

Police Services: Safe Access for All

Legal Arguments for a Complete “Don’t Ask, Don’t Tell” Policy

A REPORT BY THE IMMIGRATION LEGAL COMMITTEE

**Presented to the Toronto Police Services Board
May 2008**

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The Immigration Legal Committee is a joint project of the University of Toronto International Human Rights Program, No One Is Illegal - Toronto, and the Law Union of Ontario.

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POLICE SERVICES: SAFE ACCESS FOR ALL

A Report by the Immigration Legal Committee

EXECUTIVE SUMMARY

Introduction

The Immigration Legal Committee is a group of law students, legal professionals, and lawyers that advocate for the rights of immigrants and refugees, particularly those without status. It is a joint project of the University of Toronto Faculty of Law Immigrant Rights Working Group, No One Is Illegal (Toronto), and the Ontario Law Union.

“Don’t Ask, Don’t Tell” (“DADT”) policies are created to allow persons without immigration status to access police without the fear that they might be detained or deported for doing so. The Toronto Police Services Board (“the Board”) has previously implemented a narrow “Don’t Ask” policy, whereby police officers are not to ask victims and witnesses of crimes about their immigration status without a bona fide reason to do so. The Immigration Legal Committee created this report to provide the Board with information about the legality of adding a “Don’t Tell” component to this policy. A “Don’t Tell” component would prevent police from disclosing immigration status to federal officials, should a person’s status come to their attention. Currently, many American jurisdictions have implemented complete DADT policies.

The implementation of a complete DADT policy is vital if all Torontonians are to be able to access police without fear. A “Don’t Ask” policy alone does not allow victims and witnesses to safely access police protection unless it is combined with a “Don’t Tell” policy. This is because police officers rarely find out about victims’ and witnesses’ immigration status by asking about it directly. Rather, immigration status is usually disclosed to officers when they ask for identification, or by abusive partners who use their victim’s lack of status to keep her from seeking protection.

After reviewing U.S. DADT policies, as well as the statutory and common law relevant to the legality of implementing a DADT policy in Ontario, the Immigration Legal Committee is of the view that the law does not require police to disclose immigration status to federal officials except when they are carrying out a warrant issued under the *Immigration and Refugee Protection Act* (“IRPA”). In addition, it is very likely that disclosure of this information conflicts with police duties under the *Police Services Act*, as well as with the *Victims’ Bill of Rights*, the *Charter of Rights and Freedoms*, the *Ontario Human Rights Code*, and international law. Consequently, not only is there no duty to disclose, but a practice of regular disclosure of immigration status by police is likely contrary to statutory, constitutional and international law.

Based on this analysis, the Immigration Legal Committee recommends that Toronto police adopt a policy to prevent officers from disclosing immigration status, should they become aware of it.

The information in this report also affirms the importance of ensuring that the existing “Don’t Ask” policy is extended beyond victims and witnesses, to include all people police come into contact with. Community agencies have reported that racialized clients with and without immigration status are stopped by police and asked about their status. Questions about status are used by police to justify stops made primarily on the basis of race. The lack of a more inclusive “Don’t Ask” policy therefore allows police to use immigration status as a racial profiling tool. This demeans the dignity of racialized persons in Toronto and is a violation of the Ontario *Human Rights Code* and the *Charter of Rights and Freedoms*.

Consequently, the Immigration Legal Committee further recommends that the Board extend its DADT policy to other persons police come into contact with, and not restrict it to victims and witnesses.

Main Findings:

- ▶ Police have no duty to report immigration status.
- ▶ A practice of regular disclosure of immigration status is likely contrary to statutory, constitutional and international law.

Main Recommendations:

- ▶ The Board should adopt a “Don’t Tell” policy, directing officers not to disclose immigration status.
- ▶ The Board should extend its “Don’t Ask” and “Don’t Tell” policies beyond victims and witnesses of crime. The only exception to these policies should be where a police officer is carrying out a specific warrant under the *Immigration and Refugee Protection Act*, if directed to do so by an immigration officer.

1) A “Don’t Tell” policy is legal, and recommended, under Ontario law

The first section of the report addresses whether Ontario law prevents the implementation of a more extensive DADT policy. It asks, (a) Is there a duty under Ontario law for police to disclose immigration status to federal officials? and (b) In the absence of a duty to disclose immigration status, does Ontario law provide police officers with the discretion to do so?

We examine the duties conferred on police by the *Police Services Act* (“PSA”), and by the *Immigration and Refugee Protection Act* (“IRPA”). Our review indicates that there is no legal duty for police officers to report persons without immigration status to federal officials. While the PSA states that police must “prevent crimes and other offences” and assist others

in “preventing crimes and other offences”, the term “offences” does not include violations of the *IRPA*. Rather, it refers only to violations of laws which Parliament or a legislature has given police a legal duty to enforce.

Police do not have a duty to enforce all laws. Statutes and regulations can be extremely complex, and police do not have the knowledge or training to enforce all laws in existence. This is why statutes and regulations charge police with duties to enforce some laws, but not others. While some statutes, such as the *Criminal Code*, the *Highway Traffic Act*, and the *Controlled Drug and Substances Act* do place duties on police officers to report and prevent their violations, the *IRPA* does not. Instead, the *IRPA* places the duty of preventing its violations on trained immigration officers. The only duty on police officers under the *IRPA* is to carry out immigration warrants, and this duty is triggered only where an immigration officer instructs a police officer to do so.

Given the complexity of immigration law, police would be incapable of adequately enforcing *IRPA* provisions without additional funding and training. There are many categories of persons without status in Canada who are lawfully entitled to remain here. Some of these categories are refugee claimants, failed refugee claimants who have not yet applied for a Pre-Removal Risk Assessment, applicants for permanent residence under the family sponsorship classes, recipients of a Federal Court stay of removal, Humanitarian and Compassionate applicants who have been accepted-in-principle, and applicants for an extension of work or study visas. Police officers do not have sufficient knowledge of *IRPA* provisions to effectively assess whether a person is in compliance.

We also examine whether, in the absence of a duty to report immigration status, police may have the discretion to report. We conclude that they do not. The *PSA Disclosure of Personal Information Regulation* governs when police may disclose personal information about persons they come into contact with. These regulations state that an officer may disclose personal information about an individual to federal officials if the individual is under investigation, charged with, convicted, or found guilty of an offence. However, it does not give police the discretion to share personal information about persons who are not under investigation, such as victims and witnesses of crimes or persons they encounter on the street.

The Regulations also state that in cases where police may disclose personal information (ie: if a person is under investigation, charged with, convicted, or found guilty of any offence), they must consider “what is consistent with the law and the public interest”. Given the deterrent effect that disclosing immigration status has on crime reporting, the disclosure of immigration status is not consistent with the public interest, nor is it consistent with the law. It infringes the legal duties police do have under the *PSA* to prevent crimes and assist victims of crimes. It is also inconsistent with the *Victims’ Bill of Rights*, which states 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”.

2) Disclosure of immigration status may violate equality rights

The second section of the report addresses equality and non-discrimination arguments for a complete DADT policy. We describe how the lack of a complete DADT policy may violate the non-discrimination provisions of the Ontario *Human Rights Code* and of the *Charter of Rights and Freedoms*.

First, we assess the discriminatory effect that disclosure of immigration status has on non-citizen victims and witnesses of crimes, who cannot access police without a fear of being deported or detained. We find that for these groups, the lack of a complete DADT policy constitutes “adverse effect discrimination”. Adverse effect discrimination exists when a policy or rule places a burden on a particular group for no valid reason. A policy may create adverse effect discrimination regardless of whether it is intended to have a negative effect on the group.

Citizenship is a prohibited ground of discrimination under both the *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*. While it is only those non-citizens without immigration status that are denied equal access to police services, and not all non-citizens, our review of equality rights cases indicates that homogeneity of effect is not a requirement for making out a legal claim of discrimination.

Second, we address the particular effect that disclosing immigration status has on women without status. Domestic violence continues to be a major problem in Canada, and the powerlessness and fear experienced by all abused women is heightened for women without status. These women face the additional barriers of language, isolation, lack of familiarity with the legal system, and the vulnerability caused by their immigration status. Community groups and legal clinics report that their female clients without status do not access police protection for fear that immigration officials might be notified. These women experience a mistrust of police stemming from the belief that police are acting on behalf of immigration authorities, rather than in the interests of women who experience or witness violence. We find that this result violates women’s right to equal access to police services.

Third, we describe the adverse effect that limiting the “Don’t Ask” policy to victims and witnesses of crimes has on racialized groups in Toronto. The *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* indicates that racial profiling continues to be used by some Toronto police officers. The lack of an inclusive “Don’t Ask” policy that applies to members of the public as well as to victims and witnesses exacerbates this problem. Community agencies report that their racialized clients with and without immigration status are stopped by police and asked to produce documentation to prove that they have legal immigration status in Canada. This practice demeans the dignity of racialized persons and constitutes discrimination on the basis of race, which is a prohibited ground of discrimination under the both the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*.

3) Disclosure of immigration status may violate crime victims' right to life and security of the person

Disclosure of immigration status may violate the right not to be deprived of life or security of the person, except in accordance with the principles of fundamental justice. This right is contained in section 7 of the *Canadian Charter of Rights and Freedoms*.

Disclosure of immigration status endangers the lives and security of non-status victims of crime because they could be killed or harmed if they cannot access police protection. A rule need not intentionally harm life, liberty, or security of the person for section 7 to be implicated. Rather, it is enough that a policy, or lack of policy, have the *effect* of endangering life, liberty, or security of the person. Therefore, while the *PSA* does not expressly prohibit non-status immigrants from contacting police, the lack of a policy preventing police from reporting immigration status has the effect of cutting off access to police for persons without status.

Disclosure of immigration status also harms crime victims' security of the person due to the extreme psychological stress they experience when they must endure abuse without being able to seek police protection. Previous section 7 jurisprudence indicates that severe psychological stress can constitute a violation to the right to security of the person.

Under s.7, a deprivation of life or security of the person will only breach the *Charter* if the deprivation is contrary to the principles of fundamental justice. The principles of fundamental justice are the commonly held ideas about fairness that underpin our legal system and give courts their legitimacy. They include access to basic procedural fairness for anyone accused of an offence, and the right not to have one's rights violated by a law that is vague or arbitrary. Disclosure of victims' immigration status is not in compliance with the principles of fundamental justice because it is arbitrary. Reporting persons' immigration status to federal officials has no relation to police duties. It therefore infringes rights for no valid reason. Thus, disclosing victims' immigration status to federal officials violates victims' rights to life and security of the person in a way that is not in accordance with the principles of fundamental justice because it is arbitrary.

4) Violations of *Charter* equality and security rights are not justified by s.1

We have argued that the police practice of disclosing immigration status breaches constitutional *Charter* rights in several respects, including s.15 equality rights and s.7 rights to life and security of the person.

Section 1 of the *Charter* provides that some violations of human rights are legally permissible so long as they are "prescribed by law", and so long as a court finds them to be "demonstrably justified in a free and democratic society". However, the breach of equality rights caused by disclosure of immigration status is not justified under section 1 because it is not "prescribed by law".

The "prescribed by law" requirement means that any rule which violates a human right must be enacted by Parliament or a legislature. A decision made by a public official is not

prescribed by law if it is not required by a statute or by regulations created under a statute (such as the *PSA* Regulations on disclosure of personal information by the police). Because police decisions to inquire about or disclose immigration status are not required by statute or regulation, they are not prescribed by law. Therefore, the effect that police disclosure of immigration status has on equality rights is not legally permissible under section 1 of the *Charter*.

5) The lack of a complete DADT policy may violate international law

In the fifth section of this report, we explore international legal arguments supporting the implementation of a “Don’t Tell” policy. We focus on the provisions in the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of all Forms of Racial Discrimination*, and the *Convention on the Rights of the Child*. While international law is not binding on Canadian domestic courts in the same way as laws passed by Parliament and provincial legislatures, courts have been clear that international law should be used to inform interpretations of domestic law. These international human rights instruments, which are binding on Canada, support the implementation of a full DADT policy within Canadian police forces.

6) DADT policies in U.S. jurisdictions

The last section of the report briefly summarizes the use of “Don’t Ask, Don’t Tell” policies by police forces in the United States. There are currently thirty-two cities and counties in the U.S. with full DADT policies. This section provides a particular focus on the New York and San Francisco policies, which were first implemented in 1985 and 1989, respectively. Under the New York policy, police are prohibited from asking about a person’s immigration status, unless asking is a necessary part of an investigation. Police are also directed not to disclose persons’ immigration status if they find out about it, unless they are required by law to do so. Under the San Francisco policy, police are barred from asking about or disclosing persons’ immigration status. The only circumstances under which San Francisco police may assist immigration officials is if they are carrying out an immigration warrant.

Conclusion

After a review of statutory and common law, the Immigration Legal Committee is of the view that not only is there no duty on Toronto police to disclose persons’ immigration status, but that a practice of regular disclosure of immigration status by police is contrary to statutory, constitutional and international law.

A complete and robust DADT policy is the best course for police to follow. The policy should direct police not to ask about immigration status, and not to disclose immigration status to federal officials, should they find out about it by any means.

At the very least, this policy must be extended to victims and witnesses of crimes. However, the Immigration Legal Committee recommends that it be extended more broadly to all

persons police come into contact with, in order reduce racial profiling and promote policing that respects the equality rights of all Torontonians.

Implementing a complete DADT policy would bring forward witnesses who were previously afraid to assist police. It would allow victims of crime who currently suffer in silence to seek police protection. It would mean that perpetrators of crimes against non-status persons would no longer be able to act with impunity. Until Torontonians have access to a full DADT policy, police officers will not have the cooperation of Toronto's diverse cultural communities, and these communities will be unable to access police without fear.

I. INTRODUCTION

At its meeting on May 18, 2006, the Toronto Police Services Board (“the Board”) approved the Policy entitled “Victims and Witnesses Without Legal Status,” commonly referred to as the “Don’t Ask” policy. The policy states:

It is the policy of the Toronto Police Services Board that the Chief of Police shall:

1. Develop procedures to ensure that victims and witnesses of crime shall not be asked their immigration status, unless there are bona fide reasons to do so.
2. Establish mechanisms to encourage victims and witnesses of crime to come forward without fear of exposing their status.¹

On March 22, 2007, the Board approved a motion that the Chair, in consultation with the community, would review the feasibility of adding a “Don’t Tell” component to the existing “Don’t Ask” policy. Such a policy would guide police officers in using their discretion to disclose persons’ immigration status to federal officials, should such information come to their attention.

This Report is intended to assist the Board with this task by providing information about the legality of implementing and of failing to implement a “Don’t Tell” policy in addition to the existing “Don’t Ask” policy. The information in this report also affirms the importance of ensuring that the existing “Don’t Ask” policy be adequately enforced among police officers, and that it be extended beyond victims and witnesses to all persons police come into contact with.

The Immigration Legal Committee greatly appreciates the work the Board has done in creating a “Don’t Ask” policy to protect victims and witnesses of crime without status. By creating this policy, the Board has indicated its understanding that police services cannot be effective unless all Torontonians can access them without fear. However, a “Don’t Ask” policy alone does not make police services accessible. For instance, police officers rarely learn about the immigration status of victims of domestic violence by asking about it directly. Rather, a person’s immigration status comes to police attention when police request identification documents or when abusive spouses report the status of their victims to police officers.

It is thus vital that police officers have the benefit of a policy to guide their discretion about when **not to disclose** immigration status to federal officials. Without the existence of such a policy, non-status Torontonians cannot access police services without fear.

In addition, the existing “Don’t Ask” policy requires continued efforts to communicate it more extensively to members of the public so that they understand their rights when accessing police services. Chief Blair’s February 2007 Report to the Board indicates that the only means taken to publicize the “Don’t Ask” policy has been to post it on the Board’s

¹ Toronto Police Services Board, Min. No. P140/06.

website, and it appears that no substantive efforts have been made to communicate the policy to communities directly affected or police officers themselves.² Second, the policy must be extended to include other persons the police come into contact with, in addition to victims and witnesses of crimes, so that asking persons about their status cannot continue to be used as a tool of racial profiling.

Many U.S. jurisdictions have implemented more complete “Don’t Ask, Don’t Tell” (DADT) policies in response to these compelling policy objectives. The Immigration Legal Committee recognizes that Toronto police cannot follow suit unless Ontario law permits the implementation of a “Don’t Tell” policy in addition to the existing “Don’t Ask” policy. Our review of relevant law indicates that it does. **We found that:**

- 1. Police have no legal duty to disclose immigration status to federal officials.**
- 2. In most cases, police disclosure of immigration status likely conflicts with certain police duties under the *Police Services Act*,³ (*PSA*) as well as with provisions of the *Victim’s Bill of Rights*,⁴ the *Ontario Human Rights Code*,⁵ the *Canadian Charter of Rights and Freedoms*,⁶ and a number of international legal instruments.**

Our legal analysis in this report is divided into six sections:

The first section addresses whether Ontario law prevents the implementation of a more extensive DADT policy. We examine the duties conferred on police by the *Police Services Act* and common law. Our review of case law and statutes in this area indicates that there is no legal duty for police officers to report persons without immigration status to immigration authorities. While some discretion to report such persons may exist, its application in this context is uncertain under the *PSA*’s *Disclosure of Personal Information Regulation*. We submit that reporting the immigration status of persons in contact with police is an unlawful exercise of any discretion that does exist because it interferes with police duties under the *PSA* to preserve the peace, prevent crimes, and assist victims, as well as with the Ontario *Victim’s Bill of Rights*.⁷

Section two addresses equality and non-discrimination legal arguments for the full implementation of a DADT policy. Our review of jurisprudence surrounding non-discrimination provisions in the Ontario *Human Rights Code*, and s.15 of the *Charter* indicates that a failure to implement a “Don’t Tell” policy and a failure to extend the “Don’t Ask” policy beyond victims and witnesses may violate equality rights. First, it discriminates on the basis of citizenship and status. Second, it has a particularly detrimental impact on women without status who are victims of domestic violence, and may thus constitute a form of

² Blair, William, “Victims and Witnesses of Crime without Status Recommendations,” February 15, 2007

³ *Police Services Act*, R.S.O. 1990, c. P.15 [*PSA*].

⁴ *Victim’s Bill of Rights*, S.O. 1995, c.6.

⁵ *Human Rights Code*, R.S.O. 1990, c. H.19 [*Human Rights Code*].

⁶ *Canadian Charter of Rights and Freedoms*, Schedule B to the of the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

⁷ *Victim’s Bill of Rights*, *supra*, note 4.

indirect (or “adverse effect”) discrimination on the basis of sex. Third, the permissibility of asking persons about their status contributes to the problem of racial profiling, as racialized persons are disproportionately subject to status inquiries.

The third section considers legal arguments that the lack of a “Don’t Tell” policy may violate crime victims’ right not to be deprived of life or security of the person, except in accordance with the principles of fundamental justice, under s.7 of the *Charter*. Without a “Don’t Tell” policy, non-status victims of crime may be denied their security of the person for fear of accessing the police. This may result in an arbitrary infringement of the s. 7 right to life, liberty and security of the person, contrary to the principles of fundamental justice.

Section four asks whether the breach of the rights contained in ss.15 and s.7 of the *Charter* is justified under s.1, which allows the breach of Charter rights for reasons “prescribed by law” that are “demonstrably justified in a free and democratic society”. We conclude that it is not. The exercise of discretion by police to disclose a person’s immigration status to Citizenship and Immigration Canada (“CIC”) is not “prescribed by law” in the manner required by s.1. Such an exercise of discretion can thus not benefit from a s.1 defence.

In the fifth section we explore international legal arguments for the implementation of a “Don’t Tell” policy, focusing particularly on the provisions of the *International Covenant on Civil and Political Rights*,⁸ the *Convention on the Elimination of all Forms of Racial Discrimination*,⁹ and of the *Convention on the Rights of the Child*.¹⁰

The last section briefly summarizes the use of DADT policies by police services in U.S. jurisdictions. This section provides a particular focus on the application of the policy by police in New York City and San Francisco.

⁸ *International Covenant on Civil and Political Rights*, res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 Mar., 1976, ratified by Canada in 1976.

⁹ *Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), entered into force 4 Jan., 1969, ratified by Canada in 1970.

¹⁰ *Convention on the Rights of the Child*, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989), entered into force 2 Sept, 1990, ratified by Canada in 1991.

II. A COMPLETE DADT POLICY IS PERMISSIBLE UNDER ONTARIO LAW (*PSA* AND *IRPA*)

1) No police duty to report immigration status under the *PSA*

The duties of Ontario police officers are set out in ss.42(1) and 42(3) of the *PSA*. Section 42(1) states that the duties of a police officer include:

- a) preserving the peace;
- b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
- c) assisting victims of crime;
- d) apprehending criminals and other offenders and others who may lawfully be taken into custody;
- e) laying charges and participating in prosecutions;
- f) executing warrants that are to be executed by police officers and performing related duties;
- g) performing the lawful duties that the chief of police assigns;
- h) in the case of a municipal police force and in the case of an agreement under section 10 (agreement for provision of police services by O.P.P.), enforcing municipal by-laws;
- i) completing the prescribed training.

In addition, s.42(3) of the *PSA* gives to police officers “the powers and duties ascribed to a constable at common law.”¹¹

Our analysis of case law interpreting analogous statutory provisions indicates that subsections 42(1) and (3) place no duty on police officers to report persons without immigration status to immigration authorities. The only instances where police do have a duty to “prevent or to aid in the prevention of” offences under the *Immigration and Refugee Protection Act*¹² (*IRPA*) is where the *IRPA* mandates such participation.

a) The duty of “preserving the peace” contains no obligation to report immigration status

Section 42(1)(a) of the *PSA* places a duty on police officers to “preserve the peace”. This is a broad duty that stems from the common law duties of “preservation of the peace, the prevention of crime, and the protection of life and property” as outlined in *R. v. Dedman*,¹³ discussed further below in our analysis of police officers’ common law duties.

¹¹ *PSA*, *supra*, note 3.

¹² *Immigration and Refugee Protection Act*, 2001, c.27 [*IRPA*].

¹³ *R. v. Dedman*, [1985] 2 SCR 2 at para 16.

The duty to “preserve the peace” was interpreted by the Ontario courts as a duty “to protect the public from criminal activity” in *Snow v. Toronto (Metropolitan) Police Force*.¹⁴ However, as described in our section on the implementation of DADT policies in U.S. jurisdictions, there is no indication that adding a “Don’t Tell” policy would interfere with police duty to protect the public and in fact it is entirely legally consistent with police duties.

b) The duty to “prevent crimes” does not apply to IRPA offences

Section 42(1)(b) of the *PSA* places a duty on police officers to “prevent ... crimes and other offences and provid[e] assistance and encouragement to other persons in their prevention”. This duty is stated in more detail in the police *Code of Conduct*,¹⁵ which is violated when an officer “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” and when an officer “fails to report a matter that it is his or her duty to report”.¹⁶

The relevance of these provisions to the legality of a “Don’t Tell” policy thus hinges on the meaning of the terms “offences” and “offender”. What types of acts constitute offences and/or make a person an “offender” who police have a legal duty to report? Do these acts include infringements of the *Immigration and Refugee Protection Act (IRPA)*? Our review of case law and other statutory provisions indicates that they do not.

The British Columbia Court of Appeal has interpreted the word “offence” as having no precise definition because legislatures intend that “the word offence be coloured differently from statute to statute as to its precise meaning and connotation, having regard to the context and nature of each statute.”¹⁷ Thus, the term “offence” must be given meaning through its statutory context.

In *R. v. Suchacki*,¹⁸ the Manitoba Court of Appeal considered the meaning of the term “offence” in the context of the Canadian *Criminal Code*.¹⁹ In *Suchacki*, the accused was arrested for consuming alcohol in public, contrary to the *Manitoba Temperance Act*.²⁰ The Crown defended the arrest on the basis that s.35 of the *Criminal Code* provided that “Every peace officer is justified in arresting without warrant any person whom he finds committing any offence”. Whether or not the officer was justified in arresting the accused thus depended on whether the term “offence” related to infringements of all laws, or only those laws delegated to police through the *Criminal Code* or other statutes. The Court held that authority to arrest without warrant must be delegated to police clearly in a statute. Since the *Temperance Act* gave police officers no authority to arrest without a warrant, the term “offence” did not refer to offences in the *Manitoba Temperance Act*.

¹⁴ *Snow v. Toronto (Metropolitan) Police Force* (1998), 37 O.R. (3d) 326 at para 21.

¹⁵ *Code of Conduct*, regulation of the *Police Services Act*, O. Reg. 123/98.

¹⁶ *Ibid*, s.2(1)(a)(i.1)(v).

¹⁷ *Matsqui (District) Commissioners of Police v. Police Association* (1987), 14 BCLR (2d) 88 (CA).

¹⁸ *R. v. Suchacki*, [1924] 1 D.L.R. 97, (per Fullerton JA), [Suchacki].

¹⁹ *Criminal Code*, R.S.C. 1906, c. 46.

²⁰ *Manitoba Temperance Act*, 1916 (Man.), c.112.

Thus, the term “offence” should be interpreted to refer only to infringements of statutes which police have been given a clear statutory duty to uphold. For example, the *Criminal Code*, the *Highway Traffic Act*,²¹ and the *Controlled Drug and Substances Act*²² all impose wide and general preventive duties on police officers to uphold their provisions. Infringements of these statutes thus constitute “offences” for the purpose of the *PSA*.

In contrast, the *IRPA* imposes only a very circumscribed duty on police to help enforce its provisions, contained in a single section. Section 142 of the *IRPA* states that, “Every peace officer ... shall, when so directed by an [immigration] 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”. All other duties of enforcement and prevention in the *IRPA* are delegated to immigration officers.

Given the complexity of immigration law, police would be incapable of adequately enforcing *IRPA* provisions without additional funding and training. There are many categories of persons without status in Canada who are lawfully entitled to remain here. Some of these categories are refugee claimants, failed refugee claimants who have not yet applied for a Pre-Removal Risk Assessment, applicants for permanent residence under the family sponsorship classes, recipients of a Federal Court stay of removal, Humanitarian and Compassionate applicants who have been accepted-in-principle, and applicants for an extension of work or study visas.

It is also important to note that some statutes conferring police duties *do* impose a duty on police to prevent or assist in preventing a wider range of offences than does the Ontario *PSA*. This indicates that the Ontario Legislature could have delegated a wider range of duties to Ontario police than it chose to delegate under the *PSA*. For example, s.2.2 of the New Brunswick *Police Act* states that:

Every member of the Royal Canadian Mounted Police, every member of a police force and every auxiliary police constable appointed under this Act has all the powers, authority, privileges, rights and immunities of a peace officer and constable in and for the Province of New Brunswick, and is *ex officio* an inspector under the *Motor Carrier Act*, a peace officer under the *Motor Vehicle Act* and a conservation officer under the *Fish and Wildlife Act*, and each member of and above the rank of corporal may exercise the powers conferred by section 9 of the *Fire Prevention Act*.

Without this provision, New Brunswick police officers would not have the powers and duties of an inspector under the *Motor Carrier Act*, a peace officer under the *Motor Vehicle Act* or a conservation officer under the *Fish and Wildlife Act*. Accordingly, if the Ontario legislature had intended for police officers to carry out the duties of federal immigration officials, it would have explicitly so legislated.

Thus, the s.42(1) duty to “prevent[...] ... offences and to provid[e] assistance and encouragement to other persons in their prevention” includes the duty to execute warrants issued under the *IRPA* only when specifically directed to do so by an immigration officer.

²¹ *Highway Traffic Act*, R.S.O. 1990, c.H.8, ss. 57.1.1(1), s.134.1, s.199(3)(4), s.212(1), s.216.1.

²² *Controlled Drug and Substances Act*, R.S.C. 1996, c.19 ss.11 and 12.

The term “offences” in s.42(1) does not include other alleged violations of the *IRPA*. Therefore persons without legal immigration status are not “offenders”, and police have no duty to report their status.

c) There is no common law duty to report immigration status

Section 42(3) of the *PSA* grants police officers “the powers and duties ascribed to a constable at common law.”

The duties of a constable at common law are outlined in *R v. Dedman* and include “the preservation of the peace, the prevention of crime, and the protection of life and property.”²³ As the Supreme Court of Canada acknowledged in *R. v. Godoy*, each of these duties has already been absorbed into the duties listed in s.42(1) of the *PSA*.²⁴ Disclosing a person’s immigration status to federal authorities is not a common law police duty as it is, as shown above, not encompassed by these duties nor any other duty listed in s.42(1) of the *PSA*.

2) Any discretion to report immigration status must be interpreted in accordance with police duties and obligations

a) PSA does not create discretion for police to report immigration status

It is our position that just as police have no duty to report immigration status, in most cases they similarly have no discretion to do so. The *Disclosure of Personal Information Regulation* passed pursuant to the *Police Services Act* grants police the following discretion:

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,... [Emphasis added]

...

(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.²⁵

The majority of victims and witnesses who approach the police for assistance and protection have not been charged with, convicted, or found guilty of any offence. Thus, unless a warrant has been issued under s.142 of the *IRPA* (akin to a charge under the *IRPA*), the only rationale that could be provided to support an argument that police have discretion to share their information is that they are “under investigation” for a violation of the *IRPA* (“any

²³ *Dedman*, *supra* note 13, at 32.

²⁴ *R. v. Godoy*, [1998] 1 SCR 311 (SCC).

²⁵ *Disclosure of Personal Information*, *PSA Reg.* 265/98,

federal or provincial Act”). Whether or not s.5(1) indicates that police may share immigration information with federal officials therefore depends on how the terms “under investigation” are interpreted.

However, given that there is no statutory authorization for police to engage in investigations of *IRPA* offences, it is not clear that a police officer’s suspicion that a person may not have legal status to remain in Canada falls within the Act’s meaning of an “investigation”. That such a suspicion would constitute an “investigation” is particularly unlikely given that 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.²⁶

It is therefore very unlikely that discretion exists under the *PSA* regulations for police to disclose the immigration status of victims and witnesses of crimes.

b) If discretion to report immigration status does exist, it must be exercised lawfully

Even if suspicion about a victim or witness’ immigration status is deemed sufficient to constitute an “investigation” under s. 5(1) of the *Disclosure of Personal Information Regulation*, any discretion to disclose immigration status must be exercised lawfully. Reporting the immigration status of victims and witnesses of crimes to immigration officials would **not** be a lawful exercise of discretion for Toronto police.

The *Disclosure of Personal Information Regulation* is clear that information may not be disclosed if to do so would be inconsistent with other law or with the public interest, or if it would delay the resolution of criminal proceedings. Section 6 requires that:

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.²⁷ [Emphasis added.]

Exercising discretion to report victims and witnesses of crimes to immigration authorities is unlawful under s.6 of this regulation because it conflicts with the legal duties of the police under s.42(1) of the *PSA* to preserve the peace, to prevent crimes, and to assist victims of crimes. Exercising discretion in this way is also against the public interest, and may conflict with the rights of persons under the *Charter*, the Ontario *Human Rights Code*, and international legal documents, as we discuss further below.

²⁶ *Adequacy and Effectiveness of Police Services Regulation*, regulation to the *Police Services Act*, O. Reg 3/99.

²⁷ *Supra*, note 25, s.6.

Disclosure conflicts with police duties to preserve the peace and to prevent crimes

As stated above, police officers have the duties of preserving the peace and preventing crime under ss. 42(1)(a) and (b) of the *PSA*. Subjecting victims and witnesses to the risk of deportation for reporting criminal activity hinders police in these duties.

Several studies have shown that non-status immigrants fear being deported if they report criminal activity.²⁸ This fear prevents them from reporting crime, which hampers police in their duty to prevent crime. This was also explored in a 2005 *Toronto Star* article on the experiences of persons in Toronto without legal immigration status. In one incident described in the article, a non-status teenager did not seek police protection when he was robbed at gunpoint in Toronto because: "...our life is between work and home, but we are grateful when we see everyone home in one piece at the end of the day ... We pray that the family will still be together the next day".²⁹

Thus, lack of a "Don't Tell" policy prevents police from preserving the peace and preventing crime as effectively as they otherwise would be able to.

Disclosure conflicts with the police duty to assist victims of crime

Section 42(1)(c) of the *PSA* states that police officers have the duty of "assisting victims of crimes". A number of community groups that deputed before the Police Services Board in the past have provided compelling examples of victims who are unable to seek protection from police for the fear that they will be deported.³⁰ The duty to assist victims is thus violated when "assistance" to victims is accompanied by a risk that the victim's immigration status might be disclosed to immigration officials.

Police duties extend to all Ontarians, regardless of their immigration status. If victim assistance is linked to a risk that the victim's immigration status could be disclosed, members of Ontario's ethnocultural communities, who are less likely at present to have secure immigration status, will have unequal access to police services, and attempts to cooperate and to build productive links with these communities will be undermined.

The s.42(1) duty for police to assist victims of crime should also be interpreted so as to comply with the Ontario *Victims' Bill of Rights*.³¹ This principle is set out in s.17 of the

²⁸ For example, see S. Walker, "Complaints against the police: A focus group study of citizen perceptions, goals, and expectations" (1997) 22 *Criminal Justice Review* (2) 207 or C. Menjivar & C. Bejarano, "Latino immigrants' perceptions of crime and police authorities in the United States: "A case study from the Phoenix Metropolitan area" (2004) 27 *Ethnic and Racial Studies* (1) 139.

²⁹ N. Keung, "Hope fades for plan to aid illegal workers; Illegal workers fear effect of election" *Toronto Star* (16 May 2005) A1.

³⁰ For example, Judith Rae, Deputation presented to the Toronto Police Services Board, November 2006; Parkdale Community Legal Services Inc., Deputation presented to the Toronto Police Services Board, November 2006; Metropolitan Action Committee on Violence Against Women and Children, Deputation presented to the Toronto Police Services Board, February 2006; Ernestine's Women's Shelter, Deputation presented to the Toronto Police Services Board, February 2006..

³¹ *Victim's Bill of Rights*, *supra*, note 4.

Adequacy and Effectiveness of Police Services Regulation, which states that: “Every chief of police shall establish procedures on providing assistance to victims that, (a) reflect the principles of the *Victims’ Bill of Rights*, 1995”.³²

The *Victims’ Bill of Rights* was legislated with the following purpose:

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.³³

Reporting victims’ immigration status to federal officials undermines these objectives and thus conflicts with the *Victim’s Bill of Rights* contrary to s.17 of the *Regulations*.

Thus, neither the *PSA* nor the *IRPA* requires that police disclose the immigration status of persons they come into contact with to immigration officials. Indeed, disclosing the immigration status of victims to CIC may in fact be contrary to police duties under s.42(1) of the *PSA*, violate the *PSA* disclosure regulations, and compromise the objectives of the *Victim’s Bill of Rights*.

³² *Adequacy and Effectiveness of Police Services Regulation*, *supra*, note 26.

³³ *Victim’s Bill of Rights*, *supra*, note 4, at s.1.

III. THE LACK OF A COMPLETE DADT POLICY MAY VIOLATE EQUALITY RIGHTS

The Police *Code of Conduct* creates an offence for a police officer who:

fails to treat or protect a person equally without discrimination with respect to police services because of that person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or handicap.³⁴

Non-discrimination is, therefore, a core component of law enforcement in Toronto, requiring that police treat individuals "equally without discrimination".

In this section we assess whether the existing Toronto Police Services Board practice of reporting the immigration status of persons officers come into contact with constitutes a prohibited form of discrimination under the Ontario *Human Rights Code* and the *Charter*. Routine reporting of immigration status by police may be discriminatory on grounds of citizenship and status, sex, and race.

The first part of this section sets out the legal framework for equality analysis in the *Human Rights Code* and the *Charter*. Next we examine the distinct effects of current practices on non-citizens and people without immigration status, on women, and on racialized groups. Finally, we explore whether these inequalities constitute prohibited discrimination under s.11(2) of the *Human Rights Code* as per the *Meorin* test and under s.15 of the *Charter* as per the *Law* test.

1) Legal Tests for Equality

The equality guarantees in both the *Charter* and the *Human Rights Code* focus on discriminatory effects, not just on formal distinctions. While the police practice of reporting immigration status to federal authorities may appear facially neutral, in fact it has different effects on particular groups. For members of these groups, the police practice of reporting status imposes significant hardships, and restricts their access to police services.

(a) The Canadian Charter of Rights and Freedoms

Subsection 15(1) of the *Charter* provides:

Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

³⁴ *Code of Conduct*, *supra* note 15.

In *Andrews*, the Supreme Court defined discrimination as a “**distinction, intentional or not**, that is based on grounds relating to personal characteristics of the individual or group concerned, and that has the **effect** of imposing disadvantages or burdens not imposed on others, or of withholding access to advantages or benefits available to others” [emphasis added].³⁵ This test was expanded upon in *Law v. Canada*, resulting in a three step test for discrimination under s.15 known as the “*Law* Test”.³⁶ To find a violation of s.15, courts must find:

- (1) distinction(s) in treatment
- (2) on the basis of an enumerated or analogous ground
- (3) that amount(s) to substantive discrimination.

(b) Ontario’s Human Rights Code

The rights enumerated in the *Human Rights Code* (“*Code*”) have been called “fundamental, quasi-constitutional” rights. The preamble of the *Code* establishes its grounding in the “recognition of the inherent dignity and the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world”. Furthermore, the preamble states:

[I]t is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels part of a community and able to contribute fully to the development and well-being of the community and the Province.

In *Gould v. Yukon Order of Pioneers*, the Supreme Court of Canada held that human rights legislation must be interpreted “purposively, giving it a fair, large and liberal interpretation with a view to advancing its objects.”³⁷

The anti-discrimination clause is the first provision of the *Human Rights Code*, under Part I:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

Section 11 of the *Human Rights Code* clearly indicates that protection against “constructive” or “adverse effects” discrimination is included in the ‘right to equal treatment’:

11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that **results in**

³⁵ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [“*Andrews*”].

³⁶ *Law v. Canada (MEI)*, [1999] 1 S.C.R. 497 [“*Law*”].

³⁷ [1996] 1 S.C.R. 571, [1996] S.C.J. No. 29 (S.C.C.), at para. 5 [“*Gould*”].

the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without **undue hardship** on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Commission, the Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. [Emphasis added.]

Human rights tribunals in Canada have repeatedly held that services provided by the police are “services”, for the purposes of human rights legislation.³⁸ Following these decisions, police services come within the purview of s.1 of Ontario’s *Human Rights Code*.³⁹

The Ontario Human Rights Tribunal in *Hogan v. Ontario (Minister of Health & Long-Term Care)* noted two stages to the process of a s.11-based claim.⁴⁰ Once a complainant has shown an adverse impact on a prohibited ground of discrimination, there is a *prima facie* case of discrimination. At that point, the burden shifts to the respondent to show why the distinction is not in fact discriminatory.

In *Meoirin*, the Supreme Court of Canada set out a test for “adverse effects” discrimination under human rights statutes.⁴¹ *Meoirin* provides that if a policy or rule has a discriminatory effect, it will constitute discrimination **unless**:

- (1) It was adopted for a purpose rationally connected to its objective,
- (2) It was adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate objective, and
- (3) It is reasonably necessary to the accomplishment of that legitimate objective.

In *Hogan*, the Ontario Human Rights Tribunal applied the *Meoirin* test in a context where governmental services were at issue. This suggests the appropriateness of applying the *Meoirin* test to the present circumstances.

³⁸ *Hum v. Royal Canadian Mounted Police* (1986), 8 C.H.R.R. D/3748 (Can. Human Rights Trib.); *Gomez v. Edmonton (City)* (1982), 3 C.H.R.R. D/882 (Alta. Bd. of Inquiry); *Fraser v. Victoria (City) Police*, [1988] B.C.C.H.R.D. No. 17 (B.C. Human Rights Council); *Nassiah v. Peel (Regional Municipality) Police Services Board*, 57 C.H.R.R. D/38, 2006 HRTO 18.

³⁹ Although the term “services” is not explicitly defined in the *Human Rights Code*, it has been taken to encompass police services. See, for *e.g.*, Ontario Human Rights press release regarding tribunal decision regarding the police and racial profiling, at <http://www.ohrc.on.ca/en/resources/news/peelvictory>.

⁴⁰ [2003 HRTO 6, (sub nom. *Hogan v. Ontario (Ministry of Health & Long-Term Care)* (No.1)) 46 C.H.R.R. D/119 [*Hogan*] at 101.

⁴¹ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [*Meoirin*].

2) Current practices have unequal effects

(a) Citizenship & Status

Although citizenship is not an enumerated ground within s.15, it has been recognized by the Supreme Court as being analogous to those expressly mentioned. The Supreme Court in both *Andrews* and *Lavoie*⁴² recognized citizenship as a personal characteristic that fulfills the analogous grounds criteria. Justice LaForest in *Andrews* noted that:

The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.⁴³

Although the current lack of an adequate DADT policy does not uniformly affect all non-citizens, and non-citizens do not have uniform personal characteristics, “homogeneity is not a prerequisite for the recognition of an analogous ground”.⁴⁴

A second potential analogous ground under the *Charter* is immigration status. The law is not settled as to whether immigration status constitutes an analogous ground. The Ontario Court of Appeal has, however, explicitly referred to immigration status as an analogous ground under s. 15 in *R. v. Church of Scientology*.⁴⁵ This stance has been followed in lower court decisions. *Fraser* held that “it is not ‘plain and obvious’ that immigration status cannot be an enumerated analogous ground. Therefore on this basis as well, the respondent has satisfied the second branch of the *Law* test”.⁴⁶ In *Jaballah*, immigration status was accepted as an analogous ground in consideration of the *IRPA* provisions regarding continuing detention without review.⁴⁷

Where immigration status has been questioned as an analogous ground, it has been on the basis of its alleged lack of immutability,⁴⁸ however it is not clear whether immutability is a requirement.⁴⁹ Moreover, it is possible to argue that immigration status, like citizenship, is not usually within the control of the individual. Courts have also identified an additional factor in determining analogous grounds: lack of political power and disadvantage. As discussed throughout this document, persons without status certainly meet this description.

Citizenship is a listed ground of discrimination under s. 1 of the Ontario *Human Rights Code*. Although according to s. 16(1), the right to non-discrimination is not infringed where “Canadian citizenship is a requirement, qualification or consideration imposed or authorized

⁴² *Lavoie v. Canada (Attorney General)* [2002] 1 S.C.R. 769, 2002 SCC 23.

⁴³ *Andrews*, *supra* note 35 at para. 75.

⁴⁴ *Falkiner v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services)* (2002), 59 O.R. (3d) 481 at pp. 506-509: The case further explained that “mere disproportionate disadvantage borne by one or more sub-sets of a group does not militate against recognizing membership in that group as an analogous ground.”

⁴⁵ *R v. Church of Scientology* (1997), 33 O.R. (3d) 65.

⁴⁶ *Fraser v. Ontario (Attorney General)* [2006] O.J. No. 45 para. 78.

⁴⁷ *Re Jaballah*, 2006 FC 115, 43 Admin LR (4th) 50, 278 FTR 60, [2006] 4 FCR 193, at para. 81.

⁴⁸ *Peterson v. Canada (Minister of State, Grains & Oilseeds)* (1995), 124 DLR (4th) 96.

⁴⁹ *Andrews*, *supra* note 35, and *Falkiner*, *supra* note 44 have both found non-immutable grounds to be analogous.

by law,” this cannot be said to be the case here: citizenship is not a legally required ground to access police services.

The absence of a “Don’t Tell” policy produces serious adverse effects for non-citizens, and in particular, the subgroup of persons without status, and denies them the equal access to police protection they are entitled to under the law.

In practical terms, effective law enforcement depends upon good relationships between the Toronto Police Service and the community it serves. However, a policy of reporting the immigration status further isolates individuals who are already vulnerable, and perpetuates an attitude of fear and mistrust, rather than cooperation and confidence.

This fear affects not only whether persons report crimes in which they are the victims, but also their willingness to report crimes they may have witnessed. Community organizations have reported situations in which even those with status are reluctant to involve the police because a friend or family member is undocumented and may be deported as a result. One community organization related the following situation:

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.⁵⁰

The lack of a fully implemented DADT policy has a particular effect on women and racialized persons without status, as we describe below.

(b) Sex

It is no secret that violence against women is an ongoing and serious problem in Canada, as it is in virtually every part of the world.⁵¹ Women, as a group, are particularly at risk of domestic and sexual violence. A recent report by the YMCA indicates that family violence accounts for 60% of female homicides in Canada. The same report finds:

No single indicator or source of information is sufficient to describe the magnitude, health and social consequences of violence. Because domestic violence is hidden from public view or because of the powerlessness, fear and/or stigmatisation of the victim, much violence is unreported or misdiagnosed. Violence-related deaths may be hidden in mortality statistics when such deaths are recorded or attributed to

⁵⁰ Judith Rae, Address (Deputation presented to the Toronto Police Services Board, November 2006) [unpublished, archived at Toronto Police Services Board].

⁵¹ Claudia Garcia-Moreno *et al.*, *WHO Multi-Country Study on Women’s Health and Domestic Violence Against Women: Initial Results on Prevalence, Health Outcomes, and Women’s Responses* (WHO, 2006), available at: <http://www.who.int/gender/violence/who_multicountry_study/en/index.html>; see also Toronto City Council’s Woman Abuse Council (WAC) and related initiatives, <http://www.toronto.ca/council/wac_index.htm#c>.

accidental injuries. Many violent deaths and injuries of women, children and the elderly are ascribed to falls or burns by the perpetrators and/or the authorities.⁵²

The powerlessness and fear experienced by abused women generally is almost certainly exacerbated for women without status who face the additional barriers of language, isolation and lack of familiarity with the legal system. Moreover, women without legal immigration status are especially vulnerable to predation because their precarious social and legal situation makes exploitation more likely. Women in these situations are unlikely to report their victimization to the police because of fear that they will be deported.⁵³ A community organization related the following situation:

A non-status woman and her eleven year old child were held hostage by the woman's abusive ex-partner who forcibly occupied her house, repeatedly raped her and violently abused the child for a period of four years. During this time her ex-partner threatened to report her lack of immigration status to the police if she sought protection.⁵⁴

This situation highlights how non-status women surviving domestic violence are unable to access police protection. The resources available to non-status women who are victims of sexual and physical abuse are severely limited; there are many documented cases of women who have contacted the police only to end up in deportation proceedings.⁵⁵ The situation of these women is demonstrated by the following example provided by CLASP, a community legal clinic:

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.⁵⁶

⁵² Saralyn Allison, *A Global Problem to Overcome* (YMCA, 2000). See also *Stop Violence Against Women* (YMCA, 2003). Both available at <<http://www.ymca.int/index.php?id=636#3021>>.

⁵³ Carolina Berinstein, Jean McDonald, Peter Nyers, Cynthia Wright & Sima Sahar Zerehi, *Access Not Fear: Non-Status Immigrants & City Services* (2006), online: Don't Ask Don't Tell Toronto <<http://www.dadt-toronto.org>> at 22 [Berinstein].

⁵⁴ As told to No One is Illegal - Toronto.

⁵⁵ See e.g. Berinstein, *ibid*; Metropolitan Action Committee on Violence Against Women and Children, Address (Deputation presented to the Toronto Police Services Board, February 2006) [unpublished, archived at Toronto Police Services Board]; Erstine's Women's Shelter, Address (Deputation presented to the Toronto Police Services Board, February 2006) [unpublished, archived at Toronto Police Services Board]; Parkdale Community Legal Services Inc., Address (Deputation presented to the Toronto Police Services Board, November 2006) [unpublished, archived at Toronto Police Services Board].

⁵⁶ Meaghan McCluskey, Address (Deputation presented to the Toronto Police Services Board, November 2006 [unpublished, archived at Toronto Police Services Board].

Even women who have been legally sponsored by their partners remain vulnerable to violent control and manipulation. A woman whose status is dependent on her partner will tolerate physical and emotional abuse rather than call the police or seek help. Their partners, who are permanent residents or citizens, are well aware of the power they exert and can use it to intimidate and control their spouse. By approaching the police for protection, a woman in such a situation risks her partner revoking her sponsorship, and the consequent loss of her status, and opens herself to deportation. According to Parkdale Community Legal Services, a community legal clinic whose clientele includes a significant number of non-status women, “some spouses fail to sponsor their non-citizen partner in order to keep them in a situation of subservience and dependency.”⁵⁷ Moreover, in the experience of Parkdale’s lawyers:

These women are also afraid to call the police when they are in danger. They know the first thing their spouse will do is inform the police that they are “illegal.” Indeed this has happened in a number of cases in our experience when police have been called to a domestic violence incident, usually by neighbours who hear or see the incident. The police arrive, the spouse tells the police that the woman is an “illegal immigrant” and the police then feel obliged to contact immigration authorities. [Emphasis added.]

The above evidence indicates that women suffer adverse effects as a result of mistrust of police – a mistrust that stems from a belief that the police are acting on behalf of immigration authorities, rather than in the interests of women who experience or witness violence. Without a clear, unambiguous policy that police will not report immigration status – even when they find out about it, women will remain in danger.

(c) Race

Members of racialized communities are more likely to be arbitrarily stopped by the police and to be subject to status inquiries as a result of racial profiling. Because the current “Don’t Ask” policy applies only to victims and witnesses of crime, it does not prevent police officers from asking other individuals about their status, either on the street, during roadside checks, or while making inquiries within a neighbourhood. These situations are particularly prone to racial profiling and contribute to the fear and mistrust of police that is already more prevalent in racialized communities.

In 2003, an extensive report by the Ontario Human Rights Commission defined racial profiling as including “any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place

⁵⁷ Parkdale Community Legal Services Inc., Deputation presented to the Toronto Police Services Board, November 2006.

of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment.”⁵⁸

Racism in policing and the administration of justice more generally is well documented in Canada.⁵⁹ The Commission on Systemic Racism in the Ontario Criminal Justice System reported that:

Studies from many jurisdictions show that police stopping of and aggression toward black and other racialized people and young working-class males of all origins serves purposes other than crime prevention and detection of offenders. It allows the police to demonstrate to themselves, to people they stop, and to local residents and business people that the police control public spaces. Richard Ericson's study of police patrols in an Ontario jurisdiction shows that such demonstrations of authority are clearly evident (and deeply entrenched) in police practices.⁶⁰

The Courts have also echoed the findings of the Commission in a number of cases.⁶¹ The Ontario decision in *R. v. Khan* noted:

There is no question that racial profiling of black males by police exists in all too many parts of our society, including in the City of Toronto. At the Court of Appeal level in *R. v. Brown*, Crown counsel conceded that the phenomenon of racial profiling existed, a position which the Court of Appeal determined to be "responsible" in light of substantial social science research to that effect: para. 9. The Court went on to quote with approval ... the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*.⁶²

The existence of racial profiling in Ontario therefore forms an important part of the backdrop for assessing the impact on racialized persons of an inadequate DADT policy. The combination of racial profiling with status inquiries demonstrates that in the eyes of the state, “immigrant” is often synonymous with “person of colour”:⁶³

Police and judges...commonly assume persons of colour are immigrants and are quick to question them about their status. It is not uncommon for police to simply stop a person of colour to question them about their status. This reality suggests that problems of immigration are seen by state authorities as a problem of race. In the minds of police, the targeting of people of colour on the streets and in public spaces is the targeting of immigrants.⁶⁴

⁵⁸ Ontario Human Rights Commission: *Paying the Price: The Human Cost of Racial Profiling Inquiry Report*, Oct. 2003 (online at: <http://www.ohrc.on.ca/en/resources/discussion_consultation/RacialProfileReportEN/pdf> [*Paying the Price*]).

⁵⁹ See e.g. *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) (Co-chairs: M. Gittens and D. Cole).

⁶⁰ *Ibid* at p. 350.

⁶¹ See e.g. *R. v. Brown*, *supra* note 58 at para. 9 and *R. v. Khan*, [2004] O.J. No. 3811 at paras. 40 and 41.

⁶² *R. v. Khan*, *ibid*, at para 40.

⁶³ Gordon, Tod, *Cops, Crime, and Capitalism: The Law and Order Agenda in Canada* (Toronto: Fernwood Publishing Co, 2006) (“Gordon”) at p. 126.

⁶⁴ *Ibid.* at p.126.

This targeting is demonstrated by the following testimony of a law firm client who agreed to let the Immigration Legal Committee use his story:

In March 2007, Luis was accosted by six Toronto Police Officers who beat him, hit him in the mouth, kicked him in the stomach and then handcuffed tightly. Luis was then taken to 52 Division, and beaten in the car on the way. At 52 Division the Officers strip searched him and then told him they were looking for someone who was robbing stores. They had a photo of an alleged perpetrator who did not look at all like Luis, but was also Latin American. When they realized they had made a mistake they turned him over to Canada Border Services Agency and he was removed before he could lay a claim or make a complaint.⁶⁵

Luis' story is not an isolated incident. Immigration status and race are often conflated, such that people who get asked their status and those targeted by racial profiling are one and the same. A social worker in Regent Park, who allowed us to include her experiences, reports that her racialized clients are regularly asked about status during traffic stops. Police officers often assume her clients do not have legal immigration status based on their race along with other possible factors including the neighbourhood in which the person lived. The officers also sometimes used lack of status as a tool to achieve cooperation from the person they have stopped. The social worker reported that police officers would sometimes make her Regent Park clients feel scared about not providing information or otherwise cooperating with them by suggesting they would contact the CBSA to confirm the person's status.

The effect of status inquiries used to justify racially motivated police stops extends to all racialized persons, regardless of their status. For instance, Macdonald Scott of Carranza Barristers & Solicitors reports a client "... who called me saying she had heard about the police stopping people and asking for their status documents. She told me she was too scared to leave her home. This client actually had status as a temporary resident".

This demeans the dignity of racialized persons and further deteriorates the relationship between racialized communities and police, limiting their access to needed police services. This effect is described in the OHRC report on racial profiling, *Paying the Price*.

Persons who have immigrated from other countries also described a profound sense of not belonging as a result of experiencing profiling. They described it as a sense of being rejected by mainstream Canadian society and being told that they would always be considered an outsider. Some immigrants also told of a sense of disillusionment or betrayal as they had come to Canada to escape an unjust society and expected that they would be treated equally here.⁶⁶

Without a clear and complete DADT policy, that includes "Don't Tell" and applies beyond just victims and witnesses of crimes, racial profiling will continue and individuals already at a disadvantage within Ontario will continue to be marginalized

⁶⁵ Luis is a client of Carranza Barristers & Solicitors who agreed to let us use his story.

⁶⁶ *Paying the Price*, *supra* note 58 at 31.

3) *The Unequal Effects Amount to Legal Discrimination*

(a) **The inequality constitutes discrimination under the Code's Meiorin Test**

As described above, existing practices which give police a wide discretion to ask about and report status impose “adverse effects” on the basis of citizenship and status, sex and race. This constitutes a *prima facie* case of discrimination under the *Human Rights Code*, putting the onus on the police to demonstrate that its discriminatory conduct is nevertheless justified, according to the criteria established in *Meiorin*. *Meiorin* requires that the impugned policy is rationally connected to legal objectives, was adopted in good faith, and is reasonably necessary.

This onus cannot be met because the current policy allowing police to ask about status in most situations, and to report it in any situation, is not “rationally connected” to the objectives of the *Police Services Act*.

Earlier in this Report, we described how disclosing persons’ immigration status to immigration authorities is not required by any provisions of the *PSA* or the *IRPA*. We would also submit that neither is it rationally connected to these objectives.

The Chief of police has stated his belief that the lack of a “Don’t Tell” policy is related to the police “duty to uphold the law and report any violations of the law that are known to them”.⁶⁷ It is true that police officers clearly have a duty to “uphold the law”. However, there is no basis for holding that an obligation to “uphold the law” includes any specific legal obligation on the part of the police to ask about, or to report, immigration status. In practice, this policy comes into conflict with police officers’ duty to uphold the law, protect the public, prevent criminal activity and collect evidence to prosecute offenders, by creating a **chilling effect** on the reporting of crime and an overall impediment to the prevention and prosecution of crimes.

In addition, anything that compounds the effects of racial profiling **compromises the effectiveness of police investigations and community relations**. The OHRC reported several conclusions demonstrating that racial profiling (and by extension status profiling) is not rationally connected to the provision of effective police investigations:

[R]acial profiling, among other things, compromises our future through its impact on our children and youth, creates mistrust in our institutions, impacts our communities’ sense of belonging and level of civic participation and impacts on human dignity. Therefore, social cohesion is no doubt undermined by racial profiling at a high economic cost to Ontario society.⁶⁸

Numerous submissions described an increased personal or community mistrust of law enforcement officials, the criminal justice system, the

⁶⁷ Min. No. P254/05.

⁶⁸ *Paying the Price*, *supra* note 58 at 53.

education system, customs officials, store and mall security and society in general. One person who was himself a victim of a crime even described feeling “betrayed” by the police because of his perception that the police took his criminal investigation less seriously because the suspect was “Caucasian.” The sense of mistrust was most profound among racialized persons⁶⁹

Similarly, the precarious situation of women without status is worsened by an under-inclusive and unimplemented DADT policy whose effect is to **deny abused non-status women access to the justice system** and, indirectly, to **shield perpetrators from charge**. This clearly undermines the duty of the Toronto policy “to treat or protect a person equally without discrimination”, and suggests that such a policy is not only counter-productive but also irrational.

The existing policy and practice also fails to be “reasonably necessary” for the provision of police services. To show that the standard is reasonably necessary, it must be demonstrated that it is based on a *bona fide* requirement, and that it is impossible to accommodate individuals sharing the characteristics in question without imposing *undue hardship* upon the service provider.⁷⁰

Disclosure of immigration status will rarely be a *bona fide* requirement of police work. On the contrary, the evidence suggests that it runs counter to the mandate of the police to protect the public, by creating powerful disincentives for individuals – with or without immigration status – to come forward and engage positively with police.

Any argument in favour of characterizing current practices as *bona fide* tend to rely on stereotypes about the supposed criminality of non-status and racialized communities, which are deeply problematic and incorrect assumptions.

Consequently, the current policy and practice of the Toronto Police Services Board constitutes a prohibited form of discrimination, under the Ontario *Human Rights Code*. More specifically, it breaches s.1 by its failure to provide non-discriminatory access to an essential public service, because it imposes significant and unjustified adverse effects under s.11(1) on non-citizens, persons without status, women and racialized persons.

(b) The inequality constitutes discrimination under the Charter’s s.15 Law test

As indicated, the present situation imposes disadvantages, and limits access to an essential service, on the basis of citizenship and status, sex and race. Having discussed the nature of this difference, and that it occurs on enumerated (sex and race) or analogous (citizenship, status) grounds, the final question is whether the distinction amounts to “substantive discrimination”.

⁶⁹ *Ibid.* at 23.

⁷⁰ See s.11(2) of the *Human Rights Code*.

In order to assess whether a distinction constitutes “substantive discrimination”, Canadian courts apply the test set out in *Law v. Canada*⁷¹ (the *Law* test), as described on page 19 of this Report. Human dignity is the centre of the *Law* test. According to the Supreme Court:

the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable, and equally deserving of concern, respect and consideration.⁷²

The question is therefore whether the differential treatment perpetuates the view that a group of persons is less worthy of recognition as human beings, and is thus detrimental to their personal dignity. *Law* identified four contextual factors to aid in this analysis; these are not exhaustive and are to be evaluated from the perspective of a reasonable person in circumstances similar to the claimant. These include:

1. Any pre-existing disadvantage or vulnerability experienced by the claimant;
2. The extent of the link between the ground raised and the claimant’s actual circumstances, with discrimination being harder to establish to the extent that the law takes those circumstances into account in a manner that accords with the dignity of the claimant;
3. Any ameliorative purpose of the law or policy being challenged; and
4. The nature and scope of the interest affected by the law.

First, the impact of a law upon individuals or groups who are vulnerable and disadvantaged should always be a central consideration. It is clear that persons without status are a particularly vulnerable and disadvantaged group. Their disadvantage comes in the form of low socioeconomic position, absence of political representation, social exclusion and a position of dependence and subordination.

In *Andrews*, it was noted that “[r]elative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated”.⁷³ Non-status women are even more vulnerable and disadvantaged, especially those who experience violence or exploitation and are in need of police services for protection against crime. Racialized groups experience general disadvantage and marginalization within society, including a strained relationship with police services.

Second, the policy of asking and reporting the immigration status of disadvantaged persons does not correspond to their needs or capacities. Instead, it has the effect of exacerbating the negative circumstances in which members of the affected groups themselves. For example, women without status or citizenship have a greater – not reduced – need for the support, assistance and protection of police services. The absence of a full DADT policy prevents them from gaining the very protection that they need.

⁷¹ *Law*, *supra* note 36.

⁷² *Ibid* at para. 51.

⁷³ *Andrews*, *supra* note 35.

The distinction itself is based on the “stereotypical application of presumed group or personal characteristic, or otherwise has the effect of perpetuating or promoting the view that these individuals are less capable, or less worthy of recognition or value as human beings or as members of Canadian society.”⁷⁴ Implicit in the practices of making status inquiries and actively reporting people without status is the assumption that immigrants are less deserving of equal access to police protection. Furthermore, where such a distinction serves to reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others it is not compliant with s. 15 of the *Charter*.⁷⁵

Finally, it is clear that there is a significant interest at stake. Access to police services is absolutely essential for one’s own protection from crime and for the safety of the entire community. The removal of police protection and, with it, access to protection of the law, certainly harm the dignity of persons without status. When police report status it sends a clear message that the protection of these individuals is less important than that of others in Canadian society.

We therefore submit that the absence of a DADT policy is discriminatory under s. 15 on the basis of citizenship, immigration status, sex and race.

⁷⁴ *Law*, *supra* note 36 at para. 51.

⁷⁵ *Andrews*, *supra* note 35 at para. 5.

IV. THE LACK OF A COMPLETE DADT POLICY MAY INFRINGE LIFE AND SECURITY OF THE PERSON

Section 7 of the *Charter* provides:

Everyone has the right to life, liberty, and security of the person, and not to be deprived thereof except in accordance with the principles of fundamental justice.

In order to find that a law infringes s. 7, two prongs must be satisfied:

1. The impugned law must be found to imperil life, liberty, or security of the person
2. The deprivation of life, liberty, or security of the person must be found not to be in accordance with the principle of fundamental justice.

1) Disclosure of the immigration status of crime victims may infringe s.7

In *Singh*, the Supreme Court established that “everyone,” as contemplated in the text of s. 7 of the *Charter*, includes all persons who are physically present on Canadian territory enjoy this right; it is not restricted to citizens or persons who are in Canada legally.⁷⁶ Section 7 is, therefore, applicable in the present context.

a) Disclosure of immigration status imperils security of the person

If police officers report status information to federal authorities, people without status and sometimes others will effectively be deprived of access to police services (see the above section on equality). The result leaves the people affected more vulnerable to crime, including serious violence. Non-status migrants are especially unlikely to contact police, even where they have been a victim of a crime, if they know that doing so could result in the immigration authorities being alerted and their return to their countries of origin. This is particularly true since a great number non-status immigrants in Toronto are failed refugee claimants, who may fear removal to their countries of origin much more than they fear the crime they face in Toronto.

As discussed throughout this report, there are myriad ways a police officer may become aware of the status of a victim or witness during a criminal investigation even with the existing “Don’t Ask” policy in place. A person’s identification, or lack thereof, may reveal a lack of status. A criminal suspect, anxious to divert an officer’s attention or to thwart the proceedings against him, may report that a victim or witness has no status. In other cases, someone might volunteer this information about themselves or another person without realizing the consequences.

⁷⁶ *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at para. 35.

Denying victims and witnesses of crime access to police may deprive them of life in extreme cases, and certainly denies them security of the person. In *Blencoe v. British Columbia* (“*Blencoe*”),⁷⁷ the Supreme Court of Canada established that the imposition of serious psychological stress may constitute a violation of security of the person. To deny a person access to the protection of the state in the form of police services would give rise to the type of serious psychological stress contemplated in *Blencoe*.⁷⁸ For instance, it is difficult to imagine a situation more repugnant than a victim not reporting serious physical or sexual abuse to the police because she fears being asked her immigration status.

In *Morgentaler*, the court held that a woman’s psychological integrity and security of the person would be infringed where a law denied her access to timely medical care, in that case timely access to an abortion.⁷⁹ This was their conclusion notwithstanding that the law in question did not actually prohibit abortions outright; it merely made it difficult for many women to obtain them.

Similarly, while the lack of a “Don’t Tell” policy does not expressly prohibit non-status immigrants from contacting police, an interpretation allowing (or even encouraging) officers to report them to immigration authorities effectively prevents them from doing so. If security of the person is imperiled where a law makes it effectively impossible for a sick person to receive medical care, so too must it be imperiled where it would prevent an innocent person from availing herself of police protection.

b) Lack of a full DADT policy is not in accordance with the principles of fundamental justice

Under s.7, a deprivation of life or security of the person will only breach the *Charter* if the deprivation is contrary to the principles of fundamental justice. The principles of fundamental justice are the commonly held ideas about fairness that underpin our legal system and give courts their legitimacy. They include access to basic procedural fairness for anyone accused of an offence, and the right not to have one’s rights violated by a law that is vague or arbitrary.

Arbitrariness was recognized as antithetical to principles of fundamental justice in *Rodriguez*. A law will offend the principles of fundamental justice if it deprives an individual of life, liberty, or security of the person, while doing “little or nothing to enhance the state’s interest”. In such a case, Justice Sopinka wrote, the individual’s rights will have been deprived for no valid purpose.⁸⁰

Above, it was submitted that an interpretation of the *PSA* which requires police officers to report the immigration status of victims of crime would deprive them of security of the person. It is further submitted that this deprivation is contrary to the principles of

⁷⁷ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

⁷⁸ *Ibid.*

⁷⁹ *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

⁸⁰ *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519.

fundamental justice in that it is arbitrary; it does not further the objectives of the *PSA*, and indeed frustrates them.

The primary objective of the *PSA*, as stated in s. 1, is to “ensure the safety and security of all persons and property in Ontario”. The provisions of the *PSA* are considered in greater detail earlier in this report, however where multiple interpretations are possible the *PSA* should be interpreted in line with the constitution. An interpretation of the *PSA* which would hinder innocent community members from reporting crime or giving information to the police would tend to allow perpetrators of crimes to go free. This non-cooperation with the police affects not only the non-status immigrants who are victimized by crime, but all Torontonians, who are placed at heightened risk when criminals are not brought to justice.

This result frustrates not only the overarching goal of the *PSA*, but also many of the specific duties of police officers, in particular preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention (s. 42(1)(b)), assisting victims of crime (s. 42(1)(c)), and apprehending criminals and other offenders and others who may lawfully be taken into custody (s. 42(1)(d)).

It is not the case that the Toronto police would fail in their duty to protect the safety of Ontarians if they declined to enforce all provisions of the *IRPA*. While non-status immigrants are residing in Canada unlawfully, this does not in and of itself threaten the safety and security of Ontarians in the sense contemplated by s.7 or by the *PSA*. Remaining in Canada without authorization may be a breach of a federal civil statute, but it is not a criminal offence, nor does it implicate the physical safety of any person.

On the other hand, an interpretation of the *PSA* which would discourage victims and witnesses of crime from reporting an offence or giving information to the police would tend to allow perpetrators of crime to go free. This is directly contrary to the purposes of the statute, and accordingly such an interpretation would render the law arbitrary.

V. CHARTER VIOLATIONS ARE NOT JUSTIFIED UNDER S.1

Section 1 of the *Charter* states as follows:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits **prescribed by law** as can be demonstrably justified in a free and democratic society [Emphasis added]

We submit that the lack of a fully implemented DADT policy cannot be justified under s.1 of the *Charter* because it is not prescribed by law.

The words “prescribed by law” in s.1 of the *Charter* make clear that an infringement of individual rights can never be justified if not authorized by statute or by accompanying regulations, regardless of how reasonable the action may appear to be.⁸¹ Requiring an infringement of individual rights to be prescribed by law is important in preserving the rule of law in a democracy because it prevents arbitrary and discriminatory actions by government officials. It also provides citizens with an opportunity to know the laws that govern them and to act accordingly.⁸²

The reporting of persons without immigration status to immigration authorities is not mandated by statute, and, as we have shown above, discretion to do so is not permitted by s.5(1) of the *PSA Regulations* on disclosing personal information.⁸³ It is thus not prescribed by law, and cannot be justified under s.1.

However, even if s.5(1) of the *Regulations* is interpreted to create a discretion for police officers to share information in a general sense with federal officials, reporting persons without immigration status to immigration authorities is an unlawful exercise of this discretion and is thus not prescribed by law. A law that confers discretion will only satisfy the “prescribed by law” requirement if that discretion is constrained by legal standards.⁸⁴ The discretion that is granted under s.5(1) is constrained by legal standards articulated in s.6 of the *Regulations*:

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.⁸⁵ (Emphasis added.)

Thus, exercising discretion to disclose information to federal officials is only lawful if the officer disclosing the information has considered all of the required factors. As discussed

⁸¹ For example, see *R. v. Therens* [1985], 1 S.C.R. 613, *R. v. Simmons* (1988) 2 S.C.R. 485, *R. v. Dersch* [1993] 3 S.C.R.

⁸² Hogg, Peter, *Constitutional Law of Canada*, (Carswell, Toronto, 5th Edition, 2007), pp. 38-12.

⁸³ O. Reg 265/98.

⁸⁴ *Re Ontario Film and Video Appreciation Society*, 1984, 45 OR (2d) 80 CA.

⁸⁵ *Ibid.*

previously, in the vast majority of cases the exercise of discretion to share persons' immigration status with federal officials will not be in compliance with these factors because it will be against the public interest and inconsistent with the law contained in the *PSA*, the *Victim Protect Act*, the *Human Rights Code*, and constitutional *Charter* rights. An exercise of discretion that is not in accordance with these factors will not be prescribed by law.

It is unlikely that reporting victims and witnesses of crime without immigration status to immigration authorities would ever be prescribed by law. It follows that such an exercise of discretion cannot not be justified under s.1 of the *Charter*.

VI. INTERNATIONAL LAW AND THE DADT POLICY

1) *Canada is bound by international law*

Canada is a party to several international treaties relevant to the “Don’t Ask, Don’t Tell” policy. Treaties create legally binding obligations at international law. The fundamental principles of international treaty law are expressed in the *Vienna Convention on the Law of Treaties*,⁸⁶ to which Canada is a party. Article 26 enshrines the principle of “pacta sunt servanda” according to which, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. Article 27 provides that “A party may not invoke the provisions of its internal law as justification for failure to perform a treaty”. Canada’s treaty commitments create serious legal obligations, including a requirement to implement the treaty in good faith and to overcome any internal challenges in doing so.

2) *Canadian law incorporates norms from international law*

Traditionally, Canadian courts have refused to directly apply treaty terms in domestic law absent legislation that expressly implements the treaty. However, Canadian courts have increasingly used unimplemented treaties in interpreting legislation and the *Charter*. Indeed, the Federal Court of Appeal in *De Guzman v. Canada* noted that the “expanding role that the common law has given to international law in the interpretation of domestic law...has been one of the signal legal developments of the last fifteen years”.⁸⁷

The Supreme Court has held that international law, particularly on human rights, should be used to inform *Charter* interpretation. In *Slaight Communications Inc. v. Davidson*,⁸⁸ the Court adopted the comments of Justice Dickson in his dissent in *Reference Re Public Service Employee Relations Act (Alberta)*.⁸⁹

[T]he *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Regarding the Ontario *Human Rights Code*, the Supreme Court of Canada has held that international obligations also inform statutory interpretation, even when the statute does not explicitly refer to international legal obligations: *114957 Canada Ltée. (Spraytech Société d'arrosage) v. Hudson (Town)*.⁹⁰ In that case, the Supreme Court adopted the statement of Driedger on statutory interpretation:

⁸⁶ Date of Signature: 23 May 1969. *United Nations Treaty Series*, vol. 1155, p. 331.

⁸⁷ *De Guzman v. Canada*, [2005] F.C.J. No. 2119 at 62.

⁸⁸ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

⁸⁹ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313.

⁹⁰ *114957 Canada Ltée. (Spraytech Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241.

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

In *De Guzman* the Federal Court of Appeal indicated that binding international obligations are **determinative of statutory interpretation “in the absence of a clearly expressed legislative intention to the contrary”**.⁹¹

As relevant to this legal opinion, Canadian law is therefore to be interpreted in ways that provide protection *at least as great* as that afforded by the international human rights instruments detailed below.

3) Specific International Treaties

International Covenant on Civil and Political Rights

Canada became a party to the *International Covenant on Civil and Political Rights (ICCPR)* in 1976, the same year it entered into force.⁹² The Supreme Court, academics and government officials have all recognized the close connection between the *ICCPR* and the *Charter*. Prof. Peter Hogg, a leading Canadian constitutional scholar, made the following comments on the relevance of the *ICCPR* to *Charter* interpretation:

Where (as is common) the Covenant makes a detailed provision for a right that is also guaranteed by the *Charter*, but in language that is less clear or complete, the terms of the Covenant may well indicate the appropriate interpretation of the *Charter*...

The decisions of the Human Rights Committee of the United Nations are relevant to the interpretation of the *Charter*, not only because Canada is a party to the Covenant which they interpret but also because they are considered interpretations by distinguished jurists of language and ideas that are similar to the language and ideas of the *Charter*.⁹³

Canadian government representatives have stated that “the provisions of the Canadian *Charter* were based on the Covenant”.⁹⁴ Likewise, the Supreme Court has used the *ICCPR* in its interpretation of both ss. 7 and s. 15(1) of the *Charter*: see *Suresh v. Canada (Minister of Citizenship and Immigration)*⁹⁵ and *Lavoie v. Canada*.⁹⁶

⁹¹ *De Guzman*, *supra* note 87 at paras. 70, 108.

⁹² *ICCPR*, *supra* note 8.

⁹³ Peter W. Hogg, *Constitutional Law of Canada* (Scarborough: Carswell, 2002) at 36-39 – 36-41.

⁹⁴ Statements by Ms. Fry; Summary Record of the 1738th Meeting; 26 March 1999.

⁹⁵ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

⁹⁶ *Lavoie v. Canada*, [2002] S.C.J. No. 24.

The *ICCPR* extends rights to everyone, regardless of status. Article 2(1) clearly extends the rights guaranteed by the Covenant to everyone within the State Party's territory:

2(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Human Rights Committee, which monitors implementation and compliance with the *ICCPR*, has noted that most rights in the Covenant extend to citizens and non-citizens alike regardless of immigration status:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction... As indicated in General Comment 15 adopted at the twenty-seventh session (1986), **the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals**, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. [Emphasis added.]

This holding is bolstered by the wording of the Covenant itself. Certain rights are specified as applicable to citizens, such as article 25: the right to participate in the public service. However, rights such as equal protection before the law (article 26) and protection of children (article 24) on their face extend to *everyone* within Canada's jurisdiction, regardless of legal immigration status.

The Human Rights Committee has held that the articles 3, 7 and 26 of the *ICCPR* combine to require states to take positive steps to address domestic violence. The relevant provisions of the *ICCPR* are almost identical to the *Charter* provisions. Articles 3 and 26 of the *ICCPR* prescribe equality before the law, similar to s.15(1) and s.28 of the *Charter*.

3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7 of the Covenant parallels s.12 of the *Charter*:

7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The Human Rights Committee has unequivocally held on multiple occasions that the combination of Articles 3, 7 and 26 requires states to take *positive* steps to provide better protection to victims of domestic violence, enhanced prevention of domestic violence and prosecution of perpetrators. Regarding protection and prevention, the Human Rights Committee made the following Concluding Observations regarding Madagascar's compliance with the *ICCPR* based on articles 3 and 7:

The State party should provide better protection for women, strengthen preventive measures and punishment for domestic violence against women and children, and address the factors underlying women's vulnerability, including economic dependence on their partners. It should also establish support structures for victims and programmes to raise awareness, including training courses for law enforcement officials.⁹⁷

Articles 3 and 7 combine to require States to take steps to ensure punishment and prosecution of perpetrators of domestic violence:

The State party should take appropriate steps to combat domestic violence and ensure that those responsible are prosecuted and appropriately punished. The State party is invited to educate the general public about the need to respect women's rights and dignity, with a view to changing cultural patterns...⁹⁸

The *ICCPR* is a key international instrument with clear parallels to the *Charter*. As such, its interpretation and the holdings of the United Nations' Human Rights Committee are particularly pertinent to *Charter* and statutory interpretation. The Human Rights Committee has held that the Covenant requires state parties to take social and legal steps to address domestic violence against *all* persons within Canada. As the *ICCPR* is a binding international instrument, these holdings should be determinative of the interpretation of the *Charter* and the Ontario *Human Rights Code*.

As has already been detailed by previous sections, a robust "Don't Ask, Don't Tell Policy" would contribute to the prevention of domestic violence and would help bring those who perpetrate it to justice. The absence of such a policy exposes people without status to continued violence and imposes adverse effects on women. It grants immunity to those who commit acts of violence against people without immigration status in Canada. A full DADT policy would enhance the punishment, deterrence, and successful prosecution of domestic violence offences by ensuring that the victims and witnesses of such crimes can come forward without fear.

⁹⁷ Concluding observations of the Human Rights Committee: Madagascar, 11/05/2007, CCPR/C/MDG/CO/3 at para. 11.

⁹⁸ *ICCPR*, *supra* note 8 art. 7.

Convention on the Elimination of all Forms of Racial Discrimination⁹⁹

In General Recommendation No. 30 of the Committee on the Elimination of Racial Discrimination on Discrimination against Non-Citizens (2004), interpretation of Article 5 of the Convention required:

States parties to prohibit and eliminate discrimination based on race, colour, descent, and national or ethnic origin in the enjoyment by all persons of civil, political, economic, social and cultural rights and freedoms.

The Committee asserts that we may take “all persons” to include citizens and non-citizens, except in the context of certain rights, including the right to participate in elections, vote, and stand for elections.

The Committee directly addresses the possibility of differential treatment based on citizenship or immigration status and stands firm in its position that this differential treatment constitutes discrimination if there is no legitimate aim,¹⁰⁰ or if the differential treatment is not appropriately proportional to the achievement of an otherwise legitimate aim.

Convention on the Rights of the Child¹⁰¹

Article 3 of the *Convention of the Rights of the Child* (CRC) states:

States parties shall ensure that the institutions, services, and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities...

Article 34 states:

States parties undertake to protect the child from all forms of sexual exploitation and sexual abuse

Those institutions, services, and facilities stipulated in Article 3 include civil institutions such as the police force. Without a robust “Don’t Ask, Don’t Tell” policy, non-status children who may be at risk of abuse/violence at home may be adversely affected by current police policies that render mothers reluctant to call the police for fear of detainment/deportation. In addition, children may be afraid to call the police themselves in the event of domestic abuse. In continuing with a policy that enables police to demand identification and detain people based on their non-status may, for many of the same reasons above, fail to protect the child from abuse.

⁹⁹ In force: 4 January 1969; signed and ratified by Canada in 1966 and 1970, respectively.

¹⁰⁰ This is judged in light of the objectives and purposes of the Convention, such as in article 1, paragraph 4.

¹⁰¹ In force: 2 September 1990; signed and ratified by Canada: 1990 and 1991, respectively.

In the concluding comments of the 34th session of the Committee on the Rights of the Child Canada was encouraged to form a coherent and comprehensive rights-based national plan targeting all children, especially the most vulnerable groups including Aboriginal, migrant, and refugee children.

Summary

Supreme Court of Canada jurisprudence has held international human rights law, detailed above, must be taken into consideration when interpreting the *Charter* and Human Rights Codes. This powerful interpretive role is important even where international treaties, though binding, have not been implemented in domestic law. The protection afforded by the *Charter* and the Ontario *Human Rights Code* should be *at least as great* as our clear commitments under international law. A clear “Don’t Ask, Don’t Tell” policy is precisely in line with Canada’s obligations under international law. Indeed, international law may require it.

VII. “DON’T TELL” POLICIES EXIST IN MANY U.S. JURISDICTIONS

DADT policies are fairly common in North America. Historically, police boards in the United States have been relatively united in their view that federal immigration laws are to be enforced exclusively by federal agents, and not by state and local police. According to a report issued by the Congressional Research Service in August 2006, there are currently 32 cities and counties in the United States with DADT policies.¹⁰² Altogether, these jurisdictions encompass roughly 25 million people, approximately 8% of the U.S. population.

The U.S. cities considered fall into two broad categories: those that have implemented and maintained a DADT policy since the 1980s and those, such as New York City, where the policy was made ineffectual due to federal law,¹⁰³ but was subsequently renewed.¹⁰⁴

Of the cities currently employing a DADT policy, New York and San Francisco are both interesting comparators for Toronto. New York first initiated its DADT policy in 1985 under an executive order by Mayor Koch, and although the law was struck down in 1999, it was re-initiated in 2003 by Mayor Bloomberg through Executive Order 41. The Order states that law enforcement officers may never inquire into the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance. Furthermore, the Order classifies as “confidential” a range of personal information, and specifies that information relating to immigration status may only be disclosed as required by law or where there is suspected illegal activity other than undocumented status, among other provisions.¹⁰⁵

New York has benefited greatly from the broad decline in crime rates throughout the 1990s and has seen a leveling off of both violent and property crime rates during the current decade. What is significant about the implementation of the DADT policy in late 2003 is that certain types of crime have resumed their decline and have reached new, lower, levels.¹⁰⁶ The particular types of crimes that saw these declines are arguably crimes where the likelihood of re-offending is particularly high if the perpetrator is not apprehended and successfully prosecuted. While these decreases in crime are a result of many factors, they

¹⁰² Congressional Research Service, “Enforcing Immigration Law: The Role of State and Local Law Enforcement” (August 14 2006). These include Anchorage, Alaska; Fairbanks, Alaska; Chandler, Arizona; Fresno, California; Los Angeles, California; San Diego, California; San Francisco, California; Sonoma County, California; Evanston, Illinois; Cicero, Illinois; Cambridge, Massachusetts; Orleans, Massachusetts; Portland, Maine; Baltimore, Maryland; Takoma Park, Maryland; Ann Arbor, Michigan; Minneapolis, Minnesota; Durham, North Carolina; Albuquerque, New Mexico; Aztec, New Mexico; Rio Arriba County, New Mexico; Sante Fe, New Mexico; New York, New York; Ashland, Oregon; Gaston, Oregon; Marion County, Oregon; Austin, Texas; Houston, Texas; Katy, Texas; Seattle, Washington; Madison, Wisconsin

¹⁰³ Section 287(g), Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, Div. C, 110 Stat. 3009-546.

¹⁰⁴ City of New York, Office of the Mayor, Executive Order No. 41 (September 17, 2003).

¹⁰⁵ New York Mayoral Office, “City-wide privacy policy and amendment of executive order no. 34 relating to city policy concerning immigrant access to city services” Executive Order No. 41 (17 September 2003). For full text see Appendix 1.

¹⁰⁶ Cases of rape have declined by 12% in 2004, compared to a decline of 5% for the state, after years of relatively constant levels; while in property crime, burglaries have declined by 8% in 2004 and 11% in 2005, compared with 7% and 4% for the state, improving on prior declines of roughly 5% a year.

would seem to indicate that the enactment of DADT policies does not lead to an increased level of reported crime, and in many situations actually coincides with a decrease in reported crime levels in spite of the increased likelihood of victims with precarious immigration status reporting offences against them.

San Francisco first adopted its DADT policy in 1985, when the city was declared to be a “sanctuary city” for immigrants, regardless of their immigration status. In San Francisco, all city employees are barred from assisting Immigration and Customs Enforcement agents with immigration investigations or arrests, unless assistance is formally requested by a federal or state law warrant.¹⁰⁷ Accordingly, city employees, including police, are not to report persons’ status should it be disclosed to them through any means. San Francisco recently hired an “immigrant rights administrator” to work with city agencies to help their employees understand the “sanctuary city policy” and it is currently investing \$83 000 in publicizing the policy so that persons without immigration status can feel safer using city services.¹⁰⁸

The strength and degree of implementation of DADT policies vary considerably among U.S. jurisdictions, as does the size of the populations which they affect. However, even given these discrepancies, it is clear from the U.S. examples that the implementation of a full DADT policy does not lead to an increase in crime, while ensuring access to police protection for a vulnerable part of society.

¹⁰⁷ Vega, Cecilia, “S.F. promotes services for illegal immigrants,” *San Francisco Chronicle*, April 3, 2008.

¹⁰⁸ Ibid.

VIII. CONCLUSION

After reviewing the statutory and common law outlined above, the Immigration Legal Committee is of the view that Toronto police have **no legal duty to disclose immigration status to federal officials**, unless they are carrying out a warrant issued under the *IRPA*. In addition, to disclose such information likely conflicts with police duties under the *PSA* and the *Victims' Bill of Rights*, as well as with equality guarantees under the *Charter*, the *Ontario Human Rights Code*, and international law. Consequently, not only is there no duty to disclose, but **a practice of regular disclosure of status by police is contrary to statutory, constitutional and international law**. A robust DADT policy is the best course for police to follow.

Such a policy would require (1) training police in order to instruct them on the new policy, the significance of its rationale, and its consistency within the *Police Services Act*; (2) widespread publicity and dissemination of the policy, to ensure that members of the public understand the need for the policy and to reassure affected individuals that they can approach police officers without fear; and finally, (3) a mechanism for holding police officers accountable if they breach the policy.

The Immigration Legal Committee thus implores the Board to move forward with the implementation of a complete DADT policy. Such policies have already been implemented in many U.S. jurisdictions and it is particularly important in Toronto for the benefit of the many cultural communities that rely on Toronto police services.

The implementation of a “Don’t Tell” policy would bring forward witnesses who were previously afraid to assist police. It would allow victims of crime who are subject to widespread abuse to seek police protection. It would mean that perpetrators of crimes against non-status persons would no longer be able to act with impunity. The implementation of a more inclusive “Don’t Ask” policy would reduce racial profiling. Until Torontonians have access to a full DADT policy, persons without status are unable to access police protection without fear, and police officers are unable to perform their duties as effectively as they could with the cooperation of Toronto’s cultural communities.

IX. APPENDIX

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