To Serve Some and Protect Fewer: The Toronto Police Services' Policy on Non-Status Victims and Witnesses of Crimes

Abigail Deshman
TO SERVE SOME AND PROTECT FEWER: THE TORONTO POLICE SERVICES’ POLICY ON NON-STATUS VICTIMS AND WITNESSES OF CRIMES

ABIGAIL DESHMAN*

INTRODUCTION
All individuals in Canada, regardless of their immigration status, should have access to basic police protection. Traditionally, however, the Toronto police have been free

* Abigail Deshman is the project director for the Canadian Civil Liberties Association; JD University of Toronto Faculty of Law (2008). The opinions in this paper are those of the author and do not necessarily represent the position of the Canadian Civil Liberties Association. This paper reflects the law as of June 2009.
to inquire about, report on and, under certain circumstances, enforce compliance with immigration statutes.\(^1\) As the number of people living in Toronto without immigration status has continued to grow, there has been an increasing awareness of the extent to which casual police investigations into immigration status effectively create a population without access to police services. The impact on the physical safety of non-status individuals, surrounding community members and community–police relations in general can be devastating.

In recognition of the barriers non-status individuals face in accessing police services, the Toronto Police Services Board [Board] set up a working group to examine the feasibility and scope of a proposed “Don’t Ask, Don’t Tell” policy for victims and witnesses of crime. In its most comprehensive and robust form, such a policy would consist of two directives. First, the “Don’t Ask” portion would prevent police officers from inquiring into victims’ or witnesses’ immigration status. Second, the “Don’t Tell” portion would mandate that the police treat victims’ and witnesses’ personal information as confidential, thereby restricting police officers’ ability to communicate this information to federal immigration and border services agencies. In late 2008, the Toronto Police Services Board [TPS] finalized their *Victims and Witnesses without Legal Status* policy directive.\(^2\) While the final version included a “Don’t Ask” component, restricting officers’ ability to question victims and witnesses about their immigration status, the Board declined to include a “Don’t Tell” clause.\(^3\)

This article examines the current TPS policy on victims and witnesses without legal status and evaluates the legal and policy arguments raised both for and against a robust “Don’t Ask, Don’t Tell” policy with respect to non-status individuals. The second part of this article summarizes some of the major barriers that recent migrants regularly face when interacting with police officers. The third part focuses on Toronto and details the experiences of non-status persons in their interactions with police. These individual accounts offer an insight into the adverse impact that the fear of deportation can have on both individual and community safety. The fourth part describes the TPS’s past and current policy towards non-status victims and witnesses of crime. The following two parts examine legal and policy controversies surrounding the Toronto “Don’t Ask, Don’t Tell” policy. For example, the article will ask from a legal perspective if police officers have a legal obligation to enforce federal

---


immigration laws when they suspect a violation of these provisions. The article will also ask from a policy perspective if there are national security implications of a full "Don’t Ask Don’t Tell" policy, and finally, whether the partial policy that was ultimately adopted by the Board actually works.

Although the Toronto policy has not been in place long enough to definitively assess its impact on police relations with non-status individuals and communities in general, I attempt to show how such policies can be put into operation by drawing on recent experiences interpreting and implementing a similar policy in New York City. Ultimately, I conclude that a more robust policy would be legally permissible and that the Toronto policy as it is written is unlikely to achieve its goal of reassuring non-status community members and increasing community safety.

**Barriers Faced by Recent Migrants When Accessing Police Services**

The rapid rise in the number of migrants and minority ethnic populations over the past few decades has brought increased attention to the significant barriers these recent migrants face when attempting to access municipal services generally, and police services specifically. Numerous studies have detailed the adverse impact that linguistic and cultural differences can have on the relationship between a migrant community and the police. Migrant communities also frequently face additional socio-economic and organizational obstacles that hamper their efforts to educate their peers and advocate for reform to policing practices. Below is an overview of major barriers identified in the literature.

**Language Barriers**

Language represents the most universal barrier that new migrants face when attempting to access police services. In Toronto, approximately 1.36 million people out of a population of approximately 5.1 million use a language other than English or French as their primary language at home, and 212,900 people in Toronto have no knowledge of either official language. Moreover, statistics indicate that these figures are on the increase: between 2001 and 2006, the number of people in Ontario who used a language other than English or French as their primary language at home increased by nearly 275,000; the number of people with no knowledge of either official language increased by nearly 34,000. Not surprisingly, the vast majority of this


increase is attributable to immigration. According to Citizenship and Immigration Canada, between 2002 and 2006 well over a third of the 644,845 new permanent residents settling in Ontario spoke neither English nor French. Similarly, across Canada, 42.5 per cent of spouses and dependents of new economic class migrants, 41.5 per cent of family class immigrants and 37 per cent of refugees were unable to communicate in either official language. For a very large proportion of new migrants, therefore, effective communication with the average police officer is all but impossible.

Given the sheer number of individuals in the Toronto area with no knowledge of English or French, it is not surprising that language is a primary obstacle in new migrants' abilities to access police services. Indeed, in a recent study of Toronto-area Chinese immigrants, only about 19 per cent of respondents surveyed reported no problems communicating with the police in English and 94 per cent stated that there were not enough bilingual police officers in the city. Studies conducted across North America have consistently confirmed that, irrespective of whether the migrant is a witness, victim, or suspect, language is a primary difficulty when dealing with police.

Miscommunications can also worsen relations between the community and police. Links have been drawn between language ability and an individual's perceptions of police helpfulness, concern and fairness, and the extent to which the individual believes police are responsive to neighbourhood issues. In the Toronto study of Chinese immigrants referenced above, the researchers found that "poor communication" was the most powerful predictor of whether an individual would perceive "police prejudice against Asians."

The consequences of the language barrier often go further than simply creating a barrier to services. Migrants within culturally and linguistically isolated communities may have a limited understanding of police protocols and procedures, inhibiting

---

6. Ibid. at 12.
8. Doris C. Chu & John Huey-Long Song, "Chinese Immigrants' Perceptions of the Police in Toronto, Canada" (2008) 31:4 Policing: An International Journal of Police Strategies & Management 621. Note that as a result of the methodology of the source paper, which drew its participants from community service organizations in Toronto, these figures are likely higher than the actual figures within the Toronto Chinese immigrant community as a whole.
10. Skogan et al., ibid. at 19-20.
11. Chu & Song, supra note 8 at 623.
their pursuit of legal remedies and hampering their ability to learn their legal rights and obligations in their new home. In one study, officers policing in a community with high immigrant concentrations reported that routine traffic stops took twice as long when dealing with non-English-speaking residents, and that often they would not pursue a violation because they were of the opinion that even if they did give the individual a ticket or a citation, he or she would not understand what to do with it. Moreover, an individual's lack of information on local laws, policy and procedure can easily be misunderstood by officials and lead police officers to draw negative inferences. During a New York City consultation between immigrant communities and police, a Mexican community leader noted that when assessing the credibility of two residents in a dispute, the police tended to favour the one that speaks English more fluently. As explained by Menjívar and Bejarano, “Police authorities may complain that language and cultural barriers get in the way of communicating with immigrants, [and immigrants] may be perceived as uncooperative and suspicious.”

**Cultural Barriers**

Cultural differences—both generally in terms of community practice, and specifically in terms of individuals' previous relations with state law-enforcement agencies—can also have a large impact on how individuals relate to police. Although the cultural influences that affect immigrants' interactions with police are varied and depend greatly on the background of the specific individuals involved, several trends should be noted. One recurring theme is that immigrants often come from countries where police forces are corrupt and ineffective, and traditionally, few conflicts are resolved by calling the police. Studies indicate that an individual's willingness to report a crime is directly related to prior experiences with the police, and victims are more likely to report violent crime to the police if they or those close to them have had positive experiences with the police in the past. The impact of prior experience may be particularly strong for refugees who have been traumatized by state persecution...

and mistreatment. Past persecution by authority figures can result in post-traumatic stress disorder and a tremendous fear of all law enforcement agents. In a New York focus group, one African refugee stated that for many years after he had arrived and safely landed in the United States, the mere sight of a police uniform and gun made him tremble uncontrollably.19

**Lack of Social Support Structures**

Community empowerment and a collective voice have been found to be very important factors in determining whether people feel comfortable contacting police and reporting on crime.20 Those who have recently immigrated are often isolated from the larger community, are vulnerable and lack civic engagement.21 Research indicates that when migrants need help they turn first to family and friends.22 However, family and friends may not be any more knowledgeable about the legal and policy context than the individual in need of assistance.23

Self-organizing community efforts are relatively rare. Many new migrants do not know how to communicate their concerns to politicians or decision-makers. Those who have never lived in a functioning democracy may not know how the political system works, and many others are skeptical that those who wield public power will be responsive to their concerns.24 Furthermore, for many recent migrants the daily struggle for economic survival leaves very little free time for community or volunteer work.25 More formal support networks can also be limited, and though Toronto has a number of community resource centres and legal clinics directed specifically towards new migrants and non-English speakers, it is indisputable that new migrants often remain highly marginalized. The dearth of community organizations representing migrants, and the limited funding for those groups that do exist, means that the needs and concerns of many of these communities remain unvoiced and unaddressed.

POLICE AND THE NON-STATUS COMMUNITY: THE EXPERIENCES OF TORONTO-AREA RESIDENTS

There is no census data or reliable published statistics regarding the number of non-status persons living in Canada. Estimates have ranged from 200,000\(^2\)\(^6\) to 400,000\(^2\)\(^7\) across the country, with the majority of individuals likely living in Toronto and other large urban centres.\(^2\)\(^8\) These communities face the typical cultural, linguistic and socio-economic barriers of recent migrants. In addition, however, they must confront the fear that their interactions with police will expose their immigration status, eventually leading to deportation.

Studies have repeatedly shown that the fear of deportation acts as a strong deterrent to communicating with law-enforcement agencies.\(^2\)\(^9\) Within Toronto there have been numerous documented incidents in which non-status victims of crime have refused to approach the police for fear of deportation.\(^3\)\(^0\) In 2005, for example, a non-status teenager was robbed at gunpoint near the north end of the city. The eighteen-year-old refused to approach the police and report the crime for fear that he and his family would be deported.\(^3\)\(^1\)

Non-status community members are also frequently more socially marginalized than the average new migrant. In one Toronto-area study of non-status individuals, re-

---

30. See e.g. Carolina Berinstein, Jean McDonald, Peter Nyers, Cynthia Wright & Sima Sahar Zerehi, “Access Not Fear: Non-Status Immigrants & City Services” (2006) online: <http://www.tsci.ca/files/ET_Readings/Access_Not_Fear_Report.pdf> at 22-23 [Berinstein et al., 2006]; Meaghan McCluskey, Community Legal Aid Service Program, Address (presented to Toronto Police Services Board, November 2006) [unpublished, archived at Toronto Police Services Board and on file with author] [CLASP]; Parkdale Community Legal Services Inc., Address (presented to Toronto Police Services Board, November 2006) [unpublished, archived at Toronto Police Services Board and on file with author], [Parkdale]; Judith Rae, Immigration Legal Committee, Address (presented to Toronto Police Services Board, November 2006) [unpublished, archived at Toronto Police Services Board and on file with author], [Immigration Legal Committee, 2006]; Peter Rosenthal & Jackie Esmonde to Alok Mukherjee, chair, TPSB (27 November 2006) [unpublished, archived at Toronto Police Services Board and on file with author] [Rosenthal & Esmonde 2006]; Macdonal Scott, Carranza Barristers & Solicitors, Address (presented to Toronto Police Services Board, November 2006) [unpublished, archived at Toronto Police Services Board and on file with author] [Scott].
spondents described pervasive feelings of fear and isolation, not only from the wider host society but also from the more immediate migrant or ethnic community.\textsuperscript{32} One non-status individual described the impact of her fear of deportation as follows:

[Y]ou become completely isolated from your community, from people, from everything. And it is because of the fear of being deported that we live with. One becomes totally isolated to the point that, I don't even go to the church where they speak my language ... it is because people will ask uncomfortable questions.\textsuperscript{33}

This heightened fear and isolation experienced by non-status individuals push police services even further out of reach.

Within the non-status community, female victims of domestic violence constitute one of the most oppressed and at-risk demographics.\textsuperscript{34} Non-status women in Toronto adamantly affirm that they would not report abuse to the police for fear that immigration authorities would be notified.\textsuperscript{35} Indeed, there are many documented cases of women who have contacted the police only to end up in deportation proceedings.\textsuperscript{36} The following example relayed by a Toronto-area community legal clinic demonstrates the precarious position of these women:

A client came to our clinic in need of help gaining status in Canada. She had been in a relationship with a man for seven years of which she was only in the last two years able to extricate herself. Six months into their relationship, the man, on top of the physical abuse, would drive her to the police station, and sitting parked outside would threaten to report her to immigration. After nine years in the country, she happened to come into contact with the police, who reported her to Immigration Officers when they learned of her status in Canada. She was put in the Immigration Holding Centre until she was released on bond to none other than her abuser. Being in such a position, her abuser forced her to sign over legal custody of their daughter to him. When she filed a statement of claim to regain custody, her abuser pulled his bond and threatened to send her daughter to live with his family abroad.\textsuperscript{37}

Even women who have been legally sponsored by their partners and who are on the path towards regularizing their status remain vulnerable to violent control and manipulation. A domestic abuse complaint to the police or a social service organization is accompanied by the risk that the woman's partner will revoke his sponsorship. Because the woman's immigration status is dependant on her permanent resident or

\textsuperscript{32} Judith K. Bernhard, Luin Goldring, Julie Young, Carolina Berinstein & Beth Wilson, "Living with Precarious Legal Status in Canada: Implications for the Well-being of Children and Families" (2007) 24:2 Refuge 101 at 106.

\textsuperscript{33} Ibid. at 107.

\textsuperscript{34} Berinstein \textit{et al.}, supra note 30 at 22.

\textsuperscript{35} Ibid.

\textsuperscript{36} See e.g. \textit{ibid.}; CLASP, supra note 30; Immigration Legal Committee, \textit{supra} note 30; Parkdale, \textit{supra} note 30.

\textsuperscript{37} CLASP, \textit{ibid.}.
citizen partner, the abused woman will then be at risk of deportation. Women who are in abusive relationships and are not permanent residents or Canadian citizens may tolerate physical and emotional abuse rather than seek help, as calling the police or accessing emergency shelter or other social services can result in the partner withdrawing his sponsorship, resulting in the woman's potential deportation.

In recognition of this problem, Citizenship and Immigration Canada has implemented a "family violence" policy, under which women who lose their status as sponsored spouses because they sought refuge from their abusive partners may be granted a deportation deferral and apply for permanent immigration status under humanitarian and compassionate grounds. There have not been any official assessments of the efficacy of Citizenship and Immigration Canada's domestic violence policy. At least one Toronto-area community legal clinic, however, has reported that it has a limited impact, explaining that immigration officials have been known to apply the policy inconsistently, and the processing fee is an often-unaffordable $550. Moreover, the women can take advantage of the policy only if they are aware of its existence and have access to the legal expertise needed to benefit from it. Given the barriers described above and the typically marginalized position of abused women, it would not be surprising if the policy failed to reach a good portion of the population that would theoretically benefit from it.

The multiple barriers that non-status community members face in interacting with the police have repercussions not only for their own safety, but also for the safety of their families and close friends—who may or may not have status. Non-status individuals will often have children who are Canadian citizens by birth. Studies have demonstrated, however, that these children frequently face serious barriers in accessing basic services, such as education and health care. The implications for access to police protection are particularly stark, as related by one Toronto community organization:

A child was being repeatedly and violently abused. Someone found out. The child was a citizen. The suspected perpetrator was a citizen. And the witness who found out was a citizen. So what was the problem? The child's parents were non-status. The witness was afraid to call police for fear the whole family would be deported. This left the child at sustained risk, likely exposed to further crimes of violence.

38. In October 2006 I spoke with a woman who was being detained at the Immigration Detention Holding Centre in Etobicoke. She had called the police to report the abusive behaviour of her Canadian husband, who was her sponsor at the time. When the police apprehended her husband, he notified CIC that he was revoking his sponsorship. The woman was subsequently detained and deported.


40. Ibid., s. 13.10.

41. Parkdale, supra note 30.

42. Ibid.

43. Bernhard et al., supra note 32 at 107.

44. Immigration Legal Committee, supra note 30.
Finally, the fear of deportation can also have a negative impact on more general relations between the police and minority migrant communities. Over the past forty years, dramatic shifts in the ethnic makeup of Canada’s urban centres have posed particular challenges to police services, which have at times been slow or reluctant to recognize, and subsequently embrace, the operational and organizational changes required to effectively police an increasingly multicultural society.\(^{45}\) In the late 1980s and 1990s, numerous task forces, commissions and government and private inquiries examined the recurring allegations of over-policing, excessive force, and discrimination against minority populations.\(^{46}\) The main response of Canadian police services in their attempt to improve relations between police and members of ethnic or visible minorities has been to increase liaisons and communication between the police and minority migrant communities.\(^{47}\) The TPS, for example, has set up a community consultative process “[to create] meaningful partnerships through trust, understanding, shared knowledge and effective community mobilization to maintain safety and security in our communities,” and heralds itself as “a world leader in the policing community when it comes to consultation with its communities.”\(^{48}\)

A central tenet of community policing is that police must have community cooperation, involvement, support and trust to be effective.\(^{49}\) However, in relation to the non-status population, a basic precept of community policing—building neighbourhood trust through increased involvement and liaising—is undermined by the police practice of investigating and enforcing immigration laws. Non-status residents’ willingness to involve themselves with police investigations into crimes they may have witnessed is therefore limited. This jeopardizes community safety and hampers police ability to investigate crimes in neighbourhoods with substantial non-status populations. The deportation of victims and witnesses will also undermine


\(^{47}\) Stenning, *supra* note 45 at 21.


To Serve Some and Protect Fewer

overall community trust in the police, again directly countering community policing efforts.

**The Policy Response: TPS's Victims and Witnesses Without Legal Status Policy**

In light of the barriers that typically separate migrant populations and non-status individuals from police services, the imperative to build understanding and trust between the police and this community is very strong. So long as casual contact with the police continues to lead to deportations, police services will remain unavailable to the non-status community and their close family and friends.

Prompted by the efforts of community service organizations and grassroots activists, the TPS has recognized that “[p]olice services should be available to all members of the community regardless of their immigration status.” As well, the Board has stated that “there appears to be a need to establish mechanisms to encourage victims and witnesses to come forward without fear of exposing their status.” In this section I will trace the development of the TPS's policy governing its interactions with non-status community members and outline current policy.

Prior to February 2006, there was no specific policy directing whether or not officers were permitted to inquire into the immigration status of ordinary community members, or under which circumstances such inquiries would be warranted. The most that could be said was that there was no explicit requirement for police officers to check the immigration status of victims, witnesses, or those calling the police for assistance. The decision about whether to make inquiries into immigration status, therefore, was left to the individual officer's discretion. Community groups reported that in their experience the police routinely inquired into the immigration status of victims and witnesses of crime. Once the police became aware of any immigration issues, standard practice was to communicate these suspicions to Citizenship and Immigration Canada. Historically, then, the TPS practice regarding the immigration status of victims, witnesses and general community members could be described as one of “often ask, always tell.”

---


53. TPSB August 2005, supra note 1 at 7.

54. Berinstein et al., supra note 29 at 22; CLASP, supra note 29; Immigration Legal Committee, supra note 29; Parkdale, supra note 29; Rosenthal & Esmonde 2006, supra note 29; Scott, supra note 29.

55. TPSB August 2005, supra note 1 at 7.
Public debate regarding the issue was initiated in late 2004 when a complaint was filed against the TPS alleging a “practice of inquiring as to the immigration status of a person seeking police services and of providing that information to immigration authorities.”\textsuperscript{56} The police responded that, although a victim's or witness's immigration status had no bearing on the police investigation, and there was no explicit requirement mandating inquiries into the immigration status of victims and witnesses, the police did have a legal duty to report any irregularities to Citizenship and Immigration Canada.\textsuperscript{57} The initial TPS report on the matter concluded that no changes to the rules, procedures, or policies of the TPS were required.\textsuperscript{58}

However, upon reviewing the original complaint and the responses of the TPS and the chief of police, the Board undertook to study the matter further.\textsuperscript{59} In February 2006, a Board Working Group issued a report recognizing that

> the immigration status of victims and witnesses of crime is largely irrelevant in the conduct of police investigations and that there appears to be a need to establish mechanisms to encourage victims and witnesses to come forward without fear of exposing their status.\textsuperscript{60}

The full Board adopted the recommendations of the 2006 Working Group report and gave the chief of police two directives. First, the chief of police was required to develop a “Don't Ask” policy toward victims and witnesses of crime, prohibiting the police from inquiring into the immigration status of victims and witnesses in the absence of \textit{bona fide} reasons.\textsuperscript{61} Second, the Board directed the chief of police to develop policies that would encourage non-status victims and witnesses to come forward with information regarding personal and community crime. The Board, however, stopped short of recommending a “Don't Tell” portion to the policy, which would require the police to treat any immigration information they did happen upon in the course of an investigation as strictly confidential.\textsuperscript{62}

In February 2007, the Board again revisited the issue, officially approving the Toronto Police Service's proposed \textit{Victims and Witnesses without Legal Status Policy}, which stated that “victims and witnesses of crime shall not be asked their immigration status, unless there are \textit{bona fide} reasons to do so.”\textsuperscript{63} The phrase “\textit{bona fide} reasons,” left undefined in the 2006 directive, was clarified in the final policy to mean

- a victim or witness who may possibly require or may seek admission into the Provincial Witness Protection Program;

\textsuperscript{56} TPSB February 2006, \textit{supra} note 51.
\textsuperscript{57} TPSB August 2005, \textit{supra} note 1 at 7-8.
\textsuperscript{58} \textit{Ibid.} at 7.
\textsuperscript{59} \textit{Ibid.}
\textsuperscript{60} TPSB February 2006, \textit{supra} note 51.
\textsuperscript{61} \textit{Ibid.}
\textsuperscript{62} \textit{Ibid.}
\textsuperscript{63} TPS, \textit{Victims and Witnesses}, \textit{supra} note 2.
To Serve Some and Protect Fewer

- a Crown Attorney is requesting information for disclosure purposes;
- the information is necessary to prove essential elements of an offence; or
- investigations where the circumstances make it clear that it is essential to public or officer safety and security to ascertain the immigration status of a victim or witness.64

The Board again declined to oblige the Toronto Police Service to include a “Don’t Tell” provision.65 In late 2008, despite the continued advocacy of many community groups, the Toronto Police finalized their policy in the area without a “Don’t Tell” clause.66 In a brief explanation of this decision, the Board’s Working Group referred to continued unresolved concerns on the part of the chief of police regarding an officer’s legal responsibilities and liabilities.67 The conclusion of the Working Group was that “a Don’t Tell component is not feasible” and that “the policy as it currently exists and as it has been implemented by the Chief is as far as we can go on this matter.”68

The absence of a “Don’t Tell” clause means that the decision of whether or not to treat information regarding victims and witnesses as confidential is still left to the individual officer’s discretion. This issue has been the centre of lengthy discussions between multiple stakeholders and has been approached from both legal and policy perspectives. In the following section, I review and evaluate the TPS’s and other critics’ legal objections to developing a comprehensive “Don’t Ask, Don’t Tell” policy in the context of victims and witnesses of crime.

LEGAL CONSIDERATIONS: LEGAL CONTROVERSIES SURROUNDING A COMPREHENSIVE “DON’T ASK, DON’T TELL” POLICY

There has been significant debate regarding the legal obligation of police officers to investigate, inquire into, communicate and act upon immigration violations. There now seems to be general agreement that the police are not legally required to inquire into the immigration status of witnesses, victims, or those seeking general police assistance and advice. The TPS have acknowledged that their investigation of criminal conduct does not mandate an inquiry into immigration status, stating, “The investigation into the crime being reported by the victim and any investigation regarding the victim’s immigration issues are separate and distinct ... the victim’s immigration status will have no bearing on the police investigation.”69 Furthermore, simply because immigration status is regulated by law does not mean that the police have an

64. Ibid.
65. Ibid.
66. TPSB November 2008, supra note 3 at 55.
67. Ibid.
68. Ibid.
69. TPSB August 2005, supra note 1.
absolute duty to investigate potential violations. There are a large number of civil statutes, including, for example, environmental protections, landlord-tenant provisions and labour regulations, that the police do not investigate or enforce on a routine basis, if ever. The limits of police responsibility are even clearer with respect to an officers’ duty to enforce compliance with immigration statutes. The police are specifically prohibited from detaining or arresting a person in violation of the Immigration and Refugee Protection Act [IRPA] unless they have been given an explicit direction by an immigration officer to execute a warrant or a written order. The main point of debate, therefore, relates not to an officer's obligation to inquire into immigration status, or to take people into custody on the basis of immigration violations, but rather whether or not the police have a legal obligation to communicate immigration information to other agencies once they are aware of a potential violation.

According to a 2005 report the chief of police made to the Board, it appears that the primary concern of the TPA is that a “Don't Tell” provision would not be legally permissible because it could force officers to contravene their statutory duty:

A violation of the Immigration and Refugee Protection Act is a federal offence, and police officers are duty bound by law to act upon the information they receive ... For a police officer to suppress that information, or for the Service or the Board to direct officers to do so would constitute an offence.

To support this position, the chief of police cited three legal sources of police authority and duty. First, s. 2 of the Oaths and Affirmations regulation of the Police Services Act [PSA] sets out the oath that officers must swear. The oath reads,

I solemnly swear (affirm) that I will be loyal to Her Majesty the Queen and to Canada, and that I will uphold the Constitution of Canada and that I will, to the best of my ability, preserve the peace, prevent offences and discharge my other duties as (insert name of office) faithfully, impartially and according to law.

The broad duties to “preserve the peace” and “prevent offences” are interpreted to include not only acting to prevent criminal offences, but also any other activity that may contravene any federal or provincial laws. Additional support for this position was drawn from the duties listed in s. 42(1) of the PSA, which include preserving the peace, preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention. Because the officers’ duties include “preventing crimes and other offences”, the chief of police argued that there is an

---

71. TPSB August 2005, supra note 1 at 10.
72. O.Reg. 144/91 [Oaths and Affirmations Regulation].
73. R.S.O. 1990, c. P.15 [PSA].
74. Oaths and Affirmations Regulation, supra note 72 at s. 2.
75. TPSB August 2005, supra note 1.
76. PSA, supra note 73 at s. 42(1).
77. Ibid.
To Serve Some and Protect Fewer

obligation to prevent and report possible violations of the IRPA.\textsuperscript{78} Finally, the chief of police's report refers to the Code of Conduct contained in the General Regulation to the PSA.\textsuperscript{79} The Code dictates that a police officer will be found in Neglect of Duty when he or she:

(i) without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of the police force,

\[ \ldots \]

(iv) fails, when knowing where an offender is to be found, to report him or her or to make due exertions for bringing the offender to justice,

(v) fails to report a matter that it is his or her duty to report,

(vi) fails to report anything that he or she knows concerning a criminal or other charge, or fails to disclose any evidence that he or she, or any person within his or her knowledge, can give for or against any prisoner or defendant\textsuperscript{80}.

The report therefore concludes that the police have a legal duty to enforce the IRPA—it is a police officer's duty to prevent offences, and it is an offence for an officer to neglect his or her duty, or to fail to report any offender or matter it is his or her duty to report.\textsuperscript{81}

The TPS bolstered their conclusions by pointing out that contravention of the IRPA is an offence against an Act of Parliament, and those who have violated any act are not “law abiding.” According to this reasoning, although non-status persons are equally protected by police services, they may find themselves in a situation where they themselves are reluctant to come forward because they are personally in violation of the law. To grant a “Don’t Ask, Don’t Tell” policy would therefore be to “justify an exemption from the law as a result of becoming a victim of a crime.”\textsuperscript{82}

The conclusions that a “Don't Tell” component to the policy would force officers to contravene their statutory duties, and that police are legally obliged to report information concerning a person's immigration status, have been contentious points.\textsuperscript{83} As others have pointed out, even if the interpretation of a police officer's duty provides for the enforcement of all statutes and provisions, this duty, as with all other enforcement duties, must be exercised with discretion.\textsuperscript{84} Police officers do not investigate,

\begin{itemize}
  \item \textsuperscript{78} TPSB August 2005, \textit{supra} note 1.
  \item \textsuperscript{79} O. Reg. 123/98, at Schedule [General Regulation].
  \item \textsuperscript{80} \textit{Ibid.}, at Schedule, at s. 2(1)(c).
  \item \textsuperscript{81} TPSB August 2005, \textit{supra} note 1.
  \item \textsuperscript{82} \textit{Ibid.}
  \item \textsuperscript{83} See e.g. Immigration Legal Committee, \textit{Police Services: Safe Access for All, May 2008} [unpublished, on file with author]; Peter Rosenthal and Jackie Esmonde to Steve Watson (13 October 2005), [unpublished, on file with author] [Rosenthal & Esmonde 2005].
  \item \textsuperscript{84} Rosenthal & Esmonde 2005, \textit{ibid.} at 5.
\end{itemize}
and would not be faulted for failing to pursue, every single violation of the *Criminal Code*. Rather, they constantly exercise their powers of law enforcement with reference to their overarching guiding principle—ensuring the safety and security of persons and property.\(^8\) Moreover, two of the five core services of the TPS are the prevention of crime and the provision of assistance to victims of crime.\(^8\) Taking into consideration the dual mandate to protect witnesses and victims as well as prevent crime, and the public policy interests outlined above with respect to the community relations and safety implications of police enforcing immigration statutes, it is difficult to conclude that there is an absolute duty to inform immigration officials of a person's immigration status.

There is further support for this position in other provisions of the PSA and the associated regulations. In addition to the oath of office cited above and used to support the position of the chief of police, all officers must also swear an oath or affirmation of secrecy, which reads, "I solemnly swear (affirm) that I will not disclose any information obtained by me in the course of my duties ... except as I may be authorized or required by law."\(^8\) The specific circumstances and requirements leading to the authorization and duty to disclose personal information such as name, address and birth date to other persons or agencies are set out in regulations made pursuant to the PSA entitled *Disclosure of Personal Information*.\(^8\) Section 5 of these regulations states,

\begin{enumerate}
  \item 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,
  \begin{enumerate}
    \item 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.\(^8\) [Emphasis added]
  \end{enumerate}
\end{enumerate}

In most cases, the TPS would presumably be disclosing personal information to Citizenship and Immigration Canada in the course of investigations for violations of the *IRPA*. However, the spectre of police officers initiating official investigations into potential *IRPA* violations, and then using their investigation as a justification for sharing confidential information, is a dubious proposition from a policy standpoint. To start an investigation of a potential *IRPA* violation, officers must have some basis

---

85. PSA, *supra* note 73 at s. 1(1).
87. Oaths and Affirmations Regulation, *supra* note 72, at s. 4.
88. O. Reg. 265/98 [Disclosure of Personal Information Regulation].
89. *Ibid.* at s. 5.
for their suspicion. IRPA, however, is a complex piece of civil legislation. There are many categories of people who do not have official or secure immigration status, but are nonetheless legally permitted to remain in Canada. Police officers are not trained in the various categories and provisions of the IRPA or how to investigate potential violations. Section 12(1) of the PSA regulations, entitled Adequacy and Effectiveness of Police Services, outlines that police chiefs must “develop and maintain procedures on and processes for undertaking and managing general criminal investigations and investigations” into twenty-two specifically enumerated areas—and immigration is not one of the enumerated areas.90 In fact, some have suggested that the Criminal Code provision that allows police officers to arrest individuals solely on the reasonable and probable belief that a warrant exists does not apply to IRPA violations because police officers do not have enough knowledge to make this determination.91

In the absence of adequate training and complex investigative methods, investigations initiated by police officers would almost certainly rely on measures such as racial, cultural and socio-economic profiling practices the TPS has very vigorously denied employing in recent years.92 This concern is reinforced by experiences from other countries where accusations of racial profiling have been levied against police forces that have explicitly taken on the enforcement of immigration provisions.93

As further evidence of the suspect basis of a police officer’s legal obligation to share personal information with immigration officials, s. 6 of the Disclosure of Personal

90. O. Reg. 3/99, s. 12(1) [Adequacy and Effectiveness Regulation].
Information regulations of the PSA explicitly requires police officers to use discretion when deciding whether or not to disclose personal information:

In deciding whether or not to disclose personal information under this Regulation, the chief of police or his or her designate shall consider the availability of resources and information, what is reasonable in the circumstances of the case, what is consistent with the law and the public interest and what is necessary to ensure that the resolution of criminal proceedings is not delayed.  

Contrary to the assertions made by the chief of police in the 2005 report to the Board, this provision demonstrates that even when the police have no doubt that a person is in violation of IRPA, they are under no immediate obligation to disclose personal information to Citizenship and Immigration Canada. Consistency with the law is but one of the considerations that must be taken into account when deciding whether or not to disclose personal information. Moreover, the other mandated considerations such as the public interest, potential delay of criminal proceedings, and reasonableness in the circumstances of the case would all seem to indicate that personal information of victims and witnesses should not be disclosed to Immigration.

Finally, the considerable number of statutes and regulations that protect victims of crime cannot be ignored when it comes to evaluating competing factors in a discretionary decision. Section 17 of the PSA regulations governing the adequacy and effectiveness of police services states,

Every chief of police shall establish procedures on providing assistance to victims that,

(a) reflect the principles of the Victims’ Bill of Rights, 1995; and
(b) set out the roles and responsibilities of members of the police force in providing assistance to victims.  

The preamble to the Victims’ Bill of Rights further defines the principles that should guide the actions and policies of the police:

The people of Ontario believe that victims of crime, who have suffered harm and whose rights and security have been violated by crime, should be treated with compassion and fairness. The people of Ontario further believe that the justice system should operate in a manner that does not increase the suffering of victims of crime and that does not discourage victims of crime from participating in the justice process.  

The previous TPS policy to possibly inquire into and always communicate a non-citizen victim's personal information to other agencies without his or her permission directly undermines the intent and purpose of the enumerated police duty to assist

94. Disclosure of Personal Information Regulation, supra note 88 at s. 6.
95. Ibid.  
96. Adequacy and Effectiveness Regulation, supra note 90 at s. 17.  
97. S.O. 1995, c. 6, Preamble.
victims of crime.98 Even the modified policy, however, leaves open the possibility that a victim may be further victimized by the accused’s power to disclose the victim’s immigration status and affect his or her deportation.

Overall, it appears that in addition to the discretion that police officers have regarding the communication of personal information, they also have an overriding duty to protect victims and witnesses. These considerations suggest strongly that, at the very least, a “Don’t Tell” provision would not place police officers or the Board in contravention of existing law. Although the Board indicated that their decision to reject a “Don’t Tell” policy was based on “numerous discussions with the Chief,” including “legal ramifications, and numerous liability issues,”99 the only legal arguments that were publicly discussed were those canvassed above. On the basis this information, it is difficult to support the conclusion of the chief of police that a “Don’t Tell” policy would not be legally permissible.

POLICY CONSIDERATIONS: NATIONAL SECURITY CONCERNS AND THE EFFICACY OF THE TPS’S EXISTING VICTIMS AND WITNESSES WITHOUT LEGAL STATUS POLICY

In addition to the legal debate over police officers’ obligations to report IRPA violations, two main policy debates surfaced during the discussions that eventually led to the current TPS policy. First, the Canada Border Services Agency [CBSA] highlighted a number of considerations from a national security perspective that are summarized and briefly analyzed below. Second, there remain concerns by community groups that the existing policy will not, as it is currently formulated, adequately address the needs of non-status individuals and the surrounding communities.100

In the second part of this section I will explore several aspects of the policy that may prevent it from being truly effective in increasing access and confidence in police services. I also draw on the considerable experience of New York City, which has had a similar provision since 1985, in order to examine how such policies can function in day-to-day operations.

98. See PSA, supra note 73 at s. 42(1)(c).
99. TPSB November 2008, supra note 3 at 55.
100. See e.g. Immigration Legal Committee, “Police Services: Safe Access for All; Legal Arguments for a Complete ’Don’t Ask, Don’t Tell’ Policy” (May 2008) [unpublished, on file with author]; and Peter Rosenthal & Jackie Esmonde to Alok Mukherjee, chair of the Toronto Police Services Board (14 July 2008), [unpublished, on file with author] [Rosenthal & Esmonde 2008]. The Toronto Police Services Board also noted that it had received 844 individual petitions stating that, although the Board had adopted a “Don’t Ask” policy, it was not uniformly enforced and required a “Don’t Tell” portion to be effective. See TPSB November 2008, supra note 3.
National Security Implications

When a “Don’t Ask, Don’t Tell” policy was first being considered by the Board, the CBSA objected strongly to the then-proposed policy based on potential national security implications. The CBSA asserted that IRPA itself contains provisions for the protection of vulnerable persons such as victims and witnesses of crime. For example, they explained that Citizenship and Immigration Canada has developed policies and procedures to take into account the needs and special circumstances of human trafficking victims, and offers humanitarian and compassionate grounds applications to allow for situations not anticipated through the other IRPA provisions. Furthermore, the CBSA stated that consultation with the Crown is required before potential witnesses are removed from Canada, thereby allowing for the simultaneous pursuit of criminal justice and compliance with immigration requirements.

Additionally, the CBSA argued that some important and pertinent information to crime investigation can be provided only by the CBSA. The existence of foreign warrants, foreign criminal records and crime-related immigration violations is often discovered only upon communication with the CBSA:

Our post-9/11 reality, increased security concerns, threats from organized crime and community safety concerns have reinforced the need for fulsome and timely information sharing and co-operation between law enforcement agencies at all levels. It is the key to addressing and mitigating potential threats.

The CBSA urged that refusing to ask and tell about basic immigration information is equivalent to making a decision to disregard relevant information about a person’s background.

The Board’s reception of the CBSA comments was cold, with members stating that the concerns were “premature” and that the alarmist tone had taken them aback. Although it is beyond the scope of this paper to thoroughly canvass the links among national security, international crime and immigration violations, a few issues should be highlighted. First, the proposed police policy would not prevent the communication of the immigration status of those charged, or even those being investigated, under the Criminal Code. Furthermore, if there were bona fide reasons to inquire into immigration history, such as reasonable grounds to suspect links to international

101. Concerns were first publicly raised in a letter from John Gillan, director general of the Canada Border Services Agency for the Greater Toronto Area Region, addressed to Alok Mukherjee, chair of the Toronto Police Services Board, 1 November 2006. See TPSB November 2006, supra note 28.
102. John Gillan, Address (presented to the Toronto Police Services Board, 28 November 2006) [unpublished, archived at Toronto Police Services Board, on file with author] [Gillan 2006].
103. Ibid. at 2.
104. Ibid.
crime or terrorism, investigation into and communication of this information would not be prohibited.

The CBSA also suggested that if victims' names are not communicated, independent investigations by the CBSA could lead to the deportation of victims before the completion of the criminal justice process. According to the CBSA, this would lead to a sense of betrayal in the victim and the victim's family, undermining the atmosphere of trust that the "Don't Ask, Don't Tell" policy is aimed to foster. The validity of this concern is dubious, as community organizations reported that victims and witnesses to crimes were regularly deported under the previous system. Furthermore, as noted in the CBSA's own submissions, s. 50(a) of the IRPA states that a removal order is stayed if the removal would contravene a decision that was made in another judicial proceeding, preventing the removal of a witness subject to a court subpoena or summons to appear. As such, a simple questioning of potential deportees and an administrative check with the Crown's office prior to removal should be sufficient to assuage the fear of derailing the criminal justice process.

**Impact of Existing Policy on Non-Status Individuals and Surrounding Communities**

On the opposite side of the debate, community groups have expressed concerns that the TPS policy as it is currently drafted will not provide sufficient security to non-status individuals. The TPS's policy is relatively new, and there have been no thorough assessments of its implementation, adherence to the policy by individual officers, or impact on police relations with immigrant and non-status communities. There are, however, several features of the current policy that indicate that it may ultimately fail to achieve its goals.

First, while there is only anecdotal information regarding police implementation of and adherence to the policy, available information suggests that there has not been a vigorous institutional push to incorporate the new directives into daily policing routine and interactions with marginalized communities. In November 2006, six months after the "Don't Ask" portion of the policy was supposed to have been adopted, community groups continued to receive reports that police were still regularly questioning victims and witnesses regarding their immigration status. Furthermore, over two years after the 2006 directive, it appeared that the only step that the TPS had taken to publicize the new policy and encourage non-status victims and witnesses to come forward was to post the *Victims and Witnesses without Legal Status* policy on their website. The fact that the TPS strongly fought against adoption of the policy

---

in the first place, combined with a seemingly minimal effort at policy dissemination and implementation after its official adoption, will likely make it difficult for non-status communities to believe that there has been a significant change in their practical relations with the police.

Second, the limited scope of the policy—applying only to victims and witnesses of crime—may also undercut its efficacy. Ordinary community members should feel comfortable interacting with police, regardless of whether or not they have been directly affected by the commission of a specific crime. Although offering some protection to victims and witnesses is a good first step, ultimately relations with the larger community will likely remain strained and mistrustful so long as casual encounters with the police can lead to inquiries into immigration status and deportations.

Finally, and most concerning from a policy perspective, is the absence of any sort of “Don’t Tell” component to the policy. As discussed, victims and witnesses are in a particularly vulnerable position, especially when their involvement with a case leads to criminal charges and prosecution. Unless clear guidelines are developed on the disclosure of sensitive information, victims and witnesses will still be held hostage to the threat that the accused will inform the police of their immigration status. There will always be the possibility that police will somehow find out about a person’s immigration status without explicitly asking, and absent a strong “Don’t Tell” policy, there is no guarantee that this information will not get passed on to immigration officials. Even without direct inquiries, if the police, for whatever reason, suspect a person may be without status, they will be free to pass that individual’s name, birth date and other personal identifying information on to federal immigration officials. Given these possibilities, it is difficult to understand how a policy without a robust confidentiality clause is an improvement over no policy at all.

The experience of non-status residents in New York City, which for more than two decades has had a much more comprehensive “Don’t Ask, Don’t Tell” policy, provides a useful point of comparison. New York, like many other large U.S. urban centres, has a long history of being a “sanctuary city” for immigrants. In 1985, an executive order issued by Mayor Edward I. Koch prevented police from asking about a suspect’s immigration status and forbade officers from reporting individuals to the Immigration and Naturalization Service [INS]110 or cooperating with federal agents in tracking undocumented foreigners, unless the immigrant had committed a crime or expressly authorized the release of the information.111 Even if a city worker suspected an alien of criminal activity, the information could not be transmitted directly to federal authorities. Instead, the case would be passed to a specialized officer, who

---

would receive the report and consider the matter on a case-by-case basis to decide what action, if any, should be taken.\textsuperscript{112}

In the mid-1990s, however, the U.S. Congress passed several key pieces of legislation in an attempt to facilitate, and arguably mandate, increased police involvement in immigration enforcement.\textsuperscript{113} Most significantly, in 1996 the federal government made it illegal for municipalities to pass "Don't Tell" policies prohibiting their employees from sharing information about an undocumented immigrant to federal agents.\textsuperscript{114} Mayor Rudolph Giuliani refused to comply and upheld the city's "Don't Tell" policy.\textsuperscript{115} The 1985 executive order, however, was eventually challenged in the courts, and in 1999 the U.S. Court of Appeals for the second circuit ruled that Mayor Koch's original policy was unconstitutional.\textsuperscript{116}

New York City's official position on immigration information and the police was not clarified until September 2003, when Mayor Bloomberg enacted Executive Order 41 [EO 41].\textsuperscript{117} The new order stated that law enforcement officers may not inquire into a person's immigration status or disclose confidential information if the only illegal activity they were investigating was status as an undocumented alien. Furthermore, they may never inquire into the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.\textsuperscript{118} The current New York order, therefore, is a much stronger prohibition against inquiring into the immigration status of victims and witnesses, providing for no bona fide reasons whatsoever, beyond investigation of non-immigration illegal activity. It is also wider in scope than the Toronto policy, providing protection not just to victims and witnesses, but to anyone who approaches the police for any reason.

\textsuperscript{112} Executive Order 124, cited in \textit{New York (City of) v. United States}, 179 F.3d 29 (2nd Cir. 1999).

\textsuperscript{113} The \textit{Illegal Immigration Reform and Immigrant Responsibility Act}, which came into effect in September 1996, added s. 287(g) to the \textit{Immigration and Nationality Act}, enabling state officers and employees to become certified to enforce immigration law. So long as state or local law enforcement agencies enter into a Memorandum of Agreement with the Department of Homeland Security (DHS) and the local law enforcement officers receive appropriate training and supervision of U.S. Immigration and Customs Enforcement officers, they are explicitly authorized to enforce immigration laws. There are 63 active Memorandums of Agreement between local law enforcement agencies and DHS, 87\% of which have been signed within the last three years. See U.S. Immigrations and Customs Enforcement, "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," online: <http://www.ice.gov/partners/287g/Section287_g.htm>.


\textsuperscript{115} Chaleampon Ritthichai, "Executive Order 34 Revisited" \textit{Gotham Gazette} (August 2003).

\textsuperscript{116} \textit{New York (City of) v. United States}, 179 F.3d 29 (2nd Cir. 1999); petition for certiorari denied, see \textit{New York (City of), et al. v. United States, et al.}, 528 U.S. 1115 (2000).


\textsuperscript{118} \textit{Ibid.}
When EO 41 was passed in 2003, it was hailed as an affirmation of Mayor Koch’s original 1985 Order and said to be an “assurance to all law-abiding New Yorkers—whether you’re an immigrant, a victim of domestic violence, or any taxpayer—that the confidential information you give to the City will stay with the City.” The mayor further stated, “The promise of confidentiality is not for everyone … It offers no protection to terrorists and violent criminals who seek to avoid responsibility for their crimes. Nor is it a shield for law-breakers to hide behind.”

The impact of the New York policy on the ground, however, has been mixed. Most significantly, the efficacy of the “Don’t Ask” portion of the policy has been drastically reduced by the National Security Entry-Exit Registration System [NSEERS], a program launched in 2002 that required “high-risk alien visitors” to provide fingerprints and extensive biographical information. It also required these individuals to re-register with U.S. immigration officials periodically and imposed deportation orders on those who failed to comply. Violators of the NSEERS requirements are listed in the National Crime Information Center [NCIC] database, a database that was traditionally used to detect out-of-state criminal warrants. The information in the NCIC database is generally accessible in the squad cars of local police departments and is regularly accessed by police officers in the course of traffic stops and other routine encounters. Because the NCIC database now contains the names of so many violators of standard administrative immigration provisions, it is seldom necessary to ask about a person’s immigration status to find out confidential information: simply running the name will be sufficient.

The protection given to confidential information that appears to be offered by the New York policy—allowing for disclosure only in cases of suspected illegal activity—has also been effectively undermined. First, New York City police have confirmed that the name of every non-citizen who is arrested is automatically reported to Immigration and Customs Enforcement [ICE], which is part of the Department of Homeland Security. This fact is not surprising, as the policy specifically contemplates that those suspected of criminal activity will not benefit from the confidentiality provisions. As one New York municipal councilman pointed out, however,

Anybody can be arrested … Arrested doesn’t mean you’re guilty. You know what it is in our society today—they arrest you based on profile, on minor things. And as long as they arrest you, that’s an excuse for them to give that information to ICE.

120. Ibid.
122. Ibid.
Second, even when a person is not officially arrested, the police have defined "illegal activity" very broadly, to include investigations into extremely minor transgressions. As recently as 2005, community leaders were still citing cases in which routine traffic stops or misdemeanour investigations had led directly to the deportation of non-criminal non-status residents. Police have since confirmed that "anyone whose driver's license is checked by the police, even in a random traffic stop, will have his or her name and birth date run through the [NCIC] database." If the person is listed as having violated immigration laws, the police will call ICE and, at the request of immigration authorities, hold the individual for forty-eight hours for pickup by federal officers.

The experience of Waheed Saleh, a Palestinian cab driver living in New York City, offers a concrete example of how the New York policy has been applied and interpreted. According to media reports, Mr. Saleh believed that he was being harassed by a member of the New York Police Department, who had issued Mr. Saleh a summons for disorderly conduct when he found Mr. Saleh smoking a cigarette outside a doughnut shop. The officer also reportedly yelled at him, telling him to go back home to his own country. Shortly after this incident, Mr. Saleh filed a complaint with New York City's Civilian Complaint Review Board. Before he heard back regarding the outcome of the investigation, however, he was approached by the same police officer, this time accompanied by immigration officials. The federal immigration authorities questioned him briefly, and then the police officers took him into custody for administrative immigration violations.

The police denied that their actions were done in retaliation for the complaint, and the Civilian Complaint Review Board subsequently rejected the complaint in any case. When Mr. Saleh complained to city council alleging a breach of EO 41, he was referred back to the very agency he was accusing of misconduct—the police department. The Mayor's Commissioner of Immigrant Affairs, though technically responsible for protecting immigrants' access to city agencies, has no authority to investigate or enforce EO 41. A police spokesperson further explained that there

126. Ibid.
128. Ibid.
129. Ibid.
132. Ibid.
133. Ibid.
had been no violation of the Mayor's Order, as Mr. Saleh, a taxi driver, had a variety of traffic summons issued against him that amounted to illegal activity, just as a single parking ticket would.\textsuperscript{134}

The New York experience should give the Toronto Police Services Board considerable pause regarding the practical impact that their policy, as currently formulated, is likely to have on the target community. Prior to 1999, New York had been, for almost fifteen years, a "sanctuary city" where the local police did not involve themselves in immigration enforcement. Despite this history and overwhelming community support for a robust "Don't Ask, Don't Tell" policy, the availability of alternative means of determining an individual's immigration status, a relatively vague "Don't Tell" provision, and an apparent lack of police will to purposively interpret the policy, have led to heavy police involvement in immigration matters. Toronto, in comparison, has a new policy that does not enjoy equally robust institutional support, is more limited in scope, allows for more exceptions, and provides no protection whatsoever for confidential information. Although the efficacy of the existing Toronto policy cannot be thoroughly assessed at this point, there appear to be very legitimate concerns that it will ultimately prove insufficient to achieve its goals.

\textbf{Conclusion}

Recent immigrants, both those with and without status, are often highly marginalized within the larger Canadian society. In interacting with government offices and officials, they face significant linguistic, cultural and organizational barriers that interfere with their ability to access the most basic government services. In the case of non-status community members who have been victims or witnesses of crimes, or who are simply attempting to access basic police services, these individuals face the additional overriding fear that their interaction with the police will lead to the deportation of themselves, their families, or other close members of their community. The impact of having police fill the role of investigating and apprehending non-status individuals has serious safety consequences, not only for the non-status individual but also for the surrounding community.

As outlined above, however, while the Board has recognized the inherent difficulties that arise when police contact regularly leads to prosecution for immigration violations, there remains a real possibility that the existing policy response will ultimately fail to address the underlying concerns. The chief of police has attempted to argue that a "Don't Tell" provision would place police officers in contravention of their statutory duties. A more comprehensive and purposive reading of the governing legislation and regulations, however, leads to the conclusion that, not only is a "Don't Tell" provision legally permissible, but putting such a policy in place would actually further the objects and purposes of the legislation. Moreover, the policy-based ob-

\textsuperscript{134} \textit{Ibid.}
jections to a comprehensive provision appear weak, while the experience in New York City suggests that even a more robust policy than what is currently in place in Toronto remains highly susceptible to subversion and abuse.

All those present in Canada have their right to life and security of the person guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms. Access to police services is an integral part of securing these rights and should in no way be impaired by a person's immigration status, or the immigration status of their immediate family or community. The TPS and the Board have taken important first steps in demonstrating their willingness to address the issue of non-status individuals' rights and their desire to build trusting and mutually beneficial relationships with this highly marginalized community. Ultimately, however, there remains a substantial and very real concern that the current policy measures will do little, if anything, to increase the trust that non-status individuals are able to place in the police. So long as the non-status community fear that interactions with the police will lead to deportation, they will remain a highly vulnerable and marginalized population, living outside the state-guaranteed physical and legal protections that are so often taken for granted by the rest of Canadian society.