

# Citizens Union Agenda for Police Reform

## 2021 ISSUE BRIEF AND POSITION – PART 1 GOVERNANCE AND ACCOUNTABILITY


### Summary of Recommendations

#### NYPD as a Mayoral Agency

- Establish a Deputy Mayor for Public Safety with the expertise and authority to monitor and supervise the Police Department on the Mayor's behalf.
- Make the appointment of the Police Commissioner subject to the advice and consent of the City Council.

#### Oversight of the NYPD

- Merge the Office of the Inspector General for the NYPD and the Commission to Combat Police Corruption into the Civilian Complaint Review Board.
- Update the NYPD's information and data storage technology to allow police oversight agencies to access data relevant to their mission.

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- Create a legal framework for policing, by establishing policies through publicly accessible law and regulation covering such areas as use of force, handling of demonstrations and the imposition of disciplinary sanctions.

## The Disciplinary Process

- Expand the CCRB's jurisdiction to include allegations of profiling or discrimination.
- Expand the CCRB's jurisdiction to include traffic and school safety agents and other civilian employees of the NYPD.
- Allow the CCRB to initiate investigations without having to wait for an individual complaint.
- Provide the CCRB with prompt and full access to footage from body-worn cameras, police officers' employment history and disciplinary records and all other documents and materials in the possession of the NYPD relevant to its investigations.
- Transfer disciplinary hearings involving police officers from the NYPD to the Office of Administrative Trials and Hearings (OATH).
- In cases in which the Police Commissioner proposes to depart from a discipline recommendation of the CCRB involving suspension or termination, provide the CCRB with the right to appeal to the Deputy Mayor for Public Safety, who would have final authority over the penalty.

## Other Mechanisms for Accountability

- Create a statewide authority to certify and decertify police officers.
- Repeal or waive qualified immunity in cases against the state, political subdivisions of the state, and state and local officials.



# Introduction

Events of past year have brought into sharp focus the role of policing in New York City, as in other American cities. The number and size of demonstrations following the murder of George Floyd shows the frustration that such incidents keep happening and that police officers often experience few or no consequences when they engage in misconduct, which too often is directed against people of color. More broadly, they are a sign of a fundamental disconnect between police officers and many of the communities they serve, especially communities of color, where the level of distrust of the police is high.

The rhetoric over the past several months, as with too many other issues facing our society, has been polarized. Some have argued for the defunding or even elimination of police departments while others view any criticism of the police or calls for reform as undermining public safety. In between, various public officials, groups and individuals have made many proposals for reform, but in this fraught political environment, many of these proposals are criticized by both poles as being either harmful or inadequate.

Citizens Union (CU) considers this polarization to be strongly counterproductive. Public safety requires a modern, professional police force that has the authority to enforce the law. We also believe policing must be carried out in ways that are consistent with constitutional principles and our democratic form of government. When the police are not accountable, or are disconnected from the communities they serve, or perform functions that are outside their core area of expertise, they lose the trust necessary to do their job well.

While the NYPD is a highly regarded police force in many ways, it also has acted in ways which undermine public confidence. This has been a historic pattern. There has been a legion of complaints over the years that the NYPD systemically, and officers individually, treat persons of color with less respect and more harshly than whites. Furthermore, the department has in many instances impinged upon first amendment rights of protesters and other civilians. The past several months have seen ample demonstrations of both behaviors. The problems keep recurring and the public perceives little has been done to address them.



Citizens Union has been studying police accountability and performance in New York City for more than a decade.<sup>1</sup> In light of recent events, CU reconvened and expanded its working group to consider the current state of policing in the City and make recommendations to:

- Assure appropriate oversight and accountability of the NYPD
- Improve the effectiveness of policing in the City's various communities

We have spoken with public officials, experts and community groups and considered a number of recent published reports regarding needed reforms (a selected bibliography of sources is attached to this report). We believe we can best advance the discussion by synthesizing what we have learned into a specific agenda for reform. The time for reform is now, especially in light of the Governor's Executive Order No. 203, issued June 12, 2020, requiring local police agencies, including the NYPD, to adopt a plan by April 1, 2021 "that reinvents and modernizes police strategies and programs in their community based on community input."<sup>2</sup>

The first part of that agenda, set forth below, deals with issues of governance and accountability. Just as we must have civilian control of the military at the federal level, so we should insist on civilian control of the police on a local level. This means far stronger monitoring and management by City Hall, a much more robust body of laws and regulations governing the police to clarify how police should act and limit the vast amount of discretion the NYPD and police officers currently exercise, and a more effective and transparent system of disciplining police officers accused of misconduct. We fully understand that police officers put their lives at risk every day, and most officers conduct themselves with dedication and understanding. But for those officers who engage in misconduct, and data show there are too many, penalties must be imposed that are commensurate with the level of misconduct, and the public must be able to see that those officers are being held accountable.

In a subsequent paper, we will propose an agenda for more effective policing. This includes a stronger connection and better communication between local precincts and the communities they serve and improved training of the police to accomplish

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<sup>1</sup> See the following reports by CU's Committee on Municipal Affairs: Issue Brief and Policy Position Statement on Police Accountability (2016) (<https://citizensunion.org/portfolio-item/citizens-union-issue-brief-and-policy-position-statement-on-police-accountability/>); Issue Brief and Position on Reforming Stop, Question and Frisk (2013) ([https://citizensunion.org/wp-content/uploads/2013/09/Issue\\_Brief\\_Stop\\_and\\_Frisk\\_FINAL1.pdf](https://citizensunion.org/wp-content/uploads/2013/09/Issue_Brief_Stop_and_Frisk_FINAL1.pdf)); Diminished Accountability: How Discipline for Police Misconduct in Downgraded by the NYPD (2012) ([https://citizensunion.org/wp-content/uploads/2013/09/CUReport\\_AccountabilityPoliceMisconduct1.pdf](https://citizensunion.org/wp-content/uploads/2013/09/CUReport_AccountabilityPoliceMisconduct1.pdf)); White Paper: Public Oversight of Police Misconduct (2008) ([https://citizensunion.org/wp-content/uploads/2013/09/2008IB\\_PoliceMisconduct1.pdf](https://citizensunion.org/wp-content/uploads/2013/09/2008IB_PoliceMisconduct1.pdf)).

<sup>2</sup> <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-reinvent-and-modernize-police-strategies-and-programs>.

that and to provide greater skills in dealing with situations in which the use of force may be counter-productive. In this connection, we will examine the myriad functions the police are asked to perform, such as enforcement of public health measures, school safety and response to mental health emergencies and homelessness, that might be better done by other agencies, with the police in a backup role.

## **A. THE NYPD AS A MAYORAL AGENCY**


### **1. MAYORAL CONTROL**

The NYPD, like virtually all City agencies, and with the exception of a few independent boards or commissions, is subject to Mayoral control. The Police Commissioner is hired and may be fired by the Mayor, and the Mayor bears ultimate responsibility for the policies, priorities and conduct of the NYPD. However, for a variety of reasons, mayors have been exceedingly reluctant to exercise close control over the Police Commissioner. In part, this reflects a prudent realization that there is considerable expertise involved in policing that the Commissioner has and the Mayor does not. It also reflects the institutional strength of the Police Department to resist outside pressure, aided by the fact that because crime is always an important and emotional issue, the Commissioner (and the police unions) wield a degree of independent political clout that the Mayor challenges at his peril. In addition, the Mayor has many other areas of responsibility and lacks any civilian bureaucracy, like the Department of Defense at the federal level, with the power and expertise to serve at least occasionally as a counter-weight.

It is therefore not surprising that the Office of the Attorney General has recently proposed the creation of a multi-member commission, whose members would be appointed by several different elected officials, with power to hire and fire the Police Commissioner and control the budget and policies of the NYPD<sup>3</sup>. Such police commissions exist in several other jurisdictions, most notably Los Angeles. In support of them, it is argued that they create a useful buffer between police policy and the volatility of pressure group

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<sup>3</sup> See *Preliminary Report on the New York City Police Department's Response to Demonstrations Following the Death of George Floyd* ("OAG Preliminary Report") at 36, <https://ag.ny.gov/sites/default/files/2020-nypd-report.pdf>.




politics and thereby provide stable and expert control, akin to the role played by the Board of Governors of the Federal Reserve with respect to monetary policy.

Nevertheless, **we continue to believe that with the reforms recommended below, Mayoral control of the NYPD remains the best means of achieving appropriate governance and accountability.** Policing is one of the most important functions of municipal government and should be subject to democratic control. If the voters of the City wish to change the way in which the NYPD is run, they have the power to elect a Mayor and City Council committed to doing so. Indeed, in the 2013 City elections, the NYPD's implementation of its stop and frisk policy was a central issue, and the election of a Mayor opposed to that policy played a significant role in ending it. Similarly, we are now at the start of an election cycle in which policing is one of the central issues, and the outcome of the election should be permitted to determine how best to reform policing more broadly. By contrast, the creation of a multi-member police commission, whose members would have fixed terms and might be appointed by different persons, would, in our view, dilute democratic control and blur the lines of accountability, especially as it is coupled with a recommendation that its policy proposals would have the force of law. Our concern in this regard is based in part on the City's experience with the Board of Education prior to the introduction of Mayoral control of education. Finally, although there is little solid empirical evidence regarding how police commissions work in other jurisdictions, there seems little basis to believe that policing in those jurisdictions is more effective and accountable than it is here.<sup>4</sup>

Although we favor continued Mayoral control over the NYPD, we hasten to add that we believe the Mayor must play a more active role in overseeing the Police Department and guiding it toward

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<sup>4</sup> In addition, we are not convinced that there is an expertise involved in the setting of police policy similar to that involved in monetary policy. Rather, it is an area where the experience and input of ordinary citizens should inform a democratic process in setting policy.



necessary reforms, and the Police Commissioner must remain responsible (and answerable) for the direction of the NYPD.<sup>5</sup>

## 2. THE NEED FOR A DEPUTY MAYOR FOR PUBLIC SAFETY


As noted above, one of the reasons that the Mayor has not historically exercised strong control over the Police Department is his need to focus on a wide variety of other issues as well. **We therefore recommend that there be such a Deputy Mayor with the expertise and authority to monitor and supervise the Police Department on the Mayor's behalf.**

The Criminal Justice Coordinator has done an admirable job over the years in coordinating among the Police Department and other agencies and offices that are part of the criminal justice system, including those that are part of City government (Corrections, Juvenile Justice, Probation, Victim Services), as well as those that are independent (the District Attorneys and the court system). However, the Office of the Criminal Justice Coordinator was never designed and has not functioned to exercise oversight of the Police Department. If there is to be significant reform of policing, it is essential to have a Deputy Mayor whose principal focus is public safety.

Building on the resources of the Criminal Justice Coordinator, the Deputy Mayor should serve as the point person to ensure coordination between the Police Department and other agencies within the criminal justice system (Probation, Corrections, Juvenile Justice, Victims Services) and well as to work with the Deputy Mayor(s) with responsibility over other areas in which the police need to play a supportive role, such as mental health, traffic, education, and homelessness, not to mention control of the pandemic. Furthermore, if the public's trust in the Police Department is to be repaired, the Deputy Mayor should have authority to oversee the restructuring and monitoring of the system

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<sup>5</sup> In this connection, we note that disciplinary procedures within the NYPD, in contrast to almost all other local governments, are exempt from collective bargaining under the Taylor Law. See *Matter of Patrolmen's Benevolent Assn. of City of N.Y. v. New York State Pub. Empl. Rel. Bd.*, 6 N.Y.3d 563 (2006).



for disciplining police officers to ensure that serious misconduct receives appropriate sanctions.

### **3. THE ROLE OF THE CITY COUNCIL**

In the area of policing, as in other areas, the role of the City Council is to enact laws, approve a budget and conduct oversight through committee hearings. The Council does not currently play any role in the appointment of the Police Commissioner, or for that matter in the appointment of any other commissioner with the exception of the Commissioner of Investigation. Because of the importance of the Police Commissioner and the impact of the NYPD on the daily lives of the City's residents, **we recommend that as with the Commissioner of Investigation, the appointment of the Police Commissioner be made subject to the advice and consent of the Council**, and we support that portion of the bill before the Council which would accomplish that end.<sup>6</sup>

We do so on the assumption that the Council, in evaluating the qualifications of nominees for Police Commissioner, as it has for nominees for Commissioner of Investigation, will do so in a responsible manner and without the introduction of extraneous political considerations.

## **B. OVERSIGHT OF THE NYPD**


### **1. THE CONSOLIDATION OF POLICE OVERSIGHT AGENCIES**

There are currently three bodies that exercise oversight of the NYPD within their respective areas: the Inspector General for the Police Department, the Mayor's Commission to Combat Police Corruption and the Civilian Complaint Review Board. The first two gather information and make reports and recommendations on

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<sup>6</sup> *A Local Law to amend the New York city charter, in relation to requiring advice and consent of the council for the police commissioner*, Pub. L. No. Int 2209-2021. Accessed February 11, 2021. <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4771042&GUID=510F929A-DDB6-4C8C-9F28-93069BD24873&Options=&Search=>.





policies and procedures; they perform similar and somewhat overlapping functions. At a minimum, the Mayor's Commission to Combat Police Corruption should be merged into the Office of the Inspector General for the Police Department in light of the small size and scarce resources of the former and the greater investigator capacity of the latter. In our view, the CCRB should also be combined with them in a single agency with oversight of the NYPD.

We recognized that the CCRB serves a somewhat different purpose and that its adjudicative function would probably need to be handled by a separate staff than the one conducting more legislative type inquiries relating to policies and procedures of the NYPD. Nevertheless, we believe the CCRB's ability to investigate complaints, obtain relevant information and prosecute wrongdoing could be strengthened as part of a larger and more comprehensive police oversight agency. Indeed, all three of these agencies have frequently experienced similar problems in obtaining access to materials and witnesses from the NYPD.<sup>7</sup> Their work could be performed more effectively and efficiently if they were one agency with easy access to NYPD information that could be shared.

Accordingly, we support the proposal of the Mayor in his State of the City 2021<sup>8</sup> and the recommendation set forth in the recent report of the New York City Department of Investigation<sup>9</sup> that **the three oversight agencies should be consolidated into one agency**. Under the Mayor's proposal, the powers of the IG and CCPC would be transferred to the CCRB; the DOI Report states that the combined agency should have an independent board and not be part of the Inspector General system under DOI. These


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<sup>7</sup> See text at note 14 below.

<sup>8</sup> <https://www1.nyc.gov/office-of-the-mayor/news/062-21/state-the-city-2021-mayor-de-blasio-recovery-all-us>. This proposal and several other police reforms, which the Mayor refers to as the "Dinkins Plan", have been incorporated into the Mayor's draft plan, issued in response to the Governor's Executive Order No. 203, entitled *Recovery for All of Us: Mayor de Blasio Outlines Next Phase of Comprehensive Police Reform Effort* (Mar. 5, 2021, <https://www1.nyc.gov/office-of-the-mayor/news/158-21/recovery-all-us-mayor-de-blasio-outlines-next-phase-comprehensive-police-reform-effort> and NYC Police Reform and Reinvention Collaborative Draft Plan: Part 2 (Mar. 12, 2021)

[https://www1.nyc.gov/assets/policeform/downloads/PolicingReport\\_Part%202\\_FINAL.pdf](https://www1.nyc.gov/assets/policeform/downloads/PolicingReport_Part%202_FINAL.pdf). A number of the proposals set forth in that draft plan go beyond the scope of this agenda. Citizens Union plans to issue comments on those proposals in a separate paper.

<sup>9</sup> See *Investigation into NYPD Response to George Floyd Protests* ("DOI Report") at 72-111, <https://www1.nyc.gov/assets/doi/reports/pdf/2020/DOIRpt.NYPD%20Reponse.%20GeorgeFloyd%20Protests.12.18.2020.pdf>.



would appear to us to amount to the same thing, although we prefer to rename the agency the Police Oversight Board to reflect its broader mission. We also agree with the view expressed in the DOI Report (and implicit in the Mayor's proposal) that the policy recommendations of such a consolidated agency, like those of the IG currently, would continue to be merely proposals to be considered by the democratically elected branches of City government — the Mayor and the Council.


## **2. THE UPDATING OF TECHNOLOGY USEFUL FOR OVERSIGHT**

One reason the police oversight agencies often find it difficult to access data relevant to their mission is because the information and data storage technology of the NYPD is out of date. For example, many relevant records are handwritten and stored locally. Tablets are available that would permit such records to be uploaded to a central data base.

Similarly, there is still some confusion as to when police officers must activate their body-worn cameras, as well as some non-compliance with the activation requirements. Technology is available that automatically activates an officer's body-worn camera when the officer's gun or taser is drawn and automatically activates the body-worn cameras of all officers in the immediate vicinity whenever one officer's camera is activated. Technology is also available that would permit the footage of body-worn cameras to be searched by GPS coordinates.

## **3. THE CREATION OF A LEGAL FRAMEWORK FOR POLICING**

Unlike any civilian agency, the NYPD, like most police departments around the country, operates with virtually complete discretion, subject only to constitutional limitations enforced by the courts. There is almost no statutory law or properly issued regulations concerning the police function. A few laws have recently been enacted governing discrete subjects like choke holds



and procedures for police stops and the introduction and use of surveillance technology. However, the proper functioning of a police department in a democratic society requires the existence of a body of law regulating its authority and conduct.

This is not to say that every aspect of policing or every item in a police manual should be made subject to a rigid code of law; some discretion is necessary in policing as it is in other areas of government. However, **significant policies, such as those governing the use of force, the handling of demonstrations and the imposition of disciplinary penalties<sup>10</sup>, should be established through the ordinary procedures for enacting statutes or promulgating regulations, after appropriate public notice and comment.** This legal framework should be easily accessible on the NYPD website. We thus agree with the recommendation of the Office of the Attorney General that the policies of the NYPD, as with other City agencies, should be embodied in law and regulations; we also agree with the AG's specific recommendations concerning the substance of use of force regulations.<sup>11</sup>

## **C. THE DISCIPLINARY PROCESS**

### **1. EXPANSION OF CCRB JURISDICTION**


Pursuant to the New York City Charter,<sup>12</sup> the CCRB has the power to investigate and recommend action with respect to complaints against members of the NYPD alleging misconduct “involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, racial slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.” Allegations of racial profiling and discrimination,

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<sup>10</sup> In that regard, we note that the NYPD recently adopted “Disciplinary System Penalty Guidelines” (effective Jan. 15, 2021), [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/disciplinary-system-penalty-guidelines-effective-01-15-2021-compete-.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/disciplinary-system-penalty-guidelines-effective-01-15-2021-compete-.pdf). (known as the “Discipline Matrix”). Although adopted after public notice and comment, the Discipline Matrix is not embodied in formal regulations, places no legal constraints on the Police Commissioner and can be changed by him at any time. Indeed, it specifically states: “Nothing in these Guidelines shall be construed to limit the discretion of the Police Commissioner to impose discipline. The Police Commissioner may modify these Guidelines as appropriate to address emerging issues and advance the goals of the disciplinary system described herein.”

<sup>11</sup> See *OAG Preliminary Report* at 37-38 and 43-44

<sup>12</sup> Chapter 18-A, § 440(c)(1)



however, are not within its jurisdiction. Thus, in a case involving allegations of excessive force and racial profiling, the CCRB conducts the investigation of excessive force while the NYPD's Internal Affairs Bureau conducts the investigation of racial profiling.

There is little to recommend this limitation of authority. **The jurisdiction of the CCRB should be expanded to include allegations of profiling or discrimination based on race, ethnicity, religion, gender, sexual orientation and disability.** In addition, **the CCRB should be able to initiate investigations based on evidence available to it without having to wait for an individual complaint.**<sup>13</sup> Finally, **the jurisdiction of the CCRB should be expanded to include traffic and school safety agents and other the civilian employees of the NYPD.**

## **2. CCRB ACCESS TO NYPD MATERIALS**

Pursuant to the New York City Charter,<sup>14</sup> the CCRB has the power to “compel the attendance of witnesses and require the production of such records and other materials as are necessary for the investigation of matters within its jurisdiction.” In practice, however, the NYPD withholds significant, relevant information from the CCRB or produces it after substantial delays and often with redactions.<sup>15</sup> The NYPD does not provide the CCRB with the complete disciplinary records of police officers who are the subject of complaints - clearly relevant information with respect to credibility as well as the CCRB's recommendation regarding an appropriate penalty.<sup>16</sup> In addition, following the introduction of


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<sup>13</sup> These two recommendations are similar to proposals set forth in the Mayor's State of the City 2021. See note 7 above. However, the Mayor's proposal would give the CCRB authority to investigate only individual instances of “biased-based policing” misconduct, whereas, we support giving it authority to also investigate a pattern or practice of biased-based policing. Inasmuch as the Mayor also proposes to merge the IG into the CCRB, it would appear that in the end, the CCRB would also have that authority too.

<sup>14</sup> Chapter 18-A, § 440(c)(3)

<sup>15</sup> See *DOI Report* at 99-103 (demonstrating NYPD resistance to the production of information not only to the CCRB but also to the IG and the CCPC). See also Eric Umansky and Mollie Simon, *The NYPD Is Withholding Evidence From Investigations Into Police Abuse*, PRO PUBLICA (Aug. 17, 2020), <https://www.propublica.org/article/the-nypd-is-withholding-evidence-from-investigations-into-police-abuse>.

<sup>16</sup> On February 4, 2021, the two agencies entered into a “Memorandum of Understanding Between the New York City Police Department and the New York City Civilian Complaint Review Board Concerning the NYPD Discipline Matrix.” Most of the MOU sets forth a modest commitment by the NYPD and the CCRB to generally abide by the discipline Matrix or, in exceptional cases, to provide a written statement of reasons for any departure. In addition, one of its paragraphs provides: “In any case where the CCRB investigator recommends that an



body-worn cameras, the NYPD resisted and delayed efforts by the CCRB to obtain the footage from body-worn cameras. The two agencies finally agreed to a cumbersome procedure for providing access by CCRB investigators to such footage, but because of the pandemic, it has not been fully implemented.<sup>17</sup>

The NYPD justifies its failure to provide the CCRB with prompt access to documents and other relevant materials based on a myriad of claims of privilege and privacy concerns, some based on statutes designed to protect innocent civilians, not police officers accused of misconduct. It is easy to get lost in the competing legal arguments involved. Our conversations with various interested parties, both inside and outside city government, as well as a review of the relevant laws, convince us that for the most part the NYPD's arguments against sharing materials with the CCRB do not appear to be well supported.

The basic point is that the City currently runs two parallel systems for disciplining police officers. One is run by the NYPD through its Internal Affairs Bureau and has access to all relevant information in the possession of the Department. The other is run by the CCRB and has access only to the materials that the NYPD decides to turn over. This situation is intolerable.

**The CCRB should have prompt and full access to footage from body-worn cameras, police officers' employment history and disciplinary records and all other document and materials in the possession of the NYPD relevant to its investigations.**<sup>18</sup> To the extent that there are well-founded legal arguments making that

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allegation of misconduct be substantiated, the CCRB's Board must have access to the NYPD employment history of the officer in order to appropriately evaluate the appropriate penalty, including but not limited to aggravating and mitigating factors as set forth in the Disciplinary Matrix."

<https://www1.nyc.gov/assets/home/downloads/pdf/office-of-the-mayor/2021/Disciplinary-Matrix-MOU.pdf>.

Even apart from the fact that such an MOU is not legally enforceable and can be revoked at any time, this commitment does not solve the problem of the NYPD withholding relevant documents from the CCRB. The definition of employment history is extremely narrow, referring only to "a document which was previously supplied by the NYPD to the CCRB in cases where CCRB's Administrative Prosecution Unit handled the prosecution of substantiated allegations resulting in charges and specifications." Pursuant to that prior practice, the NYPD provided only some but not all of an officer's disciplinary record. Thus, the MOU fails to cover all relevant employment history and is therefore inconsistent with the Charter provision quoted above granting the CCRB the power to require the production of all records necessary for the investigation of cases within its jurisdiction.

<sup>17</sup> See Ethan Geringer-Sameth, *Under News Body Camera Policy, NYPD Still Controls the Video and the Narrative*, GOTHAM GAZETTE (Sept. 2, 2020), <https://www.gothamgazette.com/city/9723-new-body-camera-policy-nypd-controls-video-narrative>.

<sup>18</sup> See Mayor's State of the City 2021, note 8 above.



impossible, the applicable laws should be changed. However, it should be the Corporation Counsel, not the NYPD, who makes the legal judgment as to whether there are any current legal impediments to the NYPD sharing all relevant materials with the CCRB.

### **3. REMOVAL OF HEARINGS FROM THE NYPD**


All disciplinary proceedings against police officers are heard within the NYPD before administrative hearing officers who are appointed by the Police Commissioner and serve at his pleasure. This is in contrast to all other City agencies for which disciplinary cases against employees (including uniformed employees) are heard before the Office of Administrative Trials and Hearings (OATH). The administrative law judges of OATH serve for fixed terms and are not answerable to the agency head whose employees are the subject of the hearing.

Thus, the officials within the NYPD who hear and make recommendations with respect to disciplinary cases against police officers lack the independence and job security of the administrative law judges within OATH who hear and decide such matters in disciplinary cases involving all other city employees. This anomaly is the result of a state law which has been interpreted to require all disciplinary cases against police officers to be heard and decided within their police department.<sup>19</sup>

**Public confidence in the disciplinary process would be enhanced if the disciplinary hearings for police officers, like those for all other City employees, were conducted before the independent administrative law judges of OATH rather than within the NYPD.** In order to achieve that result, the State Legislature should abolish the requirement in state law that police disciplinary hearings be conducted within the police department. Following such amendment, the Mayor should issue an Executive

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<sup>19</sup> See New York State Unconsolidated Laws § 891; *Lynch v. Giuliani*, 301 A.D.2d 351, 356-57 (1st Dept. 2003).



Order, pursuant to the New York City Charter,<sup>20</sup> transferring disciplinary hearings from the NYPD to OATH.

#### **4. THE COMMISSIONER AS THE FINAL DECISION-MAKER ON DISCIPLINE**

Pursuant to the New York City Charter,<sup>21</sup> the Police Commissioner has “cognizance and control of the government, administration, and discipline of the department, and of the police force of the department.” Although the CCRB may make findings and recommendations with respect to discipline, the Commissioner is the final decision-maker. Recent evidence has revealed a disturbing pattern of departures by the Commissioner from the findings and recommendations of the CCRB (and on occasion from those of the NYPD Trials Commissioner), suggesting a systemic failure to impose penalties on police officers commensurate with the gravity of their wrongdoing. As summarized powerfully by the *DOI Report* at 41 (footnotes omitted):

Over the five-year period between 2014 and 2018 (the last year for which full data is available), CCRB received more than 55,000 complaints from the public, including nearly 20,000 individual misconduct allegations for excessive force. The CCRB fully investigated and substantiated more than 4,000 individual allegations of misconduct, and recommended discipline for nearly 2,500 officers, including recommending more than 600 officers be suspended or terminated. Yet, not once in those five years did the NYPD Commissioner fire an officer following CCRB’s recommendation. In only eight cases over those five years did the NYPD Commissioner determine that the next most serious penalty — a suspension of longer than one month and/or dismissal probation — was merited. Even suspensions of more than 10 days only happened a handful of times a year, on average.

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<sup>20</sup> Chapter 45-A, § 1048(2).

<sup>21</sup> Chapter 18, § 434(a).



In light of this history, we have considered the following three options.

**Option 1:** To some, the appropriate response is to remove the final say over discipline from the Commissioner and place it with some person or board over him. However, while recognizing the gravity of the problem, we are not yet inclined to take that step. We believe that employee discipline is one of the critical functions of management for any organization. Accordingly, every other City commissioner has final authority with respect to employee discipline, and we are loathe to deprive the Police Commissioner of that authority if there is some less drastic alternative to achieve greater accountability.

There is such an alternative set forth in a recent amendment to the New York City Charter,<sup>22</sup> which was added by referendum approving a proposal of a Charter Revision Commission in 2019. It requires the Police Commissioner to provide a detailed, written report to the CCRB in any case substantiated by the CCRB in which the Police Commissioner “intends to impose or has imposed a different penalty or level of discipline that that recommended by the [CCRB] or by the deputy commissioner responsible for making disciplinary recommendations.” Such a report must contain a detailed explanation of the reasons for deviating from the recommendation of the CCRB or deputy commissioner, and in cases in which the Police Commissioner intends to impose or has imposed a lower level of discipline than that recommended, the report must include “an explanation of how the final disciplinary outcome was determined, including each factor the police commissioner considered in making his or her decision.”<sup>23</sup> Because of the application of New York Civil Rights Law § 50-a to those reports, and the judicial stay of the statute repealing that law,<sup>24</sup> those reports were not made available to the public, and we


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<sup>22</sup> Chapter 18-A, § 440(d)(3).

<sup>23</sup> This provision is similar to the procedure set forth in a Memorandum of Understanding between the CCRB and the NYPD entered into on April 2, 2012. See “Memorandum of Understanding Between the Civilian Complaint Review Board (CCRB) and the Police Department (NYPD) of the City of New York Concerning the Processing of Substantiated Complaints”, [https://www1.nyc.gov/assets/ccrb/downloads/pdf/about\\_pdf/apu\\_mou.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/apu_mou.pdf).

<sup>24</sup> That stay was recently lifted after the U.S. Court of Appeals for the Second Circuit affirmed the decision of the U.S. District Court for the Southern District of New York in dismissing the claims of the police and fire officers unions challenging the repeal of § 50-a (with one exception not relevant here). See *Uniformed Fire Officers Ass’n*





do not know how useful or effective this provision has been. However, from the case involving Police Officer Daniel Pantaleo, who applied the chokehold that killed Eric Garner, there is reason to think that when there is public disclosure of the results of a disciplinary proceeding, the Police Commissioner will be more reluctant to depart from the penalty recommendation of the CCRB or the deputy commissioner.

Now, following the repeal of Section 50-a of New York Civil Rights Law, the public will be able to see whether this provision helps in providing the appropriate level of transparency and accountability with respect to police discipline. It will be incumbent upon the Police Commissioner to provide convincing explanations for each and every departure, as well as the aggregate data on how often he or she departs from the findings and recommendations of the CCRB. If the Police Commissioner proves unable to do so, then it will be time to reconsider whether the Police Commissioner should continue to have final authority with respect to discipline.


**Option 2:** We conclude from this evidence that the time has come to remove the final say over discipline from the Police Commissioner and place it with some person or board over him, at least in cases in which the CCRB has recommended the most severe penalties, such as termination or suspension. We recognize that this is a drastic step, as it deprives the Police Commissioner of some authority to control the discipline of police officers that all other City commissioners have with respect to their work force. However, we are convinced that no lesser remedy is likely to achieve real accountability in light of the longstanding failure of the NYPD to impose appropriate sanctions on officers found to have committed serious wrongdoing.<sup>25</sup>

That failure is not due to happenstance, but is structural. As long as the Police Commissioner comes from within the Department,

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*v. De Blasio*, \_\_\_ F.3d \_\_\_, Docket Nos. 20-2789-cv(L) and 20-3177-cv(XAP) (Feb. 16, 2021), [https://www.ca2.uscourts.gov/decisions/isysquery/3391781d-f8b6-4fe6-bd96-3e1f525411ca/21/doc/20-2789\\_so.pdf](https://www.ca2.uscourts.gov/decisions/isysquery/3391781d-f8b6-4fe6-bd96-3e1f525411ca/21/doc/20-2789_so.pdf).

<sup>25</sup> The February 4, 2021 MOU between the NYPD and the CCRB, referred to in note 13 above, does little to solve this problem. In it the parties agree to generally apply the Discipline Matrix recently adopted by the NYPD and if, in exceptional cases, either party departs from the Matrix, to provide a statement of reasons for the departure. The MOU does limit the discretion of the Police Commissioner to depart from the recommendations of the CCRB as long as his proposed departure is consistent with the recommendation of either the Trials Commissioner or the Departmental Advocate.



his training, experience and ties to his officers tend to push him in the direction of excessive leniency. Moreover, even a Police Commissioner who comes from outside the Department is likely to be influenced by the power of the police unions. Public trust in the NYPD cannot be reestablished unless and until its broken disciplinary system is repaired, and we do not see that as a likely outcome as long as the Police Commissioner remains the final authority with respect to all discipline. Accordingly, **in cases in which the Police Commissioner proposes to impose a lesser penalty from the one recommended by the CCRB in cases in which the CCRB has recommended suspension or termination, after writing the required memorandum justifying that departure, we propose that the CCRB should be granted the right to appeal the proposed decision of the Police Commissioner to the Deputy Mayor for Public Safety, who would have final authority over the penalty.**<sup>26</sup> This change in procedure will require an amendment to the provisions of the New York City Charter and Administrative Code that grant the Police Commissioner control of discipline within the NYPD.<sup>27</sup>

**Option 3:** For the reasons set forth in Option 2 above, we believe that the Police Commissioner should no longer play *any* role in deciding disciplinary cases that originate with the CCRB and that the CCRB should be the final decision-maker with respect to cases within its jurisdiction.<sup>28</sup> As a first step, the City Council has introduced a resolution requesting that state law be amended to remove the Police Commissioner's exclusive authority over discipline, and the Chair of the CCRB has testified in support of that resolution.<sup>29</sup> A similar bill has been recently introduced in the


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<sup>26</sup> In the event the Mayor does not appoint a Deputy Mayor for Public Safety, or as an alternative, we would recommend the appointment by the Mayor of a three-person panel, with fixed terms, to decide on the appropriate penalty in such cases.

<sup>27</sup> See Charter § 434(a) and Administrative Code § 14-115(a). It appears that these provisions of city law originated in state law and therefore require state legislative action to amend them. See New York City 2019 Charter Revision Commission, *Preliminary Staff Report* (April 2019) at 14, <https://static1.squarespace.com/static/5bfc4cecf7fde7d3719c06/t/5cc20da7085229f4fcd80ffc/1556221355492/Preliminary+Staff+Report.pdf>. Any such state legislation should also preserve the current exemption from collective bargaining under the Taylor Law regarding NYPD disciplinary procedures. See note 5 above.

<sup>28</sup> In the event that the CCRB is merged into a comprehensive police oversight agency as proposed above, then it would be that agency whose decisions would be final with respect to disciplinary cases within its jurisdiction.

<sup>29</sup> See Res. 1538-2021, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4770966&GUID=E46>; Testimony of Frederick Davie Before City Council Public Safety Committee (Feb. 16, 2021), <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=837165&GUID=0B230AE4-078A-4A38-B639-57108A195767&Options=info%7C&Search=>.



state Legislature<sup>30</sup>. In addition to amendments to State and City law that currently require police disciplinary cases to be heard within the NYPD and decided by the Police Commissioner, this procedure would require a modification of the powers of the CCRB under the Charter and Administrative Code so that the CCRB would be authorized and required to conduct full evidentiary hearings in order to decide charges against police officers with all of the due process protections available in any adjudicatory body.

After considering these three options, Citizens Union has determined to support Option 2, providing the CCRB the right to appeal the Police Commissioner's decision to impose a lesser penalty in certain cases. The evidence demonstrates that the Police Commissioner routinely departs from the recommendations of the CCRB and often fails to hold police officers sufficiently accountable for acts of wrongdoing.

We therefore conclude that there needs to be some oversight of the Police Commissioner's exercise of authority in this area. However, we do not think it advisable to grant the CCRB final decision-making authority over cases in its jurisdiction. We are not comfortable having the same agency act as both prosecutor and judge in discipline cases, with no appeal process from its decisions. In addition, we think that the Police Commissioner, because of his law enforcement experience and expertise, should continue to participate in the disciplinary process. Maintaining the Police Commissioner ability to impose penalties but granting the option to appeal those decisions in certain cases provides for the benefits of that participation while granting final authority to decide cases to someone outside the NYPD in cases involving a proposed departure from the recommendation of the CCRB.

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<sup>30</sup> An act to amend the New York city charter and the administrative code of the city of New York, in relation to providing final discipline authority over civilian complaints to the civilian complaint review board. Jamaal Bailey 2021/S5252. Accessed March 18, 2021. <https://www.nysenate.gov/legislation/bills/2021/S5252>



## D. OTHER MECHANISMS FOR ACCOUNTABILITY

### 1. STATE CERTIFICATION FOR POLICE OFFICERS

We agree with the recommendation of the Office of the Attorney General that the **State should create an authority to certify and decertify police officers** in order to ensure that officers who are terminated or forced to leave one police department because of misconduct are not then hired by another.<sup>31</sup>

### 2. CIVIL LITIGATION AND QUALIFIED IMMUNITY

The defense of qualified or official immunity against public officials alleged to have deprived a plaintiff of a constitutionally protected right serves as an unfair and unnecessary impediment to an appropriate remedy for persons who have suffered such a violation. For that reason, it should be repealed or waived through state legislation in cases against the state, political subdivisions of the state, and state and local officials.

However, it is by no means clear that this would increase accountability of public officials such as police officers, who are indemnified under state law for liability rising from actions taken within the scope of their employment. To be sure, those indemnification provisions could be repealed, but they are there for sound reasons of policy and apply to all public officials, not just police officers. Moreover, even if police officers (or all public officials) were denied indemnification for misconduct, it is unlikely that the result would be greater individual liability and therefore accountability. The unions would undoubtedly implement an insurance plan for their members, whose premiums would come out of union dues, and it is doubtful that they would be tailored to the employment history of each covered individual. Accordingly, **although we support the repeal or waiver of the qualified immunity defense, we do not view it as a significant remedy for the lack of accountability for police misconduct.**

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<sup>31</sup> See *OAG Preliminary Report* at 41-42.



## Conclusion

We regard this agenda for reform as comprehensive — with each of the proposals supporting and strengthening the others. This is not to say that we intend them to require an all-or nothing approach. Rather, we urge that those considering our agenda recognize the ways in which many (but not all) of the proposals are interrelated and work together to make them more likely to be effective. For too long, the approach to police reform has tended to proceed in a piecemeal fashion; we think the time is ripe for a more integrated approach.

Adoption of these proposals will create a policing function in New York City that is more responsive to the Mayor, and thus to the electorate, and will establish an oversight process that is stronger and more transparent, with an oversight agency that has the tools and information to perform its role effectively. Establishing accountability is a key element of rebuilding the trust between the NYPD and the communities it serves.

However, we recognize this is just the prerequisite for a more intensive examination of the police role in this City. The gap between how the police perceive their role and how they are perceived in many communities is just too great. As public cooperation is essential to addressing crime, that gap is unsustainable in our society. In addition, the current allocation of responsibilities does little to address the underlying problems that beset many neighborhoods, which correlate with higher levels of criminal activity. What functions should we call upon the NYPD to do, and how should the NYPD interact with the people it serves when performing those functions? We will address those topics in a future paper.



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