

**The Bronx  
Defenders**

**Redefining  
public  
defense**

BY ELECTRONIC MAIL

July 11, 2022

Civilian Complaint Review Board  
Attn: Heather Cook, Esq.  
100 Church Street, 10th Floor  
New York, NY 10007

Dear Ms. Cook & CCRB Board Members:

As lawyers who represent low-income people of color in civil rights cases, we write to support the proposed rules for the new racial profiling and biased policing division at the Civilian Complaint Review Board. We have extensive experience seeking redress for racialized police misconduct on behalf of people in the Bronx, and we know the uphill battle they face in attaining accountability for biased policing. While our clients are the greatest experts in this injustice, we write to offer insights we have gleaned in representing them that bear on the need for and appropriateness of the proposed rules.

### **The Bronx Defenders and the Impact Litigation Practice**

Before sharing our comments on the proposed rules, we first provide context on our perspective. The Bronx Defenders (BxD) is a public defender non-profit with a staff of over 350 that includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, social workers, advocates and investigators who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. From this representation, the staff at BxD learn of widespread and often intractable injustices affecting low-income people in the Bronx.

The Impact Litigation Practice (ILP) is a civil rights division at BxD that uses civil litigation to challenge systemic problems or injustices that affect our clients. ILP collaborates with others at BxD to identify and develop cases, including cases that challenge racially discriminatory policing, unequal access to housing and employment, government seizure of property, curtailment of parental rights in family court proceedings, immigration abuses, and other government

misconduct. We choose cases based on the needs of the clients we serve, and our docket is driven by the knowledge we gain from our direct representation.

Drawing from this experience in direct and systemic representation, we support the rules promulgated by the Civilian Complaint Review Board (CCRB). In these comments, we note the current difficulties in scrutinizing bias-based policing and racial profiling; then explain how the CCRB's new investigatory authority helps to address these challenges; and finally articulate why the definitions proposed by the CCRB are appropriate. When the City Council amended the CCRB's charter, it aimed for "greater accountability" and "improve[d] public safety for all New Yorkers."<sup>1</sup> We believe the proposed rules align with those goals.

### **Individuals Subject to Biased Policing Face Hurdles to Accountability.**

We have seen that low-income people in the Bronx experience racially biased policing but that many do not seek accountability because seeking accountability presents risks to them or seems a futile effort. We have had clients or community members inquire about the possibility of leveling civil rights claims against officers, and it is common to hear them describe their experience of policing as "harassment." These people are uniformly Black or brown, and they describe the abuse as racially motivated—a perspective that is borne out by the facts they share. These are not isolated incidents, yet the corrosiveness of racially biased policing routinely goes without official condemnation and the predominantly Black and brown communities that absorb its harms are without real redress.

We recently worked with a group of over twenty clients to challenge racialized police misconduct at a protest in Mott Haven and to demand accountability, and their experience exemplifies some of the difficulties those subjected to biased policing confront. Mott Haven is a neighborhood in the South Bronx comprised of predominantly Black and brown residents. Racially disparate and disproportionate police violence against people in this neighborhood and the Bronx is persistent and longstanding.<sup>2</sup> Yet there have been no independent government systems available to investigate individual instances of potential police bias.

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<sup>1</sup> Press Release, *CCRB Granted Power to Self-Initiate Complaints by City Council* (Dec. 9, 2021), [https://www1.nyc.gov/assets/ccrb/downloads/pdf/about\\_pdf/news/press-releases/2021/PR\\_Self-Initiating\\_Complaints\\_Bill\\_Victory\\_12092021.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/news/press-releases/2021/PR_Self-Initiating_Complaints_Bill_Victory_12092021.pdf) (statement from Council Member Adrienne Adams).

<sup>2</sup> See, e.g., Human Rights Watch, *"Kettling" Protesters in the Bronx*, at 2 (Sept. 30, 2020), [https://www.hrw.org/sites/default/files/media\\_2020/10/us\\_mott%20haven0920\\_web.pdf](https://www.hrw.org/sites/default/files/media_2020/10/us_mott%20haven0920_web.pdf) (noting that "more complaints about the use of physical force by police officers have been made in Mott Haven's 40th precinct than in any of New York City's other 76 precincts") (citing Eric Umansky, *We're Publishing Thousands of Police Discipline Records That New York Kept Secret For Decades*, PROPUBLICA (July 26, 2020), <https://www.propublica.org/article/nypd-civilian-complaint-review-board-editors-note>); see also Joseph Goldstein, *Recording Points to Race Factor in Stops by New York Police*, N.Y. TIMES (Mar. 21, 2013), <https://www.nytimes.com/2013/03/22/nyregion/bronx-officers-recording-suggests-race-is-factor-in-stops.html> (reporting on 2013 recording in which 40th Precinct Commanding Officer can be heard pressuring an officer to increase stops of young Black men).

What happened at the Mott Haven protest is likely an acute manifestation of unchecked police bias. On June 4, 2020, several hundred people peacefully protested against police violence in Mott Haven and the the New York City Police Department (NYPD) trapped, physically abused, and lawlessly arrested them. The protesters were met by officers pointing guns from surrounding rooftops, a helicopter flying low overhead, and dozens of officers who were dressed in military style armor. The NYPD encircled the protesters, and then, with the protesters trapped, officers unleashed a brutal attack, indiscriminately beating protesters with batons, firing pepper spray at them, and shoving and throwing them to the ground.

While there were numerous large protests in New York City in the spring of 2020, some of which involved looting, the NYPD arrested and charged more protesters in Mott Haven than any other protest.<sup>3</sup> Mott Haven is a majority Black and brown neighborhood, and it was in this neighborhood and not any other neighborhood—not protests occurring at the same time in whiter or richer neighborhoods or even the neighborhood in downtown Manhattan that experienced extensive looting<sup>4</sup>—that the NYPD used such a militarized force and instigated a mass arrest.<sup>5</sup> In sharp contrast to the treatment afforded the Mott Haven protesters, a group of white protesters who stopped traffic on City bridges just a few months later faced no police violence and no arrests.<sup>6</sup> Across the City, Black protesters faced more significant punishment from the police than white protesters: Black protesters received 68% of felony charges while only comprising 38.4% of the people charged.<sup>7</sup>

The disparate treatment of the Mott Haven protesters was also evident from the individual experiences of our clients. NYPD officers threw one of our Black clients violently back into the protest after she tried to leave before the curfew. NYPD officers searched the hair of a Latino client, and she saw the NYPD search the hair of other Black and brown protesters too but not white ones. She also noticed that officers were targeting people with darker skin for worse treatment. Our clients witnessed the NYPD harass and arrest Black and brown community members who just happened to be near the protest. Officers pulled a Muslim client's headdress over his eyes while beating him. And one Black client noticed that white women were released more quickly from booking while he and other Black people were held longer.

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<sup>3</sup> Human Rights Watch, *supra* note 2, at 15.

<sup>4</sup> The NYPD Inspector General found that “[u]nlike some protests that continued in various parts of Manhattan and Brooklyn well after 8:00 p.m., the NYPD strictly enforced the curfew in the Bronx.” See New York City Department of Investigation, *Investigation into NYPD Response to the George Floyd Protests*, at 21 (Dec. 18, 2020), <https://www1.nyc.gov/assets/doi/reports/pdf/2020/DOIRpt.NYPD%20Reponse.%20GeorgeFloyd%20Protests.12.18.2020.pdf>; see also *NYC Stores Destroyed by Looters Riots During George Floyd Protests*, ABC7NY (May 31, 2020) <https://abc7ny.com/looting-nyc-was-there-in-soho/6223350>.

<sup>5</sup> NOC 202000072634; NOC 202000072379; NOC 202000072632; see also Human Rights Watch, *supra* note 2, at 7, 31.

<sup>6</sup> Jake Offenhartz, *Photos: Police Stand By as Caravans of Trump Supporters Block Bridges, Threaten Counter-Protesters*, GOTHAMIST (Nov. 2, 2020), <https://gothamist.com/news/photos-police-stand-caravan-trump-supporters-block-bridges-threaten-counter-protesters>.

<sup>7</sup> New York City Department of Investigation, *supra* note 4, at 27.

Our clients from the June 4 protest joined together as a group to demand redress for this racially motivated police misconduct. The group—comprised of over twenty people and known as the Mott Haven Collective—demanded immediate compensation for all victims as well as a package of reparations for the Bronx that would hold those responsible accountable and provide meaningful redress for those targeted.<sup>8</sup> All of our clients from the June 4 protest received pre-litigation settlement offers from the Comptroller’s office, but they did not obtain the broader accountability for past and present patterns of racially biased policing because the City of New York resisted those demands. Indeed, the Mayor failed to respond to them at all. And the CCRB, despite its mission to respond to misconduct by NYPD officers and despite the visible misconduct with which it was faced, lacked the power to even investigate racial bias by the officers on the scene. If such mass, coordinated efforts cannot attain accountability for biased policing that happens in the plain light of day, what hope is there for the individual subject to racialized policing who speaks out alone?

Had institutional mechanisms for scrutiny of individual instances of biased policing existed in New York City before June 4, 2020, we believe the racialized violence against the Mott Haven protesters could have been prevented. And while the Mott Haven Collective decided to publicly demand redress from the City, many people subjected to biased policing face hurdles that prevent them from lodging complaints:

- A person subjected to racially biased policing might witness or hear of other Black and brown people in their community being targeted by the same officer, but this person’s observations are hearsay unless they can adduce documents corroborating the other encounters or those other victims are willing to testify. Corroborating documentation is extremely hard to come by given the extent to which the NYPD resists FOIL requests, the failure of officers to properly record encounters,<sup>9</sup> and the difficulty of identifying what documents might even exist. Without comparisons—i.e., how has this officer treated others?—it can be very difficult to hold a particular officer accountable and stop their practice of biased policing.
- When an individual is subjected to racially biased policing, they often are subjected to ongoing criminal prosecutions, deportation proceedings, family proceedings, or unstable housing as a result.<sup>10</sup> In these complex situations, individuals may not want to risk a waiver

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<sup>8</sup> Letter to Mayor Bill DeBlasio & Comptroller Scott M. Stringer from the Mott Haven Collective, *Demand for Reparations* (Jan. 26, 2021), <https://www.bronxdefenders.org/wp-content/uploads/2021/01/2021.26.01-Mott-Haven-Collective-Demand.pdf>.

<sup>9</sup> Letter from Mylan L. Denerstein, *Sixteenth Report of the Independent Monitor*, at 71-72 (May 6, 2022), <https://www1.nyc.gov/assets/nypd/downloads/pdf/monitor-reports/federal-monitor-16th-report.pdf>; see *infra* note 20 and accompanying text.

<sup>10</sup> See Matt Katz, *Held by ICE Longer Than Any New Yorker, Bronx Man Is Finally Freed*, WNYC (Sept. 29, 2020), <https://www.wnyc.org/story/held-ice-longer-any-new-yorker-bronx-man-finally-freed> (recounting the experience of Ousman Darboe, a BxD client who was arrested eight times by NYPD, held on Rikers Island for months, and unconditionally pardoned for his only criminal conviction—yet continues to face removal proceedings); Ashoka Mukpo, *For Black Immigrants, Police and ICE Are Two Sides of the Same Coin*, ACLU (Sept. 3, 2020), <https://www.aclu.org/news/criminal-law-reform/for-black-immigrants-police-and-ice-are-two-sides-of-the-same-coin>.

of their Fifth Amendment rights or may fear further retaliation from immigration, family, or housing authorities from speaking up. Lawyers often are reluctant to take on police misconduct cases when these parallel proceedings are ongoing, because they are more complicated and potentially not as lucrative. These complications directly result from the racially biased policing yet allow that same misconduct to go unexamined and unchallenged.

- A person who finds a lawyer and can avoid the risk of self-incrimination may still decide not to move forward. After an experience of bias that targets them, individuals are understandably afraid of further retaliation and mistrustful that the institutions that permitted the bias in the first place will meaningfully check the misconduct in the future. The City's resistance to the accountability sought by the Mott Haven Collective exemplifies the inadequate response that occasions mistrust in agencies charged with oversight.

Even if all of these hurdles are bypassed and the individual decides to move forward with litigation or a CCRB investigation, the current scrutiny is not sufficient to identify concerning patterns, hold the officer accountable for their actions, and prevent similar situations from recurring.

### **The New Self-Initiation and Look-Back Authorities Are Essential to Meaningful Review.**

The new investigatory authority outlined in the CCRB's rulemaking responds to the difficulty of holding officers accountable for biased policing and racial profiling. The new authority, which draws directly from the City Council's January amendments to the CCRB's charter and is thus squarely within the CCRB's power, notably authorizes the CCRB to investigate bias.<sup>11</sup> But it also involves two primary components that make the jurisdictional expansion meaningful in practice: the self-initiation of complaints<sup>12</sup> and the look-back authority.<sup>13</sup>

The **self-initiation power** permits the CCRB to begin investigations into officer misconduct without requiring a formal complaint to be filed. Under the current system, the CCRB can only respond if a complainant comes forward. As discussed above, the potential complainant may not be able or willing to file a complaint for a variety of reasons, including the risk of self-incrimination, mistrust, and lack of access to legal advice. The CCRB is required to close its eyes to instances of misconduct, even though they may be widely publicized or blatant. This can have a limiting effect on the CCRB's power because, when complainants and the public see that the CCRB cannot even investigate obvious instances of potential bias simply because a formal complaint has not been lodged, trust in the CCRB's utility and authority might erode.<sup>14</sup> This deters future complainants from coming to the CCRB.

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<sup>11</sup> N.Y.C. Charter §§ 440(c)(1), 441; *Proposed Rules: Implementation of Charter Changes and Other Amendments*, Civilian Complaint Review Board, at 10-11 (May 27, 2022) [hereinafter *Proposed Rules*] (amending § 1-02(a)).

<sup>12</sup> N.Y.C. Charter § 440(c)(1); *Proposed Rules*, *supra* note 11, at 10 (amending § 1-02(a)).

<sup>13</sup> N.Y.C. Charter § 441(b)(1); *Proposed Rules*, *supra* note 11, at 11, 17 (amending §§ 1-02(b), 1-25).

<sup>14</sup> *See, e.g.*, NEW YORK CIVIL LIBERTIES UNION, MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY, 1994-2006, at 3 (2007), [https://www.nyclu.org/sites/default/files/publications/nyclu\\_pub\\_mission\\_failure.pdf](https://www.nyclu.org/sites/default/files/publications/nyclu_pub_mission_failure.pdf).

The self-initiation power alters this state of affairs, allowing the CCRB to intervene and respond to potential misconduct. The self-initiation authority prompts investigation of potential biased policing, after which the CCRB can transparently explain to the public why certain conduct does or does not violate the standards governing police conduct.

The **look-back authority** similarly strengthens the CCRB’s ability to build community trust and provide effective oversight of police misconduct. Specifically, the look-back authority, which permits the CCRB to examine an officer’s prior professional history after a government agency or court has determined that they have engaged in an act of bias,<sup>15</sup> allows the CCRB to place an officer’s act of bias in context. The difficulties with filing litigation or a complaint with the CCRB, described above, can obscure an officer’s prior acts of bias.

As such, when a concrete finding of bias is made, that finding may be akin to the tip of an iceberg poking above the water: it is an important warning sign that the CCRB should use to scrutinize the officer’s past history. Such scrutiny can expose whether an officer is particularly disposed to instances of bias.<sup>16</sup> It can also expose organizational conditions that may be contributing to an individual’s acts of bias, providing more information to prevent such acts from recurring.<sup>17</sup> The look-back authority thus can build public trust in the CCRB by providing important context for an officer’s actions.

### **Improper Use of Body Cameras Is an Abuse of Authority.**

In light of the challenges to police accountability described above, we support the CCRB designating misconduct around body-worn cameras (BWCs) as an abuse of authority.<sup>18</sup> When the NYPD began its BWC pilot in April 2017, the goal was to reduce “mistrust between police and community.”<sup>19</sup> It aimed to do so by “provid[ing] a contemporaneous, objective record of stops and frisks, allowing for the review of officer conduct by supervisors and the courts.”<sup>20</sup> Yet despite this goal, officers have repeatedly failed to capture critical portions of civilian interactions.

For example, as BxD submitted as testimony to the City Council in November 2019, officers broke into a 59-year-old woman’s apartment after she denied needing help, tackling her and causing

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<sup>15</sup> The Charter and the implementing rules require such a look-back if the officer has engaged in a “severe act of bias.” See N.Y.C. Charter § 441(b)(1); *Proposed Rules*, *supra* note 11, at 11. A “severe act of bias” is one, *inter alia*, that causes physical injury or death or that shocks the conscience. See *Proposed Rules*, *supra* note 11, at 10 (amending § 1-01).

<sup>16</sup> See, e.g., Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1753-54, 1758 (2019).

<sup>17</sup> See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 463-64 (2004).

<sup>18</sup> *Proposed Rules*, *supra* note 11, at 7.

<sup>19</sup> Office of the Mayor, *Mayor DeBlasio, Commissioner O’Neill Host Press Conference to Announce First Phase of Body-Worn Camera Roll Out*, CITY OF NEW YORK (Apr. 27, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/784-17/transcript-mayor-de-blasio-commissioner-o-neill-host-press-conference-announce-first-phase-of>.

<sup>20</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 685 (S.D.N.Y. 2013).

physical pain. The officers charged her with obstruction of governmental administration. The officers' BWCs were not turned on until after the woman's handcuffing was complete, preventing scrutiny of the unlawful entry and use of force.<sup>21</sup>

When officers improperly use body-worn cameras, they impede the CCRB's ability to render a fair investigation and interfere with the complainant's right to be heard—either before the CCRB or more broadly. In many officer misconduct cases, there are no witnesses except the officers and the complainant, and corroborating evidence for the misconduct is sparse. Body-worn cameras have the potential to pierce a credibility battle that often leans in favor of officers. In our experience, misuse of body-worn cameras not only inhibits that potential but disproportionately prejudices our clients, robbing them of the critical corroborating evidence to substantiate their claims. As such, the CCRB is appropriately designating the misuse of BWCs as an abuse of authority.

### **The CCRB's Proposed Definitions Are Grounded in Existing Law.**

The Proposed Rules employ different terms to define an “act of bias,” “bias-based policing,” and “racial profiling.”<sup>22</sup> Each definition is grounded in existing New York City law and appropriately carries out the City Council's intent in passing the statute.

- “Act of bias” is defined as turning on “animus” on the basis of six protected categories; this definition comes directly from the City Council's amendments to the CCRB's Charter and is unchanged in the Proposed Rules.<sup>23</sup>
- “Bias-based policing” is defined as acts that rely on certain protected categories as a “determinative factor in initiating law enforcement action against an individual.” This definition, while not in the CCRB's Charter, is similarly grounded in New York City statute: law enforcement officers are currently banned from engaging in “bias-based profiling,” which the City Council defined identically to the CCRB's proposed definition.<sup>24</sup>
- “Racial profiling” is defined as a law enforcement action “motivated, at least in part, by the civilian's actual or perceived race, color, ethnicity, or national origin,” unless there is a specific and reliable suspect description that includes other identifying information

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<sup>21</sup> *Hearing re: Body Worn Cameras: Written Testimony of The Bronx Defenders*, THE BRONX DEFENDERS (Nov. 18, 2019), <https://www.bronxdefenders.org/wp-content/uploads/2020/01/BxD-Body-Cam.City-Council-Testimony.pdf>.

<sup>22</sup> *Proposed Rules*, *supra* note 11, at 7, 9-10.

<sup>23</sup> N.Y.C. Charter § 441(a). The City Council's definition is appropriately grounded in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Judicial precedents interpreting the Equal Protection Clause have stated that “animus” against a protected category, where a government official intentionally discriminates against someone on the basis of a protected category, is a primary way that the clause can be violated even without an explicitly discriminatory policy. *See Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)).

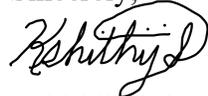
<sup>24</sup> N.Y.C. Admin. Code § 14-151(a)(1).

beyond race, age, and gender. This definition comes from the NYPD's own Patrol Guide, which notes that such enforcement actions violate Department policy.<sup>25</sup>

### **Conclusion**

Individuals who bear the consequences of police bias and racial profiling are often not in a situation to meaningfully challenge that misconduct, permitting it to continue unchecked. The City Council recognized this unfortunate reality by granting the CCRB authority to self-initiate complaints and look back at an officer's history, which the CCRB is crucially implementing through these rules. As such, we support these rules and urge their adoption.

Sincerely,



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Jenn Rolnick Borchetta  
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<sup>25</sup> *Procedure 203-25, Department Policy Prohibiting Racial Profiling and Bias-Based Policing*, N.Y. POLICE DEP'T (July 7, 2016), [https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations\\_pdf/pg203-25-dept-policy-prohibiting-racial-profiling.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg203-25-dept-policy-prohibiting-racial-profiling.pdf).