



**Testimony of the Washington Lawyers' Committee for Civil Rights and Urban Affairs<sup>1</sup>**

**Concerning**

**B23-0882, The Comprehensive Policing And Justice Reform Amendment  
Act of 2020**

**October 15, 2020**

The Comprehensive Policing and Justice Reform Amendment Act of 2020 is an important step to address injustice in our system of policing, but it is only one-step. Enactment of this legislation will make permanent critical reforms that the Council enacted earlier this year.

This Council has in recent years demonstrated a commitment to addressing the inequity and injustice of policing practices in the District. Long before the economic crisis created by COVID-19 and the public attention to policing that was brought about by the national uprising in response to the in-custody deaths of George Floyd and others, the Council enacted the Neighborhood Engagement Achieves Results Act and engaged in serious oversight of the Metropolitan Police Department.

While these reforms are important, they are by themselves insufficient and leave unaddressed fundamental injustices. This bill is an important milestone in re-envisioning policing in the District but should not be the end of the journey. In coming months, the Council will receive recommendations from the Police Reform Task Force, the Task Force on Justice and Jails, and the Criminal Code Review Commission. We urge that those recommendations serve as the basis for further comprehensive action by the Council.

**The Washington Lawyers' Committee Supports this Legislation**

The Washington Lawyers' Committee supports this bill. There are, however, several provisions that should be strengthened. A brief discussion of those provisions is set forth below:

**Body-worn camera policy:** We support the proposal to improve access to body-worn camera recordings. Body-worn cameras provide transparency and give the community a view into how MPD polices its community.

For years, community members voiced concerns about the difficulty in gaining access to body-worn camera footage. In 2019, this Council passed a law granting family members who

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<sup>1</sup> The Washington Lawyers' Committee was founded in 1968 to address racial and economic injustice through litigation and other advocacy. The Committee has a long history of working to address discrimination in housing, employment, criminal justice, education, public accommodation and against persons with disabilities. We work closely with the private bar to bring litigation and pursue policy initiatives.

lost loved ones to law enforcement access to body-worn camera footage. However, family members continue to have issues with the program. Family members are not given the opportunity to view all the footage prior to its release, nor were they given adequate notice of the release of the footage. In order to strengthen the body-worn camera policy and improve transparency, we recommend the following provisions.

- Within 48 hours after a police involved shooting or serious use of force incident, MPD will ensure that the next of kin has had the opportunity to view all unedited footage the department plans to be released.
- Within 48 hours after family members view the footage, a representative from the City should call the next of kin informing them of the release date and time. The representative would ask the family members consent to release.
- In the interest of transparency, the Chief of Police should be required to consult with a community advocacy group or civil rights group on the release of footage of shootings or uses of force that have resulted in media coverage, protest, or raised concerns by community leaders.
- When the MPD declines to release footage, including videos of significant public interest, MPD should provide a written justification for denial within seven days.
- Additional accountability measures must be put in place for failure to adhere to the policy.

**Consent Searches:** The Washington Lawyers' Committee urges the Council to prohibit all consent searches. The uneven power between officers and residents is inherently coercive.<sup>2</sup> Stops are stressful experiences, and individuals who have been stopped have a reasonable anxiety for their safety and the consequences of declining to agree to be searched.<sup>3</sup>

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<sup>2</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (Consent is determined by an examination of the “totality of circumstances.”)

<sup>3</sup> Legal commentators have called into question whether the “totality of circumstances” analysis articulated by the Supreme Court for determining whether consent is freely given fairly accounts for the coercive effect of police encounters. See, e.g., B. Sutherland, *Whether Consent To Search Was Given Voluntarily: A Statistical Analysis Of Factors That Predict The Suppression Rulings Of The Federal District Courts*, *New York University Law Review* (2006); <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-81-6-Sutherland.pdf>.

If the Council does not prohibit consent searches outright, in order to protect the critical constitutional right to be free from unreasonable searches and seizures, we recommend additional provisions:

- The detention to request a consent search can last no longer than the time that it takes to provide the advisements required by law and receive an answer from the person being detained. Overly long detentions or repeated requests should vitiate the consent.<sup>4</sup>
- Given the inherently coercive quality of stops and detention and the high value in ensuring the consent is freely given, if the consent is not in writing or on body-worn camera video, the presumption of inadmissibility should be irrebuttable.
- Officers should be required to complete a report on every consent search or request to conduct a consent search that includes a narrative describing the justification for seeking to conduct the search. Officers should be required to provide a justification that is specific and individualized to the circumstances, and canned or form language should be prohibited.
- We would favor requiring officers to obtain the permission of a supervisor before seeking to conduct a consent search. The requirement that officers justify the search to a supervisor before seeking consent will reduce searches that are pretextual or motivated by bias.
- The Department should be required to report on a quarterly basis the number of consent searches sought, the number conducted, the location of each consent search sought, the location of each consent search conducted, and the age, gender, and race of the person searched or sought to be searched.

**Training and the Police Officers Standards and Training Board:** The proposal to increase and mandate additional training on bias-free policing is important. While there is some dispute on the effectiveness of implicit bias training,<sup>5</sup> that may have more to do with the course delivered than the concepts involved. In order to make bias free policing training effective, we strongly recommend that the bill require that the City engage people and organizations from

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<sup>4</sup> *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015)(Police cannot extend a traffic stop longer than necessary to write the ticket in order to conduct a search in the absence of probable cause that would justify the additional detention and search).

<sup>5</sup><https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior>

impacted communities in the development and delivery of the training to officers, including people of color, people living in poverty, youth, LGBT persons, persons with disabilities, returning citizens, non- and limited-English speakers, and others.

Organizations led by people most likely to be policed should be compensated to be part of the design and delivery of training. Compensation of these participants will not only appropriately recognize their expertise, but will ensure that their contributions are valued.

In addition, this section of the bill requires training for officers on the obligation to report misconduct by other officers. This is a critical step, but it should be strengthened. We strongly encourage the Council to mandate that the City adopt a formal bystander intervention program by expanding the Active Bystander for Law Enforcement Project that is currently being piloted by MPD.<sup>6</sup>

**Deadly Force:** The proposed changes to use of force practices in the pending legislation are important but incomplete. Critical omissions are the requirement that officers avoid force when possible and that de-escalation is mandatory. This can be accomplished by strengthening Sections 119 (b)(2) & (3) and (c)(2)(B) & (C). De-escalation should not be just a “factor,” but mandatory. Moreover, this section should be expanded to all uses of force, not just deadly force.

Police officers are among the few public officials authorized to use force, including deadly force, in their official capacity. The execution of stops and arrests “necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it.”<sup>7</sup> The authority to use force, while broad, is not unlimited. The Fourth Amendment establishes the right of “people to be secure in their persons” and to be protected from “unreasonable searches and seizures.”<sup>8</sup> It has long been understood that the Fourth Amendment places limits on the use of force by law enforcement. Force, to be constitutional, must be objectively reasonable.<sup>9</sup> Objective reasonableness is determined by a series of factors, including: “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>10</sup>

The legal standard sets a very low bar. Even when the force used is constitutional, it can be contrary to the values of the community or the policies of a department, and even a small percentage of unnecessary or excessive uses of force can undermine trust and legitimacy. There

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<sup>6</sup> <https://www.msn.com/en-us/news/us/we-have-to-police-ourselves-dc-program-trains-officers-to-intervene-and-prevent-harm/ar-BB1a11z8>. See also, Ethical Policing is Courageous program in New Orleans, <http://epic.nola.gov/home/>.

<sup>7</sup> *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

<sup>8</sup> U.S. Const. amend. IV.

<sup>9</sup> *Graham v. Connor*, 490 US 386 (1989).

<sup>10</sup> *Id.* at 396.

is often a very large gap between what is “lawful” and what is “right” in the use of force. Therefore, community members, and this Council, should expect that police officers will make every effort to avoid and minimize the use of force.<sup>11</sup>

Forward looking police departments have included the LEED Model (Listen and Explain with Equity and Dignity) in their policies to ensure that force avoidance and de-escalation become part of the policing culture. The LEED model is described in Principles of Procedurally Just Policing from the Justice Collaborative at Yale Law School as follows:<sup>12</sup>

Principle 30:

De-escalation tactics—whether verbal or physical—should be used where possible.

- In order to de-escalate a situation, officers should attempt to use one or more of the following techniques, in addition to any other techniques, words, or actions reasonably intended to slow down an encounter and engage the individual(s) in the encounter:

**Verbal de-escalation:**

Use the Listen and Explain with Equity and Dignity (LEED) framework:

- *Listen*—allow people to give their side of the story; give them voice
- *Explain*—officers should explain what they are doing, what the individual can do, and what will happen
- *Equity*—officers should explain why they are taking action; the reason should be fair and show that the individual’s statements and input were taken into account
- *Dignity*—officers should act with dignity and leave the individual with their dignity
  - Echo back the individual’s statements to show that the officer is listening
  - Communicate using verbal persuasion, including advisements

**Physical de-escalation:**

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<sup>11</sup> See e.g., Mourtgos & Adams, Assessing Public Perception of Police Use-of-Force: Legal Reasonableness and Community Standards, Justice Quarterly (October 2019), <https://www.tandfonline.com/doi/abs/10.1080/07418825.2019.1679864>.

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[https://law.yale.edu/sites/default/files/area/center/justice/principles\\_of\\_procedurally\\_just\\_policing\\_report.pdf](https://law.yale.edu/sites/default/files/area/center/justice/principles_of_procedurally_just_policing_report.pdf):

- Avoid physical confrontation, unless immediately necessary to prevent direct harm to others or to stop behavior that may result in serious harm to others
- Use physical de-escalation techniques, including:
  - moving temporarily to a safer position
  - communicating from a safe position
  - decreasing exposure to potential threat using distance or cover

In addition, officers should be given significantly more guidance on when and how to exercise discretion not to engage in an enforcement action. There are many occasions when an officer may have the authority to take someone into custody, but circumstances dictate that there is little or no public safety benefit to doing so and the safer and better course is to withdraw. This is especially true in the context of minor offenses that do not threaten public safety.<sup>13</sup>

While de-escalation and force avoidance could be addressed in policy, given the seriousness of these issues and the record of conduct of the MPD, it is important that they be codified in law.

**Provisions Regarding Police Response to First Amendment Activity:** The proposed limitations on the use of force and other responses to First Amendment activity are important, but the exception to use riot gear for an "immediate risk to officers of significant bodily injury" is overbroad and subject to interpretation. The use of riot gear is perceived by demonstrators as oppressive, rather than defensive, and as a consequence it has a significantly escalating effect.<sup>14</sup> The role of police should be to facilitate First Amendment exercise and not engage in tactics that are intimidating or appear to be retaliatory.

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<sup>13</sup> See, for example, the policy of the Saint Paul Minnesota Police Department.  
<https://www.stpaul.gov/books/40400-tactical-disengagement>.

<sup>14</sup> See, e.g., after action of response to Ferguson demonstrations.  
<https://www.policefoundation.org/wp-content/uploads/2018/08/After-Action-Assessment-of-the-Police-Response-to-the-August-2014-Demonstrations-in-Ferguson-Missouri.pdf>.

FINDING 17. Many community members perceived law enforcement using the standard protective equipment worn by officers, such as helmets, external vests, and shields, for offensive and not defensive measures... Officers wearing defensive and tactical equipment should be staged out of sight during peaceful demonstrations.

It is telling that this section addresses the “deployment” of officers in riot gear, which by definition is a planned event, even if the period of planning is brief. We urge that the section be modified to require prior notification, except in exigent circumstances, to the Deputy Mayor for Public Safety, the Chair of the City Council and the Chair of the Council’s Judiciary Committee. The notifications should contain a detailed description of the conditions that justify the use of riot gear.

In addition, we recommend that the Council define “riot gear.” Leaving this term open may create varying interpretations inconsistent with the Council’s intent. Moreover, “First Amendment” activity may be too narrow to capture all of the contexts that the Council is seeking to address. A term like “mass gatherings” might be more effective.

**Metro police:** We strongly support the recommendation to create civilian oversight of the WMATA Police Department, but it is not enough. We urge that the bill be amended to require that Metro Police be:

- Subject to open records laws;
- Required to publish its policies on line; and
- Required to comply with the policies of the MPD.

Although Metro Police is a public agency, it is extremely difficult to learn anything about how it operates. It makes almost nothing public. Beyond daily crime reports that show the time and location of arrests, reports and citations, it does not post any data on its website. It also does not post any of its policies. In short, Metro Police is incredibly opaque.

There is no other police jurisdiction in this region that is subject to such limited oversight or for which there is such limited transparency. The Metro Police has a critical impact on the community and should be subject to the same rules as MPD.

### **The Need to Continue to Address Policing Beyond this Bill**

The reforms in this Bill are important. However, the issues concerning policing in the District run deep and require a re-examining of fundamental questions about the role and function of law enforcement. As the Council moves forward with further reform efforts, and engages in the discussion of re-imagining policing, we urge you to keep the following principles in mind:

**First**, transforming policing requires that race equity be at the core of every consideration. Involvement with the criminal legal system is a major driver of inequality in the District of Columbia. The District has a high rate of incarceration that disproportionately affects African American men, women and families. Ninety percent of the District’s prison population is

African American and only four per cent is white despite that the City is almost half white and half Black. The District has one of the highest rates of incarceration in the nation.

The disparities in the District's criminal system involvement cannot be explained by the often asserted canard that there are behavior differences between whites and African Americans. Police enforce the laws one way in white communities and a different way in Black communities - Black people get arrested when white people do not for the same conduct.<sup>15</sup> Systemic racism is built into the structure and practices of policing.

**Second**, the over policing and underserving of Black and Brown communities not only create racial disparity in criminal legal system involvement but also are dangerous and contrary to public safety. Every unnecessary encounter is dangerous, and that danger compounds. Philando Castile is a far too common experience. He had been stopped 49 times for minor traffic and equipment violations before he was shot and killed by a Minnesota police officer.<sup>16</sup>

Urgent steps to reduce police interaction are essential. The Council should build on the practices implemented during COVID to reduce custodial arrests and make those practices permanent. Additional strategies should be employed by expanding violence interrupter programs, strengthening restorative justice models, and supporting community-based, impacted community led organizations.

The safety of Black and Brown communities are undermined, not served by many police practices, as Judge Schiendlin wrote in the New York stop and frisk litigation:

[I]t is important to recognize the human toll of unconstitutional stops. While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are

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<sup>15</sup> Among the many studies belying the assertion of higher rates of "criminality" in the Black community is a report of the United States Department of Health and Human Services, which found "significantly higher likelihood of having ever been arrested among blacks, when compared to whites, even after accounting for a range of delinquent behaviors. Importantly, after controlling for racial composition of the neighborhood, these disparities were no longer present, suggesting the importance of neighborhood context in influencing racial/ethnic disparities in arrests." Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School and Community Characteristics;

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5509345/>.

<sup>16</sup> <https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html>.



overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police.<sup>17</sup>

These issues are just as urgent in the District as in New York, Minnesota and across the nation. In a study conducted by the Consortium of Legal Services Providers of 590 District residents living under 200% of poverty, 27.8% reported being stopped by the police for no reason, 15.1% reported that police did not take them seriously when they called for assistance, another 14.3% reported that police responding to a call made them feel at fault for the crime that had victimized them, and more than 10% reported police asking them inappropriate questions. The majority of those surveyed felt that the police were indifferent, at best, to the issues in their community.<sup>18</sup>

The ACLU recently released a study analyzing MPD's stop data that validated the experience reported by District residents. The data showed that Black people made up 72 percent of MPD's stops despite only making up 46.5 percent of the D.C. population. These disparities suggest a racial bias in MPD's stop practice. Even more alarming, nearly 90 percent of the stops and searches that resulted in no warning, ticket, or arrest were Black people.<sup>19</sup> Despite claims from MPD that jumpouts, a stop and frisk tactic where plainclothes officers come out of unmarked vehicles to randomly pat-down pedestrians, do not exist, residents in Ward 7 and 8 report the fear they feel when officers jump out cars to search them.

We cannot conflate arrests and patrols with public safety and we must look beyond policing. Reimagining policing requires a holistic look at what police do and how they do it as well as other factors that render communities unsafe. Police violence is not the only form of violence meted out on communities of color in the District. Inequity in education, lack of opportunity for safe and affordable housing, food insecurity, inadequate wages and employment, unequal access to recreation and culture are all forms of violence. Addressing these concerns is a public safety imperative.

**Third**, fundamental to addressing the issues in policing is changing police culture. Fundamental to culture change is meaningful internal and external accountability based in policy, law, and the values of the community. External accountability builds trust and

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<sup>17</sup> *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).

<sup>18</sup> Report of the Community Listening Project; <https://www.lawhelp.org/dc/resource/community-listening-project>.

<sup>19</sup> <https://www.aclu.org/press-releases/aclu-analysis-dc-stop-and-frisk-data-reveals-ineffective-policing-troubling-racialcite>.

transparency with the community. The Council should create an independent civil rights inspector general for MPD. The inspector general would be given staff and resources to review both incidents of potential civil rights violations and current and future policies, procedures, practices, and tactics of the department.

In addition to external mechanisms, the Council should improve the department's internal investigation process. In 2016, the Office of District of Columbia Auditor conducted a review of MPD's policies and practices related to use of force. That report found serious issues with the quality of Internal Affairs investigations. The report found that use of force investigators were insufficiently trained, conducted inadequate use of force investigations, and produced unsatisfactory investigative reports.<sup>20</sup>

**Fourth**, changing policing is not enough. While police are often the face of the criminal legal system, inequity is a product of the criminal laws, prosecutorial decisions, prison and jail conditions, and discrimination against those convicted of a crime. Truly comprehensive reform legislation would look at the spectrum of systems actors.

**Fifth**, the Council must remove police from our schools. Transferring the function from MPD to the school system is not enough. Instead, the City should make significant investments in non-law enforcement programs that improve school safety and promote the learning environment.

The presence of police in schools means that Black students are more likely to be arrested. In DC, 92% of school-based arrests are of Black youth.<sup>21</sup> Higher discipline rates for Black youth are not due to higher rates of misbehavior.<sup>22</sup> Rather, Black students are more likely to be arrested because they are more likely to encounter police and because those police view their normal, adolescent behavior as more criminal than the same behavior in white students.<sup>23</sup>

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<sup>20</sup> <http://dcauditor.org/reports/durability-police-reform-metropolitan-police-department-and-use-force-2008-2015>.

<sup>21</sup> 2019 School Report Card indicates that there were 338 total arrests of students across the District – 312 of the arrests were of Black students and 26 of the arrests were of Latino students. (104 of the arrests were for students with disabilities).

<sup>22</sup> See, e.g., Russell J. Skiba, et al. "The Color of Discipline: Sources of racial and gender disproportionality in school punishment." *Urban Review*, 34, 317-342 (2002).

<sup>23</sup> See, e.g., Goff, P.A., Jackson, et.al. "The Essence of Innocence: Consequences of Dehumanizing Black Children," *Journal of Personality and Social Psychology* (February 2014); Epstein, Rebecca, Jamilia J. Black & Thalia Gonzalez. "Girlhood Interrupted: The erasure of Black Girls' Childhood," Georgetown Law Center on Poverty and Inequality (2012), available at <http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/girlhood-interrupted.pdf>.

In addition to furthering the gross racial disparities in the criminal legal system and in academic achievement, school police are ineffective and expensive. Over the last school year, our city spent about \$25 million dollars a year on school security within DCPS alone, and about another \$10 million on MPD officers to patrol DCPS and charter schools.<sup>24</sup> There is no clear empirical research that school police reduce crime or increase safety in schools.<sup>25</sup> In fact, some studies suggest the opposite. Students are less likely to misbehave, including engaging in criminal behavior, in schools where they feel valued, respected, and listened to – in other words, where the students are part of a community.<sup>26</sup> DC's students deserve investment in programs that help them thrive and not in those designed to criminalize. At this moment, in particular, we must strengthen our mental health infrastructure and ensure our young people have increased access to mental health professionals to address the trauma caused by COVID-19, police violence, and racism.

### **Conclusion**

Thank you for moving this legislation and for this hearing. We look forward to working with the Council to continue to help make the District of Columbia a more just place for all to live and work.

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<sup>24</sup> DC Public Schools Responses to FY2019 Performance Oversight Questions, Q11, at [https://dccouncil.us/wp-content/uploads/2020/02/dcps\\_Part1.pdf](https://dccouncil.us/wp-content/uploads/2020/02/dcps_Part1.pdf) (“The DCPS school security contract for security officer personnel in FY2020 is projected to be \$23,458,808.27. The non-personnel costs in FY2020 are projected to be \$1,619,061.00”); MPD FY2021 Proposed Budget Plan, Table FA-04, Division 2300. Total budget for that division is for FY2020 was \$34 million but approx. \$23 million is the DCPS security contract.

<sup>25</sup> ACLU Pennsylvania, “Summit on School Policing: Research on the Impact of School Policing,” <https://www.endzerotolerance.org/schoolpolicingsummit> (July 2019). *See also* Matt Barnum, “Do police keep schools safe? Fuel the school-to-prison pipeline? Here’s what research says,” Chalkbeat (June 23, 2020), <https://www.chalkbeat.org/2020/6/23/21299743/police-schools-research>.

<sup>26</sup> ACLU Pennsylvania, “Summit on School Policing: Research on the Impact of School Policing,” <https://www.endzerotolerance.org/schoolpolicingsummit> (July 2019).