

Racial Equity and Social Justice (RESJ) Impact Statement

Office of Legislative Oversight

**EXPEDITED POLICE — POLICE ACCOUNTABILITY BOARD —
BILL 49-21: ADMINISTRATIVE CHARGING COMMITTEE — ESTABLISHED**

SUMMARY

The Office of Legislative Oversight (OLO) anticipates that Expedited Bill 49-21 will have little to no impact on racial and social inequities as it does not consistently align with best practices for advancing civilian oversight to improve police accountability. To improve the racial equity and social justice (RESJ) impact of this bill, this statement offers several potential amendments for Council consideration.

PURPOSE OF RESJ IMPACT STATEMENTS

The purpose of racial equity and social justice (RESJ) impact statements is to evaluate the anticipated impact of legislation on racial equity and social justice in the County. Racial equity and social justice refer to a **process** that focuses on centering the needs of communities of color and low-income communities with a **goal** of eliminating racial and social inequities.¹ Achieving racial equity and social justice usually requires seeing, thinking, and working differently to address the racial and social harms that have caused racial and social inequities.²

BACKGROUND ON EXPEDITED BILL 49-21

Addressing allegations of police misconduct has been a challenge for law enforcement. In 2000, the Montgomery County Police Department entered into an agreement with the Justice Department and the Fraternal Order of Police (FOP) to resolve complaints alleging racial discrimination in investigations of police misconduct as well as traffic stops and use of force.³ The Law Enforcement Officers Bill of Rights (LEOBR) has been viewed as a deterrent to holding police officers accountable for misconduct and making investigations of misconduct transparent to the community.⁴

With House Bill 670, the General Assembly eliminated LEOBR and required localities to establish police disciplinary systems with civilians that make such systems more accessible and transparent to the community.⁵ Expedited Bill 49-21 seeks to establish a Police Accountability Board and Administrative Charging Committee in the County by July 1, 2022 that complies with HB 670.⁶ The bill was introduced to the Council at the request of the County Executive on December 14, 2021.⁷ To align with state law, the bill creates three entities to address complaints of police misconduct:

- **A Police Accountability Board (PAB)** that meets quarterly, receives complaints of police misconduct from the public, shares them with law enforcement within 3 days, and issues annual reports describing police discipline and recommendations for improving police accountability. No active police officers may serve on the PAB; and to the extent practicable, PAB members “shall reflect the racial, gender, and cultural diversity of the County.”
- **An Administrative Charging Committee (ACC)**, a five-member committee led by the chair of the PAB or their designee, includes two additional civilian members from the PAB and another two civilian members selected by the Executive. The ACC reviews findings from agency investigations to determine if an officer should be charged and recommends discipline to the Chief of Police for the charged officer that aligns with the Maryland Police Training and Standards Commission (MPTSC) disciplinary matrix. ACC members can review camera footage, subpoena officers, and request additional information; they must also receive training from MPTSC.

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- **A Trial Board** to determine an officer's discipline if they do not accept the Chief's offer of discipline. Each Trial Board must include three members: a retired administrative law judge or retired district court or circuit court judge appointed by the County Executive, a civilian appointed by the PAB who is not a member of the ACC, and a police officer of equal rank to the police officer accused of misconduct that is appointed by their agency. Like the ACC, the Trial Board may issue subpoenas and members must receive training from the MPTSC.

Yet, HB 670's requirement that PAB's only review allegations of police misconduct from the public captures a small subset of the actual allegations of misconduct reported to the police as exemplified by an examination of local data:⁸

- In 2020, there were 220 complaints of police misconduct made to MCPD.
- MCPD's Internal Affairs Division (IAD) declined 66 complaints for investigation, 120 cases were investigated by the accused officer's chain of command, and 34 were investigated by IAD.
- Of the 34 IAD investigations opened in 2020, 26 were still open at the time of the IAD annual report publication.
- Of the 8 investigations resolved by the 2020 annual report, 6 were administratively closed due to IAD determining that the investigation could not continue, one exonerated an officer, and another found sufficient evidence to prove an allegation of misconduct.
- So, of the 220 complaints received by MCPD in 2020, a PAB and ACC would have had the authority to review up to 8 complaints of policing misconduct (less than 4 percent) if the allegation emerged from a citizen.
- Yet, the 220 complaints in IAD's Annual Report reflect allegations of police misconduct made by the public and by law enforcement. HB 670 does not authorize PAB's to review IAD investigations that originate from internal complaints. As such, the PAB's actual authority to review IAD investigations is quite limited.

Expedited Bill 49-21 also establishes additional local requirements for the PAB not specified under state law:⁹

- The PAB will consist of five members, each appointed by the Executive, subject to the Council's approval;
- PAB and ACC members will serve three-year terms with no more than two consecutive terms; the initial terms will stagger to ensure that no more than one third of the members expire annually;
- PAB and ACC members must have experience in managing or evaluating the management of a law enforcement agency, evaluating citizen complaints against a police officer, or in personnel disciplinary proceedings as a manager, employee representative, mediator, or arbitrator;
- PAB members will serve without compensation except reimbursement for expenses. ACC members, however, meet monthly and receive annual salaries of \$16,000 with the chair receiving an annual salary of \$22,000;
- The PAB will recommend changes to policy that would improve police accountability in the County;
- The Chief Administrative Officer will provide appropriate staff and support to the PAB; and
- The County Attorney will serve as counsel to the PAB.

OLO finds the functions of the County's current police disciplinary process established under LEOBR overlap with the functions of the police disciplinary system required under HB 670 and proposed by Expedited Bill 49-21. They both add civilians to local police disciplinary processes where they were previously excluded. Yet, the civilians included in the updated system tend to represent law enforcement rather than the community at large. As such, OLO finds that:

- **The ACC has the same function as the Internal Investigation Review Panel.** MCPD's Internal Investigation Review Panel - consisting of the Assistant Chiefs, the Internal Affairs Director, and the head of the division of the involved employee - currently makes the recommendation to the Chief on whether an officer should be charged. Bill 49-21 shifts this responsibility from a committee of active duty police officers to a committee of civilians that also represent law enforcement given the bill's requirements that PAB and ACC members have experience in law enforcement as managers or evaluators, or in personnel disciplinary proceedings.

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- ***The Trial Board replaces the Hearing Board for first level appeals.*** A police officer charged with misconduct can currently appeal the Chief's recommendation for discipline to a hearing board comprised of three sworn officers with one at the rank of the defendant. HB 670 shifts the first level appeals process for a Chief's recommendation for discipline from a hearing board comprised of three active duty police officers to a Trial Board consisting of one active duty police officer, a civilian who may have experience in law enforcement, and a retired judge.
- ***District Court replaces the Alternative Hearing Board for final appeals.*** A police officer charged with misconduct that disputes the discipline recommended by a hearing board can seek a final appeal to their decision via an alternative hearing board that includes an arbitrator, a member selected by the FOP, and a member selected by the Chief. In turn, HB 670 shifts consideration for a final appeal from a committee comprised mostly of active duty officers in law enforcement to other law enforcement personnel (i.e. judges) in a District Court.

POLICING, RACIAL EQUITY, AND CIVILIAN OVERSIGHT BOARDS

Understanding the impact of Expedited Bill 49-21 on racial and social inequity in Montgomery County requires understanding the history of racial inequity that shapes policing outcomes today. Toward this end, this section describes the origins of policing in the U.S., data on disparities in police interactions with the public by race and ethnicity, the features of civilian oversight boards that reflect best practices for promoting accountability in policing and how Bill 49-21 aligns with these best practices.

Inequities in Policing. Modern policing in the United States emerges from a legacy of racial inequity. The mandate of the earliest policing efforts, slave patrols, were to apprehend escaped Africans and to instill fear among enslaved Africans to deter slave revolts.¹⁰ The first municipal police forces, beginning in Boston in 1838, were about controlling people in response to public intoxication, gambling and population growth.¹¹ Both slave patrols and municipal policing were known for their brutality and ruthlessness.¹²

Moreover, with the end of slavery, the legacy of slave patrols to intimidate and terrorize African Americans continued. Post-Reconstruction racism in law enforcement persisted via the creation of Jim Crow laws that criminalized inconsequential charges such as vagrancy to maintain slavery by another name through convict leasing and chain gangs.¹³ Despite advances in law enforcement to promote constitutional policing and community trust, racial inequities in policing persist with harsher treatment of Black, Indigenous and other People of Color (BIPOC) in the criminal justice system, mass incarceration, and the collateral punishment of incarceration on BIPOC families and communities.¹⁴

Survey data demonstrates the legacy of racial inequity in policing: in 2014, 76 percent of African Americans believed there was a problem with the justice system when it comes to law enforcement and race compared to 33 percent of their White counterparts.¹⁵ Both state and local data also demonstrate the over-representation of African Americans at every point in the criminal justice system and higher incidents of traffic stops among Latino and Other race men. More specifically, while Black people represented 29-30 percent of Maryland's population, they accounted for:

- 54 percent of arrests for marijuana use;¹⁶
- 71 percent of the state's correctional population;¹⁷
- 77 percent of the maximum-security correctional population and prisoners serving life sentences;¹⁸ and
- 100 percent of exonerated individuals across the state.¹⁹

And in Montgomery County, where Black people accounted for 18 percent of the population, they accounted for:²⁰

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- 55 percent of MCPD uses of force;
- 44 percent of MCPD arrests; and
- 32 percent of MCPD traffic stops.

Among those with traffic stops initiated by MCPD:²¹

- Black men were three times as likely as White men to receive any traffic violation (46% v. 17%);
- Latino men were twice as likely as White men to receive any traffic violation (32% v. 17%); and
- Other race men were more than twice as likely as White men to receive any traffic violation (42% v. 17%).

Civilian Oversight Boards. As issues of trust and accountability have characterized community-police relations, particularly in communities of color, civilian oversight of law enforcement has emerged as a best practice to enhance police accountability and performance.²² Civilian oversight agencies are often established after an incident of police misconduct when a community identifies a need for such an agency. The first modern forms of civilian oversight in the U.S. began in several large cities during the Civil Rights era out of conflicts between police and local communities of color.²³ Today, there are more than 150 civilian oversight agencies in the U.S. that generally fall into three types:²⁴

- **Investigation-focused civilian oversight agencies** that conduct independent investigations of complaints against police officers separate from internal affairs investigations conducted by law enforcement. Non-police, “civilian” investigators, usually staff investigation-focused agencies. Strengths of this model include the potential to reduce bias in investigations into citizen complaints and civilian-led investigations may increase community trust in the investigations. Conversely, the public may get disillusioned if the community expectations for change are not met.
- **Auditor- or monitor-focused civilian oversight agencies** that usually emerge from federal consent decrees and focus on large-scale and system reforms. An inspector general with significant law enforcement expertise often staffs these agencies. Auditor-focused agencies promote broad organizational change by conducting systematic reviews of police policies, practices or training and make recommendations for improvement. Promoting long-term systemic change is a potential strength of this model while the inability to compel law enforcement to make recommended changes is a potential drawback.
- **Review-focused civilian oversight agencies** that consider the quality of completed police internal affairs investigations and make recommendations regarding findings. Review-focused civilian oversight agencies are commonly composed of citizen volunteers. Strengths of this approach include the potential for civilian reviews of complaint investigations to increase public trust in the process. Potential drawbacks to this approach include the review-focused board having too limited authority and/or organizational resources to provide effective oversight and being less independent than investigation-focused and auditor-focused forms of civilian oversight.

Experts generally find that investigation-focused agencies are the most successful civilian oversight approach for holding police officers accountable for misconduct because they focus on individual complaints.²⁵ Yet, the Police Accountability Board model advanced by Bill 49-21 generally aligns with the review-focused civilian oversight model. Conversely, the County’s Policing Advisory Commission functions as a hybrid between the auditor- and review-focused approaches as it relies on citizen volunteers rather than an auditor’s office proposes systemic changes in policing policies and practices.²⁶

For any civilian oversight agency to succeed, experts also advise that three conditions are essential:²⁷

- **Independence** from the police department so the civilian agency’s recommendations can be trusted
- **Power** so law enforcement cannot ignore the civilian oversight agency’s recommendations
- **Resources** to meet civilian oversight agency goals in a timely-fashion (e.g. investigate cases, issue reports)

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These three essential conditions of successful civilian oversight overlap with the following twelve core elements of successful oversight identified by the National Association of Civilian Oversight of Law Enforcement: independence, adequate jurisdictional authority, adequate resources, unfettered access to records, access to law enforcement executives and internal affairs staff, full cooperation, support of process stakeholders, public reporting or transparency, pattern analysis, community outreach, community involvement, and respect for confidentiality requirements.²⁸

A comparison of the three oversight approaches (investigative-, audit- and review-focused models) to the three lead conditions of effective civilian oversight (independence, power, and resources) further demonstrate the limits of the review-focused model to enhance police accountability. As previously noted, experts find the review-focused model demonstrates less independence than other civilian oversight models, their authority is limited and they can lack the organizational resources they need to make improvements to systems that make police accountable for misconduct.

The Police Accountability Board proposed with Expedited Bill 49-21 reflect the risks associated with the review-focused agency model that may undermine its oversight. Moreover, the civilians included in the PAB and ACC often represent retired law enforcement rather than the community at large. As such, OLO finds that Bill 49-21 does not align with best practices for civilian oversight of police accountability systems, as the PAB proposed is unlikely to:

- Be independent of MCPD because it requires its members to have significant law enforcement experience.
- Have the power to recommend changes to policy that would improve police accountability because its scope by default is limited to the minority of misconduct cases resulting from complaints from the public that are investigated by IAD rather than the totality of police misconduct complaints made from the public.
- Have sufficient resources to carry out its mission since its budget and staffing are not specified in the legislation.

ANTICIPATED RESJ IMPACTS

Understanding the anticipated impact of Expedited Bill 49-21 on RESJ requires understanding how the bill aligns with best practices for improving accountability for police misconduct and the anticipated impact of this alignment on the community at large and BIPOC residents in particular. As residents of color and Black residents in particular are over-represented in their interactions with law enforcement relative to their share of the County's population, they are the most likely to benefit from any improvements in police accountability for misconduct that derive from this bill.

Yet, as currently structured, Bill 49-21 offers few changes to the County's existing police accountability process that would meaningfully change the current disciplinary process of police or improve accountability for misconduct. In adherence to HB 670, Bill 49-21 structures the County's new civilian oversight for the police accountability with the weakest oversight model available. It also limits the PAB's review to investigate complaints from the public without also considering investigations that emerge from internal complaints of police misconduct.

Less independence, authority and resources necessary to challenge and improve current models of police accountability characterize the review-focused civilian oversight model that forms the basis of the proposed PAB's scope compared to other civilian oversight approaches. Limiting the role of the PAB to formally review MCPD's internal investigations of complaints generated from the public is unlikely to change current police accountability policies or practices. Formal IAD investigations from external and internal complaints that could lead to administrative charges comprised only 15 percent of all MCPD investigations (34 of 220) of police misconduct in 2020.²⁹

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Expedited Bill 49-21's exclusion of civilians without law enforcement or dispute resolution experience also skews the membership of the PAB to civilians representing law enforcement rather than the public at large. Given the demographics of active law enforcement personnel and retirees in the County, the PAB and ACC member eligibility requirements under the Bill also exclude women and BIPOC residents who more than likely account for a majority of police misconduct complainants. The exclusion of BIPOC residents without law enforcement backgrounds from the PAB and ACC could undermine efforts to improve community trust in the County's police accountability systems especially among BIPOC residents.

Overall, OLO anticipates that Expedited Bill 49-21 is unlikely to advance racial equity and social justice in policing because the PAB it proposes is analogous to the current police accountability system. The addition of civilians to existing systems of police oversight is a marginal improvement in civilian oversight at best. Further, OLO anticipates Bill 49-21 could increase the demand for police accountability by increasing the reporting of allegations. An increase in reporting is unlikely to increase the number of police officers held accountable for misconduct because the core functions of the current police accountability system remain and continue without civilian oversight. In particular, IAD continues to decide which complaints are dismissed and which merit investigation as intakes to an officer's chain of command or as formal investigations that are conducted by IAD.

In short, civilian oversight does not apply to majority of the misconduct allegations that IAD receives and considers under Bill 49-21. While the public may feel an increased sense of accountability for police misconduct with this bill because they will be able to submit complaints directly to the PAB, IAD investigation processes will likely remain the same without increased civilian oversight or understanding of their operations. If BIPOC residents in particular have increased expectations for police accountability that are not reflected to actual changes for allegations of police misconduct, OLO anticipates this bill could widen racial inequities in perceptions of policing fairness and could erode police-community relations.

RECOMMENDED AMENDMENTS

The County's Racial Equity and Social Justice Act requires OLO to consider whether recommended amendments to bills aimed at narrowing racial and social inequities are warranted in developing RESJ impact statements.³⁰ OLO finds that Expedited Bill 49-21 sustains racial and social inequities as the police accountability system it proposes neither aligns with best practices nor meaningfully provides civilian oversight for the County's system of police discipline. Available data suggests Black and Latinx residents are most harmed by the County's current accountability system for police misconduct because they are the most likely to involuntarily interact with law enforcement in the County.

Should the Council seek to improve the RESJ impact of Bill 49-21. The following best practices aimed at increasing the independence, authority and resources allocated to the Police Accountability Board (PAB) could be considered as potential recommended amendments to the bill.

- To increase the **independence** of the PAB, consider amending the bill to increase the size of its membership and change its eligibility requirements to ensure BIPOC residents disproportionately impacted by policing and misconduct are represented. For example, the Policing Advisory Commission has 13 members and requires each to have an interest or expertise in policing matters rather than law enforcement or dispute resolution experience.

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- To increase the **authority** of the PAB, consider amending the bill to expand the PAB’s scope to review all allegations of police misconduct made by the public, not just cases where administrative charges are being considered. To support this expanded scope, the bill could be amended to require MCPD provide the PAB access to relevant data and assign a designating point person to address all PAB data requests. The bill could also be amended to ensure PAB members follow the same confidentiality requirements for ACC members.
- To enhance the **resources** available to the PAB to fulfill its mission, consider amending the bill to specify the staffing and budget expected annually to support the work of the PAB and ACC. Some jurisdictions, for example, have specified a certain percentage of the police department’s annual budget fund the work of its civilian oversight function.

To further align Expedited Bill 49-21 with other best practices for civilian oversight recommended by National Association for Civilian Oversight of Law Enforcement (NACOLE), the Council may also want to consider additional amendments that mandate the County’s Police Accountability Board has unfettered access to records, access to law enforcement executives and internal affairs staff, full cooperation from MCPD, and the support of process stakeholders.³¹

Additionally, NACOLE finds civilian oversight agencies that operationalize public reporting and transparency, pattern analysis, community outreach, community involvement, and respect for confidentiality requirements are most successful.³² While Bill 49-21 mandates that members of ACC maintain confidentiality on matters being considered by the Committee until final disposition, it does not specifically include these other best practices. As such, the Council may want to consider amendments reflecting these best practices for consideration as well.

CAVEATS

Two caveats to this racial equity and social justice impact statement should be noted. First, predicting the impact of legislation on racial equity and social justice is a challenging, analytical endeavor due to data limitations, uncertainty, and other factors. Second, this RESJ impact statement is intended to inform the legislative process rather than determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

OLO Senior Legislative Analyst Elaine Bonner-Tompkins drafted this RESJ impact statement.

¹ Definition of racial equity and social justice adopted from “Applying a Racial Equity Lens into Federal Nutrition Programs” by Marlysa Gamblin, et.al. Bread for the World, and from Racial Equity Tools <https://www.racialequitytools.org/glossary>

² Ibid

³ Memorandum of Agreement Between the United States Department of Justice, Montgomery County, Maryland, the Montgomery County Department of Police and the Fraternal Order of Police, Montgomery County Lodge 35, Inc. January 14, 2000 <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/MontgomeryCounty.pdf>

⁴ Maryland Coalition for Justice and Police Accountability, Testimony on HB 670 – Police Reform and Accountability Act of 2021, February 9, 2021

⁵ Maryland Police Accountability Act of 2021, Police Discipline and Law Enforcement Programs and Procedures, House Bill 670

⁶ Ibid

⁷ Ibid

⁸ Montgomery County Department of Police, Internal Affairs Division Annual Report, 2020

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⁹ Montgomery County Council, Bill 49-21

¹⁰ Danyelle Solomon, The Intersection of Policing and Race, Center for American Progress, September 1, 2016

¹¹ Ibid

¹² Ibid

¹³ Andrea Flynn, Susan Holmberg, Dorian Warren and Felicia Wong, The Hidden Rules of Race: Barriers to An Inclusive Economy, 2017

¹⁴ Ibid

¹⁵ Data from 2014 McClatchy-Marist Poll cited by Danyelle Solomon

¹⁶ Jasmon Bailey, Racial Equity Note for House Bill 32, Department of Legislative Services, Maryland General Assembly

¹⁷ Jasmon Bailey, Racial Equity Note for House Bill 3, Department of Legislative Services, Maryland General Assembly

¹⁸ Ibid

¹⁹ Jasmon Bailey, Racial Equity Note for House Bill 740, Department of Legislative Services, Maryland General Assembly

²⁰ Elaine Bonner-Tompkins and Nataliza Carrizosa, Local Policing Data and Best Practices, OLO Report 2020-9, Office of Legislative Oversight, July 12, 2020

²¹ Ibid

²² Also referred to as citizen oversight, external review, and citizen review boards.

²³ Joseph De Angelis, Richard Rosenthal, and Brian Butcher, Civilian Oversight of Law Enforcement: Assessing the Evidence, OJP Diagnostic Center and National Association for Civilian Oversight of Law Enforcement, 2016

²⁴ Ibid and Michael Vitoroulis, Cameron McElhiney and Liana Perez, Civilian Oversight of Law Enforcement: Report on the State of the Field and Effective Oversight Practices, Washington, DC: Office of Community Oriented Policing Services, 2021

²⁵ Joseph De Angelis, Richard Rosenthal, and Brian Butcher

²⁶ Montgomery County Code, Section 35-6. Policing Advisory Commission

https://codelibrary.amlegal.com/codes/montgomerycounty/latest/montgomeryco_md/0-0-0-19952#JD_35-6

²⁷ Olugbenga Ajilore, Are civilian oversight agencies actually holding police accountable? Urban Wire: Crime, Justice, and Safety, Urban Institute, July 19, 2018

²⁸ Joseph De Angelis, Richard Rosenthal, and Brian Butcher

²⁹ Montgomery County Department of Police

³⁰ Montgomery County Council, Bill 27-19, Administration – Human Rights - Office of Racial Equity and Social Justice – Racial Equity and Social Justice Advisory Committee - Established

³¹ Joseph De Angelis, Richard Rosenthal, and Brian Butcher

³² Ibid