

**Written Comments of The Bronx Defenders
New York City Council
Committee on Public Safety
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Good morning. My name is Craig Levine, and I am the Managing Director for Civil Practice & External Affairs at The Bronx Defenders. The Bronx Defenders is a community-based public defender office in the South Bronx that provides holistic criminal defense, family defense, civil legal services and social services to approximately 30,000 Bronx residents each year. On behalf of The Bronx Defenders, I thank Chairperson Gibson and the entire Committee on Public Safety for this opportunity to discuss the proposed reforms to the categorization and adjudication of low-level offenses in our City.

A Positive Step in the Right Direction

We want first to make clear that we welcome the policy approach and direction represented by the proposed changes. New York City's longstanding approach to the policing, adjudication and punishment of so-called "quality of life" offenses is excessively punitive and leads in some cases to life-altering and life-long negative consequences. Some of these consequences may not have been intended by those who drafted our current laws and devised the current approach to their enforcement, but this does not make them any less real for the many thousands of people who suffer them every year. New Yorkers routinely face criminal records for minor conduct. Convictions for quality of life misdemeanors and violations lead to severe collateral consequences that can include, among others, deportation, homelessness on account of the loss of public housing, a practical inability to get a job and the loss of federal student aid. By decriminalizing certain offenses and giving the NYPD the discretion to instead employ civil enforcement mechanisms, the proposed changes should reduce these overly-punitive penalties and consequences. Additionally, by employing civil enforcement tools, fewer New Yorkers will be entangled in the criminal justice system and at risk of receiving warrants, which lead to tens of thousands of costly arrests every year. Finally, given our City's recent history with stop-and-frisk, which the evidence establishes to have been applied in a racially and ethnically discriminatory manner, there is every reason to suspect that the application of the current quality of life regime implicates similar civil rights concerns. The changes in the bills now pending before the Council represent a step in the right direction, and we encourage the Council to approve them. That said, we have a number of concerns about the bills, and proposals for strengthening them, and we urge the Council's consideration of these ideas prior to passage.

Concerns with the Proposals

The proposed changes present a new set of challenges to the fair, non-discriminatory and proportionate policing, adjudication and punishment of low-level offenses in New York City.

The Need for Fair Fora

By giving the NYPD the discretion to use civil penalties in quality of life policing, the proposed changes will lead to the adjudication of many low-level offenses in administrative hearing bodies, as opposed to criminal courts and summons courts. The Bronx Defenders has previously raised concerns with the City Council about due process shortcomings in summons courts, and these concerns persist. But the challenges they implicate are far worse in administrative hearings.

Most importantly, there is no right to counsel in administrative fora. Indigent litigants at the Environmental Control Board (ECB), Office of Administrative Trials and Hearings (OATH) and Transit Adjudication Bureau (TAB) have no access to court-appointed counsel. Assistance from non-attorney staff is non-existent. Individuals who wish to challenge the charges against them are asked to navigate a confusing and unfamiliar system on their own. It is extraordinarily difficult for wrongly accused New Yorkers to defend themselves and to be vindicated in these fora without legal assistance. And it is critical to bear in mind that in these fora no less than in criminal court, one is presumed innocent until proven guilty. The operational reality of these fora looks to a fair observer and feels to the accused like the presumption of guilt. One Bronx Defender client was strong-armed by an ECB hearing officer into paying \$2,000 to secure the return of his van. This man's van was seized after he could not timely pay \$2,000 in fines for alleged recycling violations. Never mind that these fines were designed to target large, profitable sanitation companies. This man was unrepresented and felt he had no choice but to pay. Had he had access to counsel, he likely could have challenged the tickets or negotiated a reasonable settlement. Outgunned and unarmed, as it were, he had no chance. Facing the power of the government for low-level alleged offenses without possibility of criminal records would be an important improvement over the status quo. But justice in any forum requires meaningful due process, which New York's administrative fora lack. If a right to counsel were to be deemed prohibitively expensive at this juncture, perhaps lower-level but properly trained legal assistants could be employed to help New Yorkers navigate the process and protect their rights.

Another shortcoming of these fora is hearing officers' actual or perceived lack of discretion to adjust penalties or dismiss cases in the interest of justice. In our experience, hearing officers either do not have the discretion to dismiss cases in the interest of justice or rarely choose to do so, even when confronted with extraordinary circumstances. We represented a pregnant woman before the Transit Adjudication Bureau who was arrested after using her son's student Metrocard so she could attend a mandatory appointment to secure Medicaid benefits. She had no money for subway fare, needed Medicaid to continue receiving prenatal care, and was entitled to transit fare to attend the Medicaid hearing but could not obtain it before getting there. The hearing officer said that he had no discretion to reduce her fine or dismiss her case, despite her indigence and the extraordinary circumstances of her arrest. We have many similar client stories. The reforms now under consideration should make clear that administrative hearing officers have discretion to dismiss cases or adjust penalties in light of the unique facts and circumstances of each case. Cookie-cutter justice is injustice.

The broader concern here is the fundamental principles that should mediate the relationship between the police department and marginalized communities in New York. As the adjudication of more and more law enforcement activities shifts from criminal courts to

administrative tribunals with lesser due process protections, the right to a fair trial will become increasingly illusory. Even as their dockets increase, as would surely be the case under the pending proposals, we must ensure that administrative tribunals do not become obsessed with efficiency, structured, staffed, incentivized and evaluated to prioritize the “processing” of cases over the protection of rights. Failure to ensure due process protections in administrative fora will erode the fundamental fairness that underlies the legitimacy of any adjudicatory body, while undermining the right to trial that is our most basic check on the exercise of police power.

The Possibility of Discriminatory Policing and the Importance of Detailed Reporting

Allowing NYPD officers to exercise discretion to use civil rather than criminal penalties in policing low-level offenses should reduce the excessive punitiveness of the current approach to quality of life policing. But every exercise of discretion is an opportunity for discrimination, and history counsels caution and concern. We know both empirically and anecdotally that the NYPD’s discretion has been exercised unfavorably towards people of color, homeless people, and LGBTQ communities. Clear and transparent guidelines should be developed to guide the NYPD’s use of discretion to direct the alleged low-level offenses under consideration here to criminal or civil fora. Detailed reporting – we would submit quarterly, but assuredly not less than annually – broken down geographically and demographically, and presented to the Council and the public online, will be essential to ensure both the fairness and the legitimacy of the NYPD’s exercise of its expanded discretion. Also, the Council must make clear that the creation of the possibility of civil enforcement here is not an invitation to even *more* policing of underprivileged communities, on a theory that “it’s only civil, so why not?” Here again, publicly reported data will be crucial to accountability.

The Need to Further Decriminalize Very Minor Offenses

Proposed law 18-146 would redefine many offenses under that statute as criminal or civil violations rather than misdemeanors. But there are three offenses specified in 18-146 that should be redefined as exclusively civil violations because they address extremely minor conduct:

- 18-146(a): Failure to comply with a lawful order. This rule allows police officers to arrest people for disobeying an order. Police officers are poorly situated to evaluate the lawfulness of their own orders. In practice, anyone failing quickly and completely to comply with a police officer’s directive – no matter how trivial or inappropriate – is at risk of arrest and criminal prosecution. Supporting police authority with the criminal law is unnecessary, excessive and an invitation to discrimination and the targeting of marginalized groups and young people.
- 18-146(r)(ii): Unlawful Solicitation. This law allows for the criminalization of panhandling, regardless of whether it is aggressive or persistent. It thus encourages the criminalization of homelessness and destitution, contrary to our values as New Yorkers and Americans.
- 18-146(w)(ii): Unlawful fires. "No person shall leave, throw away or toss any lighted match, cigar, or cigarette . . . near, or against any tree, building, structure . . . or in any open area." No one should face arrest and criminal charges for throwing out a cigarette butt.

These very minor offenses, the continuing criminalization of which invites discriminatory policing, should be fully decriminalized.

Proposed Modifications and Amendments

The Bronx Defenders' concerns for our clients would be ameliorated by the following modifications to the pending proposals¹:

Increase due process rights at administrative hearings.

- Commit more resources to administrative hearing tribunals. Our civil adjudication systems are already taxed by exceedingly high volumes of summonses. In FY 2015, the ECB hearings division alone received 623,758 summonses. More resources must be committed to these agencies to ensure meaningful due process.
- Provide a right to counsel or, at minimum, trained legal assistants to assist litigants in administrative tribunals.
- Mandate the reporting of how often civil summonses result in immediate payment, a negotiated settlement, or trial, and the frequency of all possible outcomes after trial.
- Ensure sufficient funding for translators in administrative tribunals.
- Grant administrative hearing officers clear authority and discretion to limit penalties or dismiss cases in the interest of justice.

Limit potentially overly harsh consequences of receiving a civil summons.

- Add language to the proposals to preclude reporting unpaid debt to credit reporting agencies.
- Wherever possible, create alternatives to in-person hearings, which can be costly and burdensome for workers, caretakers and disabled New Yorkers. Allow individuals to pay fines without hearing by mail or online. Create options for online or telephonic hearings at every administrative tribunal.
- Given the low-level nature of the offenses here at issue and the long-lasting consequences of even civil judgments, preclude the imposition of civil judgments until a person's third failure to pay a fine or complete ordered community service. At minimum, do not impose civil judgments until individuals are given multiple warnings about the consequences of a failure to pay their fine or complete their community service.
- Ensure that community-service alternatives to civil fines include options not entailing physical labor, for those whose physical condition precludes physical labor.

Ensure monitoring and reporting of policing.

- Develop and publish clear guidelines about when officers are allowed to exercise their discretion to issue a civil versus a criminal summons.
- Monitor NYPD officers' exercise of discretion to issue civil versus criminal summonses by race, perceived gender identity, ethnicity, precinct and offense, and report data quarterly.

¹ If these proposals cannot be integrated into the pending bills at this juncture, The Bronx Defenders recommends that the Council adopt them as soon as possible in subsequent legislation.