



THE CITY OF NEW YORK  
OFFICE OF THE MAYOR  
NEW YORK, N. Y. 10007

July 23, 2013

Hon. Michael McSweeney  
City Clerk and Clerk of the Council  
141 Worth Street  
New York, NY 10013

Dear Mr. McSweeney:

Pursuant to Section 37 of the New York City Charter, I hereby disapprove Introductory No. 1080, which would amend Administrative Code § 14-151, the City's existing prohibition on racial and ethnic profiling by police officers, to permit lawsuits against individual police officers and the Police Department for "bias-based profiling."

Introductory No. 1080 would define "bias-based profiling" as an act by a law enforcement officer that "relies on actual or perceived race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor in initiating law enforcement action against an individual," and the bill further defines "housing status" to include, among other things, being homeless or having a home, living in public housing, and owning or renting a home. The bill then would create two private causes of action. The first would permit a plaintiff to sue individual police officers or the Police Department for allegations of intentional bias-based profiling. The second would permit lawsuits against the Police Department alleging that "a policy or practice . . . or policies or practices within the Police Department regarding the initiation of law enforcement action has had a disparate impact" on any of the categories set forth in the bill's definition of bias-based profiling.

New York City is the safest big city in the country, and year after year our neighborhoods and streets have become even safer. Last year, there were an all-time low 419 murders, and so far this year the number of murders is down 28% compared to last year. The number of shootings last year was also a record low, and so far this year the number of shootings is 28% lower than it was at this time last year. These numbers mean lives: between 2002 and 2012, we saved 7,364 lives that would have been lost if the murder rate had been the same as it was in the ten years before 2002. Public safety is the foundation of everything the City has accomplished over the last eleven years, and New York City's success in preventing crime has been predicated on targeted policing, with data-driven strategies based upon where crime is occurring.

Introductory No. 1080 would imperil the hard-earned gains we have made and would seriously impede the ability of the Police Department and the City to protect 8.4 million New Yorkers. It is poorly conceived, overly broad, and preempted by state law. It would also unleash an avalanche of lawsuits against police officers and the Police Department, redirecting the City's fiscal resources to attorneys commencing the lawsuits and the expert witnesses retained by those attorneys, and away from supporting public schools and afterschool programs, facilities for the elderly, parks, and other essential City services.

The bill would expand the categories of people covered in the law so that virtually everyone in New York City could sue the police about any action a police officer might take, and it would authorize lawsuits against individual police officers. From the police officer's perspective, then, every officer acting on a description that includes some characteristic of a possible perpetrator would have to think about whether taking action will result in a lawsuit. The specter of the new lawsuits this bill would engender would make police officers hesitate to act on information that would prevent crime or apprehend criminals, and it would therefore endanger the proactive policing that has been crucial to New York City's success in preventing crime.

The disparate impact lawsuits that would be created by this bill, meanwhile, would pose a threat to the Police Department's ability to implement strategies that keep New Yorkers safe. The bill would permit disparate impact challenges to *any* "policy or practice" of the Police Department based simply upon statistical disparities. But targeting particular areas or types of criminals, which is essential to effective policing, could frequently give rise to allegations of disparate impact on some group or groups mentioned in the bill. Patrol strategies, investigations, arrests, the deployment of police resources to particular neighborhoods or areas, the use of cameras in high crime neighborhoods, even counterterrorism intelligence-gathering or surveillance operations: all could be subject to legal challenge based on the claim that police activities have a disparate impact by gender, or age, or religion, or housing status, or any of the categories set forth in the bill. Furthermore, the bill is entirely unclear about what would constitute a "disparate impact." While the bill says that "the mere existence of a statistical imbalance between the demographic composition of the subjects of the challenged law enforcement action and the general population is not alone sufficient to establish a prima facie case of disparate impact violation unless the general population is shown to be the relevant pool for comparison," it does not say what *is* the relevant "imbalance" that would establish a disparate impact. The Police Department would therefore be left wondering how it is supposed to know whether any strategy it adopts will become the subject of a disparate impact claim. And judges would have unprecedented leeway to decide what statistical imbalances they believe are important, thus giving them, rather than the Mayor and Police Commissioner, the final say over how to target criminal activity. The problem is compounded even further by language in the bill permitting plaintiffs to propose "an alternative policy or practice with less disparate impact." The Police Department would then have to prove that the alternative proposal would not "serve the law enforcement objective as well" as the Department's challenged policy would. This language would result in courts second-guessing police strategy based upon suppositions about what would happen if a hypothetical alternative strategy were adopted. Thus, this bill is practically an explicit invitation to judges to impose their own law enforcement policy preferences on the Police Department and, ultimately, the citizens of New York City.

Furthermore, the bill's awarding of fees to plaintiffs' lawyers would create a significant incentive for lawsuits to be filed. The bill contains a provision awarding not only attorney fees but also expert witness fees to plaintiffs' attorneys. In this regard, the bill is far more generous to plaintiffs' attorneys than the federal statute that authorizes lawsuits for the deprivation of civil rights, 42 U.S.C. § 1983, which does not permit the recovery of expert witness fees. Plaintiffs' lawyers would have an incentive to come up with creative statistical analyses to file disparate impact lawsuits with the hope of obtaining the fees this bill would authorize. Police officers would have to spend time in courtrooms rather than on the streets fighting crime. And the City would not only be forced to devote large amounts of money and resources to defend against the predictably numerous and burdensome litigations that would result from this bill, but also potentially to pay the expensive attorney and expert fees this bill authorizes courts to award to plaintiffs.

Finally, Introductory No. 1080 is legally untenable because it seeks to legislate in an area that is wholly preempted by state law. Introductory No. 1080 is, in essence, an effort to regulate the procedures governing the provision of law enforcement and the administration of criminal justice in the City of New York. These procedures, however, are not a subject within the purview of local law; rather, they are exclusively governed by state law.

The state Criminal Procedure Law is an elaborate and comprehensive set of laws that was intended to govern all matters of criminal procedure in the State of New York. For example, section 140.50 of the Criminal Procedure Law governs the stopping and questioning of persons by police officers. It specifies the conditions under which a stop may lawfully be made and the conditions when an officer may lawfully search a person. By imposing new restrictions on the use of stop, question and frisk as an enforcement tool, Introductory No. 1080 seeks to legislate in an area that has been wholly occupied by the State. Of course, because the scope of the bill includes all actions taken by police officers and other law enforcement officers, the legal problems with Introductory No. 1080 are not confined to stop, question and frisk. The Criminal Procedure Law regulates all aspects of criminal proceedings, and it preempts local legislation on any aspect of the criminal process from an initial stop to post-judgment proceedings. Regulating criminal procedure is not a role for a local legislative body. To the extent Introductory Number 1080 is an attempt to take on this role, it is unlawful.

Introductory No. 1080 is a dangerous and irresponsible bill that will make New Yorkers less safe. It is disapproved.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael R. Bloomberg", with a stylized flourish at the end.

Michael R. Bloomberg  
Mayor