

CONTACT**LEGISLATIVE AFFAIRS DEPARTMENT**

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org**REPORT ON THE CRIMINAL JUSTICE REFORM ACT OF 2015
2015-16 ARTICLE VII BUDGET BILL A.3011 / S.2011**

The New York City Bar Association (“City Bar”) has reviewed the Governor’s proposed Criminal Justice Reform Act of 2015 (A.3011/S.2011), which would make various amendments to the Criminal Procedure Law and Executive Law aimed at restoring the public’s trust in the criminal justice system.¹ The City Bar commends the Governor’s effort to address the critical issue of the public’s support for the criminal justice system; however, we believe that the proposed reforms would not achieve the Act’s intended goals and therefore require further study in order to be effective. The time is ripe for a robust public discussion of our criminal justice system that involves all of the related stakeholders and we urge the Governor and Legislature to facilitate that discussion this session so that meaningful reform ultimately can be achieved.

THE PROPOSED AMENDMENTS

The Criminal Justice Reform Act (“the Act”) is divided into eight sections. In sum, section 1 would create a Governor-appointed “independent monitor” who would be responsible for reviewing the grand jury investigations of cases involving the police-related death of an unarmed civilian. The independent monitor would then have the power to refer cases to the Governor for the purposes of appointing a special prosecutor when he or she determined that the district attorney improperly declined to prosecute or the grand jury presentation did not conform to the law. Section 2 would allow a District Attorney to create a grand jury report where a grand jury dismisses charges or declines to return an indictment in cases where a police officer is charged with causing the death of an unarmed civilian. Section 3 relates to appeals concerning the aforementioned grand jury reports. Sections 4 and 5 would establish an expedited appeals process directly to the Court of Appeals in cases where the appellate division declines a motion for a change of venue. Section 6 would create a model “use of force” policy for State and local law enforcement agencies. Section 7 would require annual reporting by all law enforcement agencies to the Division of Criminal Justice Services. Required data would include the number of arrests made for violations and misdemeanors, instances where police conduct may have resulted in the death of a person in the course of executing an arrest for a violation or misdemeanor and race information related to individuals receiving appearance tickets or summonses. Finally, Section 8 would require that in every application for a search warrant, the

¹ This memo was drafted based upon input from the City Bar committees with the greatest expertise in this area: Criminal Advocacy, Criminal Law, Criminal Courts, Criminal Justice Operations, Civil Rights and New York City Affairs. These committees include members who occupy a wide variety of positions in the criminal justice system, including prosecutors, defense attorneys and civil rights attorneys.

applicant must provide the judge with information about whether the search warrant had previously been submitted to any judges. The applicant must also provide the results of the previous submissions and identify the judge(s) who acted on such submissions.

THE INDEPENDENT MONITOR

The City Bar opposes the creation of an independent monitor to review grand jury investigations of cases where a police officer is charged with causing the death of an unarmed civilian as a modest proposal that is both logistically problematic and inadequate. The review by an independent monitor with a possible referral to a special prosecutor is an after-the-fact solution that is too cumbersome and distant from the time of the grand jury presentation to be of real value. Since the independent monitor would take into consideration both the witnesses and evidence chosen by the prosecutor to present to the grand jury as well as the prosecutor's report, it is likely that the independent monitor's report will be little more than a justification for the actions taken by the prosecutor. This is particularly so because the independent monitor can recommend a special prosecutor only where "substantial error" creates a "reasonable probability" of an indictment such that the presumption of regularity afforded to such proceedings can no longer apply, or if the independent monitor uncovers newly discovered evidence "of such magnitude that there exists a reasonable probability that had such evidence been presented" an indictment would have resulted.

A two-step process such as that contemplated by Section 1 also creates concerns about the due process rights of police defendants because they would be subject to a system of review separate and apart from every other defendant.

If the goal of Section 1 is to assure the public that the process for handling cases of use of deadly force by police against unarmed civilians is fair and unbiased, we believe further study and consideration should be given to the role of an independent special prosecutor in these cases. The Committees did not have a consensus as to whether a special prosecutor is necessarily the best way to proceed and some concerns were raised about public accountability of special prosecutors generally. Some committees are opposed in concept because they believe local prosecutors can ably prosecute cases against police officers, while others believe a special prosecutor is the most effective way to handle these cases because prosecutors cannot be truly unbiased. The Committees did, however, express a consensus view that the question of a special prosecutor is one worthy of further exploration and debate because it may provide an important reform without overhauling the entire grand jury system.²

GRAND JURY REPORTING

While the Committees had no consensus on Sections 2 and 3 of the Act, which allows a DA to create a grand jury report or issue a public letter, some concerns raised about the section's

² Over twenty years ago, the City Bar issued a report calling for the appointment of special prosecutors in cases of police corruption and severe police brutality. "Need for a Special Prosecutor for Criminal Justice", Criminal Law Committee, Feb. 1993, at http://www2.nycbar.org/pdf/report/uploads/93001-the_need_for_a_special_prosecutor_for_criminal_justice.pdf. The Committees did not reach a consensus as to whether the City Bar should adhere to that position.

drafting are worth mentioning. For instance, the legislation suggests that the DA's explanatory letter explain "the basis of the grand jury's decision to dismiss the indictment". This does not accurately reflect the grand jury process: grand juries determine whether there is probable cause to charge a person with a crime by indictment; grand juries do not possess the authority to dismiss indictments. More significantly, as the law currently stands, neither prosecutors nor anyone else has the right or the authority to learn why grand jurors or a grand jury declined to vote to indict, making this part of the proposed legislation impractical. Additionally, by calling these DA reports "grand jury reports", the possibility of public misunderstanding may be enhanced, since such reports would come not from the grand jurors themselves but from the very DA whose motives will be at issue and therefore still subject to public skepticism.

Creating any carve-out in the grand jury process for police officers is a significant public policy change worth deeper consideration. While some would argue that issuing a grand jury report in these cases would assist the public in understanding the evidence (or lack thereof), others are concerned that this kind of legislation would ultimately prejudice police defendants, who deserve the same treatment and due process protections as other defendants.

ADDITIONAL COMMENTS

The City Bar is generally supportive and does not object to the remaining sections of the Act.³ While we are supportive of Section 7 in concept, which would require greater reporting on the part of law enforcement agencies, we offer a few general comments. First, the section would require law enforcement agencies to provide information about police conduct that was "a possible factor" in the death of a civilian during the enforcement of a violation or misdemeanor without defining what "a possible factor" is. This phrase should be defined to ensure proper reporting. Additionally, greater consideration should be given to whether this section should include more detailed guidance as to how data are reported and what the data will be used for. We also have no objection to Section 8, regarding previous search warrant applications, since this is information that is currently provided by prosecutors (although not in as great detail) since the information is routinely solicited by judges.

March 2015

³ The City Bar did not review or comment on Section 6, which would create a model "use of force" policy for State and local law enforcement agencies.