non-compliance with the *IRPA* may render an individual inadmissible under s. 41 (Non-compliance with Act), police officers are not delegated authorities to form an opinion that an individual is inadmissible on this basis.<sup>49</sup>

In the context of these perceived legal limitations to the development of a comprehensive DADT policy, the TPS report indicated that the organization would expand their 2006 “Don’t Ask”<sup>50</sup> policy from victims and witnesses to include uninvolved persons. Uninvolved persons are those who “have no verified involvement in an ongoing investigation that would lead an officer to believe they are a victim, witness, person of interest, suspect, or accused.”<sup>51</sup> In the 2017 report, the TPS maintained that the “Don’t Ask” policy would not be extended towards persons of interest, suspects, or accused persons.<sup>52</sup>

The report concluded that the TPS would not implement a comprehensive DADT policy, as the CBSA “relies on the on-going support of police agencies to assist in achieving its mandate.”<sup>53</sup> In addition the TPS, “as a member of the law enforcement and public security community, respects and supports the mandate of other law enforcement agencies, like the CBSA.”<sup>54</sup> However, it was acknowledged in the report that the TPS’s “primary mandate is not the enforcement of the *IRPA*,” and that the TPS “only takes an interest in *IRPA* violations when it overlaps with the Service’s mission to keep Toronto the best and safest place to be.”<sup>55</sup>

Yet, reporting status to the CBSA does not keep Toronto the best and safest place to be. There are negative consequences both for policing and for the community and individual safety when these distinct law enforcement agencies are not kept appropriately separate. Victims and witnesses may choose not to come forward if there is a risk that their immigration status will be exposed to CBSA. When non-status individuals do not feel safe approaching the police, barriers to the reporting and solving of crimes are created. The TPS has expressed concern about its legal duties, but there is no legal duty imposed on the TPS to enforce immigration violations. Even the 2017 report acknowledges that information sharing between the TPS and CBSA is simply *authorized* by law,<sup>56</sup> rather than *mandated* by law.

Therefore, reporting a victim, witness, or uninvolved persons in a police investigation to the CBSA, because they have an outstanding *IRPA* warrant, does not align with the mission to keep Toronto the best and safest place to be. It makes Toronto a place where victims and witnesses to a crime may be reluctant to contact or cooperate with the police, because they fear information relating to their immigration status may become known.

### **The Time is Now: The Introduction of the *Community Safety and Policing Act*, 2019**

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<sup>49</sup> *Ibid.*

<sup>50</sup> “Victims and Witnesses Without Legal Status” Policy, commonly referred to as “Don’t Ask” policy was brought into effect in 2006. Toronto Police Services, Victims and Witnesses without Legal Status, online: Toronto Police Service <[http://www.torontopolice.on.ca/publications/files/victims-and-witnesses\\_wthoutlegal-status.pdf](http://www.torontopolice.on.ca/publications/files/victims-and-witnesses_wthoutlegal-status.pdf)> [TPS, Victims and Witnesses].

<sup>51</sup> *Supra* note 32 at 10.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* at 11.

<sup>54</sup> *Ibid* at 9.

<sup>55</sup> *Ibid* at 12.

<sup>56</sup> *Ibid* at 7.



The *Community Safety and Policing Act, 2019* [CSPA]<sup>57</sup> will soon be the new piece of legislation governing provincial policing powers, including the TPS. The CSPA provides a strong legal basis for implementing a comprehensive DADT policy. On March 26, 2019, the CSPA received royal assent but the CSPA is not in force until it receives proclamation of the Lieutenant Governor. When it comes into force, the CSPA will repeal and replace the PSA, which currently governs police services in Ontario.

Although it is not yet in effect, provisions governing policing responsibility and the disclosure of personal information in the CSPA, provide a strong basis for the TPSB and the Toronto Chief of Police to adopt a comprehensive DADT policy.

First, provisions on adequate and effective policing in the CSPA, and the provisions on the enforcement of immigration laws under the IRPA, noted above, indicate that the TPS does not have a duty to enforce every single municipal by-law or immigration law, unless prescribed to do so. Police Service Boards are responsible for providing adequate and effective policing, as defined in s. 11 of the CSPA:

**11(1)** Adequate and effective policing means all of the following functions provided in accordance with the standards set out in the regulations, including the standards with respect to the avoidance of conflicts of interest, and with the requirements of the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*:

1. Crime prevention.
2. Law enforcement.
3. Maintaining the public peace.
4. Emergency response.
5. Assistance to victims of crime.
6. Any other prescribed policing functions.

(2) Adequate and effective policing does not include,

- (a) the enforcement of municipal or First Nation by-laws, other than prescribed by-laws; and (...)

(3) For greater certainty, a police service board or the Commissioner **may** provide policing or other services that exceed the standards for adequate and effective policing, including providing enforcement of by-laws.<sup>58</sup>

[Emphasis Added]

Although s. 11(1) indicates that adequate and effective policing includes the function of law enforcement, s. 11(2)(a) and s. 11(3) indicates that police officers do not have a duty to enforce municipal by-laws, other than prescribed by-laws. Municipalities are authorized to appoint by-law enforcement officers under s.55(1) the CSPA,<sup>59</sup> in a way that is analogous to how the Minister of Public Safety and Emergency Preparedness is authorized to designate officials to enforce the IRPA under s. 6(1).<sup>60</sup> When read together, s. 11 and s. 55(1) of the CSPA, and s. 6(1) of the IRPA, suggest that police officers do not have a legal duty to enforce municipal by-laws or immigration laws, unless they have been prescribed to do so.

If TPS officers are not prescribed to enforce municipal by-laws relating to health violations in restaurants, then enforcement of such by-laws does not fall within the law enforcement function of the TPS under s. 11(2)(a). By analogy, if Toronto Police officers are not designated officials to “form an opinion that a permanent resident or a

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<sup>57</sup> *Community Safety and Policing Act (CSPA)*, RSC 2019, c 1.

<sup>58</sup> *Supra* note 56 at ss 11 (1), (2), (3).

<sup>59</sup> *Ibid* at s 55(1).

<sup>60</sup> *Ibid* at s 6(1).

foreign national is inadmissible” under any grounds in the *IRPA*,<sup>61 62</sup> then asking individuals about their immigration status and reporting those without status to the CBSA should not fall within the law enforcement function of the TPS.

Second, provisions in the *CSPA* on the disclosure of personal information demonstrate that a DADT policy is, in fact, legally feasible for the TPS to implement. *CSPA* provisions again indicate that the TPS has a *discretion*, rather than a *duty*, to disclose information relating to non-status individuals to the CBSA. Sections 80(1) and 80(2) of the *CSPA*, state:

80 (1): Despite any other Act, a chief of police, or a person designated by him or her for the purpose of this subsection, **may** disclose personal information about an individual in accordance with the regulations. **[Emphasis added.]**

(2) Any disclosure made under subsection (1) shall be for one or more of the following purposes:

1. Protection of the public.
2. Protection of victims of crime.
3. Keeping victims of crime informed of the law enforcement, judicial or correctional processes relevant to the crime that affected them.
- 4. Law enforcement.**
5. Correctional purposes.
6. Administration of justice, including the conduct of civil proceedings.
- 7. Enforcement of and compliance with any federal or provincial Act, regulation or government program.**
8. Keeping the public informed of the law enforcement, judicial or correctional processes respecting any individual. **[Emphasis added]**<sup>63</sup>

Under ss. 80(1) and 80(2) of the *CSPA*, the chief of police or police officers designated by the Chief, have the *discretion* to disclose personal information about an individual to the CBSA. They may disclose such information to the CBSA for law enforcement purposes, and to ensure compliance with the *IRPA*. However, much like previous legal opinions on the feasibility of a DADT policy for the TPS, these new provisions *do not* impose on the TPS any legal duty to share information with the CBSA. Thus, there are no provisions in the *CSPA* that would suggest a DADT policy is not legally feasible for the TPS to implement.

Third, provisions in *CSPA* provide a basis to argue that the TPS needs to adopt a DADT policy, in order to comply with their statutory responsibility to provide policing in accordance with the needs of the population. Section 10(1) of the *CSPA* on policing responsibility of police service boards states:

**10(1)** The police service boards and the Commissioner shall provide adequate and effective policing in the area for which they have policing responsibility **in accordance with the needs of the population in the area and having regard for the diversity of the population in the area.** **[Emphasis added]**

In addition, section 79(1) on the duties of the Chief of Police, states:

“A chief of police shall manage the members of the police service to ensure that they carry out their duties in accordance with this Act and the regulations and **in a manner that reflects the needs of the community**” **[Emphasis added]**<sup>64</sup>

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<sup>61</sup> *Ministerial instructions, Delegation of Authority and Designations of Officers by the Minister of Public Safety and Emergency Preparedness under the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations*, Item 209, A44(1) R3(1)(b)(ii), online: <<https://www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/delegation/irpa-lipr-2019-06-1-eng.html>>

<sup>62</sup> *Ibid* at item 213, A44(1) R3(1)(b)(ii), online: <<https://www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/delegation/irpa-lipr-2019-06-1-eng.html>>

<sup>63</sup> *Supra* note 56 at s 80(1), (2).

## **Recommendation: TPS Must Adopt and Implement a Comprehensive DADT Policy**

A review of victim impact statements, interviews with community organizations<sup>65</sup> and academic literature clearly indicates that there is a lack of trust towards the TPS within non-status communities.<sup>66</sup> Policing in those communities is currently less effective, as non-status victims and witnesses are not always willing to approach the TPS for fear of being reported to the CBSA. It is also clear that non-status individuals, as residents of Toronto and victims and witnesses of crimes, require equal access to policing services.

Therefore, given the significant number of non-status individuals in Toronto<sup>67</sup>, the TPSB and the Toronto Police Chief must implement a comprehensive DADT policy. This policy would prohibit officers from reporting non-status individuals to the CBSA. A DADT policy is needed in order to provide adequate and effective policing in line with the needs of the community in accordance with s.10(1) of *CSPA*. Imposing such a policy would also remove barriers that prevent non-status people from accessing police services, in accordance with Toronto's broader Access T.O. policy. After a review of the relevant policies and legislation, as it now stands, there is no legal duty for the TPS to inquire into immigration status, or to report personal information to the CBSA relating to individuals who do not have status or have an outstanding *IRPA* warrant.

As highlighted by the academic literature throughout these submissions, and supported by interviews with community organizations, inquiries into immigration status and subsequent reporting to the CBSA are instigating factors for the general fear and mistrust of law enforcement within non-status communities.<sup>68</sup> If the TPS continues to report individuals with outstanding immigration warrants to the CBSA, the existing fear and mistrust of the police among non-status communities will be reaffirmed.<sup>69</sup> So long as individuals without immigration status fear going to

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<sup>64</sup> *Supra* note 56 at s 10(1).

<sup>65</sup> Interviews were conducted with staff from four community organizations who advocate or provide services to marginalized communities that the victims may have identified with and with two community members from these communities. These include the South Asian community and migrant, refugee and newcomer communities. 1) The Alliance for South Asian AIDS Prevention (ASAAP), 2) The South Asian Legal Clinic of Ontario (SALCO), 3) Access Alliance, 4) The Canadian Council for Refugees (CCR).

<sup>66</sup> Amy Soberano from Access Alliance: *"I think certainly for non-status people, or for people whose immigration process is in a precarious spot there would be heightened risk and therefore unlikelihood of going to police even if in a dangerous situation or needing support because of the risk of detention, deportation or compromising the immigration process."*; Shalini Konanur of SALCO: *"Some [of the community clinic clients] are refugees that actually fled because of pretty horrific things that happened with the police. I have a number of clients – because I do gender-based violence- who faced gender-based violence from the police. So if they're coming here there's a general view that the police are actually not a trusted source because that's the view from home and rightly so."*

<sup>67</sup> There are an estimated 200,000 non-status individuals residing in Toronto alone.

Hudson et al., "(No) Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto, Canada," p.5;

Magalhaes, Carrasco, and Gastaldo, "Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions," p.133.

<sup>68</sup> *Supra* note 2.

<sup>69</sup> Shalini Konanur of SALCO: *"...engaging with the police when you have precarious immigration status is quite a daunting task."*, *"When people don't have status, there's just an automatic fear that if they call*

the police because they believe it could result in immigration detention or deportation, then crimes will go unreported and potential key witnesses will not approach the police. The implementation of a comprehensive DADT policy would address many of the fears that stand in the way of non-status individuals accessing police services and reporting crimes.

To support the successful adoption of a comprehensive DADT policy, the TPS must also maintain and develop organizational relationships with community organizations that are connected to non-status individuals' cultural and identity-related groups. Developing and maintaining relationships with organization that are in a better position to connect the TPS with non-status communities will help to build a lasting relationship of trust between the TPS and persons without status.

To further support access to police services for non-status individuals, in conjunction with the TPS adopting a comprehensive DADT policy, the Ontario government should amend the *CSPA* to explicitly state that all individuals have the right access police services without the fear of having their immigration status reported to the CBSA. This amendment would recognize the right of non-status individuals to have equal access to police services in accordance with ss. 10(1) and 79(1) of the *CSPA*<sup>70</sup>. These sections require the TPS to conduct their activities and responsibilities in accordance with the needs of the community. For the non-status communities in Toronto, the needs of the community include access to police services without fear of being reported to the CBSA. An amendment to the *CSPA* by the Ontario government to explicitly state the rights of non-status individuals to police services without fear would also help to ensure that there is no further misinterpretation of the TPS's duty to report to the CBSA.

TPS has previously misinterpreted the current *PSA* and incorrectly concluded that there was a positive legal obligation on the TPS to report non-status individuals to the CBSA. With the introduction of the *CSPA*, the TPS and Ontario government have the opportunity to increase access to police services for non-status Torontonians, in line with the needs of that community, by implementing a comprehensive DADT policy. A DADT policy could be supported by an amendment to the *CSPA*, by the Ontario government, that recognizes and affirms the right of non-status individuals to access police services.

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*police that could trigger something with them being removed from the country. And it's not necessarily true but I understand why that fear exists because there's nothing in our policing legislation that creates an Access Without Fear policy"*

Janet Dench of CCR: *"...even if the police did, as of tomorrow, stop collaborating in that way, stop reporting to CBSA ... there would be this level of mistrust because people in a lot of the affected communities have had so many bad experiences that they're not going to trust the police"*

Haran Vijayanathan of ASAAP: *"the police really need to develop those organizational relationships and truly look at community policing, rather than policing the community..."*

<sup>70</sup> *Supra* note 56 at s 10(1) and 79(1).