NEW YORK CITY COUNCIL
COMMITTEE ON OVERSIGHT AND INVESTIGATIONS

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CONCERNING INTRO BILL No. 1770 IN RELATION TO WHISTLEBLOWER PROTECTIONS FOR INDIVIDUALS FACING ADVERSE PERSONNEL ACTIONS

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Good morning Chair Torres and members of the Committee on Oversight and Investigations. My name is Margaret Garnett and I am the Commissioner of the New York City Department of Investigation ("DOI"). Thank you for inviting me to address the Committee on Intro No. 1770, the proposed legislation in relation to whistleblower protections for employees facing adverse personnel actions.

New York City's Whistleblower scheme is foundational to DOI's mission of rooting out corruption, fraud, waste and other wrongdoing from City government. New York City is a leader in fighting municipal corruption because of its comprehensive system of duties to report and cooperate, strong protections for employees when they act on those duties, and an independent and robust inspector general system in the Department of Investigation.

In my testimony today, I'd like to first provide the Committee with an understanding of the rules that currently guide how and when wrongdoing must be reported; second, explain how the current whistleblower protection statute functions; third, summarize DOI's recent experience with the current whistleblower statute; and, finally, highlight some concerns and recommendations that I hope the Committee will consider as it evaluates the proposed legislation.

I. Overview of the Rules that Currently Govern Reporting Wrongdoing

There are currently three places in the City's governing documents that set out important aspects of the City's system for reporting wrongdoing. One is Executive Order 16, which mandates the affirmative obligation of all public officers and employees to report corruption, fraud and other wrongdoing or risk their jobs and professional advancement if they do not. Executive Order 16 also mandates that all public officers and employees cooperate fully with DOI investigations. This duty to cooperate with DOI investigations is also included in Chapter 49 of the City Charter, within the list of duties of public officers and employees. The third place is Section 12-113 of the New York City Administrative Code, also known as the Whistleblower Protection statute, which protects public servants from retaliation when they act on their duty to report wrongdoing, as amended by Local Law 33, which expanded whistleblower protections to include complaints about children's educational welfare, health and safety, and to include officers and employees of vendors who have contracts with the City valued at $100,000 or more.

II. How the Current Whistleblower Protection Law Functions

The current whistleblower protection law, codified in Section 12-113 of the Administrative Code, has five elements that must be satisfied in order for an individual employee to be protected by the Law. First, the complainant must be an officer or employee of a City agency, or of a contractor with City contracts over $100,000. Second, the complaint must involve corruption, criminal activity, conflict of interest, gross mismanagement, abuse of authority, or the health, safety or welfare of a child. Ordinary mismanagement, disagreements about policy or procedures, or objections to decisions within the lawful discretion of agency heads or elected officials are not covered. Third, individuals must make these complaints to DOI, or to a member of the City Council, the Public Advocate, or the City Comptroller, each of whom has a duty to refer the complaints

to DOI. Employees and officers of contractors may also qualify for protection if they make such a report to the City Chief Procurement Officer, Agency Chief Contracting Officer or an agency head or Commissioner of the contracting agency, who then must refer the complaint to DOI. Individuals making a report concerning conduct involving the health, safety or educational welfare of a child by another City officer or employee may also be covered by the statute if they report wrongdoing to a superior officer or to the Mayor. Fourth, the complainant must have suffered an adverse personnel action, which can potentially include things like termination, demotion, suspension, disciplinary action, negative performance evaluation, salary reduction, denial of promotions or raises, or significant unwanted changes in duties or work environment. Fifth and finally, the adverse personnel action must have been the result of the individual's report of the wrongdoing at issue.

When DOI receives a complaint that alleges retaliation, even if it does not specifically reference whistleblower protection or the statute, we conduct a thorough inquiry. The current law requires that DOI acknowledge the receipt of the complaint within 15 days, provide a final written statement to the complainant explaining how the matter was resolved, and, if the complaint of retaliation is substantiated, provide a report of our findings and recommendations to the relevant agency.

The Law also calls for DOI to conduct public education efforts so employees and officers of covered agencies and contractors are aware of their rights and responsibilities under this Law. In addition to our other public outreach efforts, DOI conducts regular outreach to the City's workforce through both in-person and online corruption prevention trainings. In Fiscal Year 2019, we conducted 449 in-person corruption prevention and outreach lectures that reached over 16,000 City employees, an increase of 15 percent from the previous fiscal year. More than 33,000 employees completed on-line anti-corruption training through DOI's Citywide e-learning module. I believe these efforts are key to increasing awareness among the City workforce about corruption risks, their obligation to report wrongdoing, and the related whistleblower protections when they do so.

Before I move on to discuss DOI's most recent whistleblower annual report, I'd like to clarify the meaning of "whistleblower" as I have generally used it in my testimony so far. New York City's laws classify individuals as a "whistleblower" **only** when they raise a claim of retaliation in their employment as a result of reporting wrongdoing. In contrast, the term "whistleblower" is often used colloquially or in the media to describe any individual who reports wrongdoing. We are very fortunate in New York City that, thanks in part to DOI's long and storied history as an effective anti-corruption investigator, hundreds of City employees step forward to report corruption, fraud, criminality, waste, and abuse of authority to DOI each year. Many more public servants voluntarily provide crucial information about these issues to DOI in the course of our investigations, even if those investigations were not initiated by a report from a City employee. These actions are vital to DOI's effectiveness and these individuals should be commended for embracing good government principles, promoting integrity and confidence in City government, and ensuring that City operations and services are not damaged by the corrosive effects of corruption, fraud and waste. The fact that the law does not label an individual a "whistleblower" until there is an allegation of retaliation in no way diminishes

the significant contribution to government integrity made by the officers and employees in the City who report wrongdoing every day. Indeed, as I will discuss in a moment, a very small fraction of these "whistleblowing" individuals allege or suffer workplace retaliation for reporting wrongdoing. I view this as a tremendously positive sign, because it indicates that a wide range of City employees understand their duty to report and duty to cooperate, that DOI's commitment to complainant confidentiality is effective and respected, and that where the identity of a complainant becomes known, there is widespread understanding among City supervisors that workplace retaliation for reporting wrongdoing is illegal in New York City and will not be tolerated.

III. DOI's Most Recent Whistleblower Annual Report

By October 31 each year, DOI submits a letter-report to the Mayor and City Council Speaker describing the complaints from the previous fiscal year that fall within the Whistleblower Law. I have attached a copy of the Fiscal Year 2019 Whistleblower letter to my testimony today so the Committee members can see those statistics in detail. DOI began posting these letters to our public website in 2019, to further government transparency and public education on whistleblower issues in New York City.

In Fiscal Year 2019, which covers the period from July 1, 2018 through June 30, 2019, DOI received 32 whistleblower retaliation complaints, two more than the prior fiscal year. These complaints came from individuals who alleged job-related retaliation or sought workplace protection for reporting misconduct in City government. To substantiate a complaint, DOI must find that all five elements of the law have been met, as I described them a moment ago. Although the law has very specific requirements, DOI applies a broad lens in this area, meaning that DOI carefully reviews all complaints of alleged retaliation regardless of whether the complainant specifically invokes the Law or identifies themselves as a whistleblower.

In Fiscal Year 2019, DOI substantiated five whistleblower complaints, the highest number of substantiated whistleblower retaliation complaints in a single year since at least 2014. The previous year, for instance, saw no substantiated investigations. Given that the numbers have historically been small, I do not believe there is any particular reason for this one-year uptick, or any conclusion that should be drawn from a single year's statistics, other than that this was a year with complaints that merited substantiation.

Our statistics include whistleblower complaints received and investigated by DOI and by the Special Commissioner of Investigation (SCI) for the New York City School District, which has a reporting function to DOI. In Fiscal Year 2019, three of the five substantiated matters were within the jurisdiction of DOI, and two within the jurisdiction of SCI. The five substantiated matters were remedied in the following ways:

- two of the five individuals were reinstated to their positions, with back pay;
- for one additional individual, DOI directed the agency to cease adverse, unwarranted personnel actions against the individual;
- and in the case of two Department of Education employees, SCI directed schools officials to reinstate the two employees to their position with back

pay and remove disciplinary and other relevant documents from their personnel files.

IV. Concerns and Recommendations

I turn now to highlighting some concerns and recommendations for the Committee's consideration as it evaluates Intro. 1770 and the state of New York City's whistleblower regime in general.

First, as I mentioned earlier, currently, the foundational duties that underlie whistleblower protections, including the affirmative duty to report and the duty to cooperate, and the details of what those protections mean, are found in three separate places. Any revision of the whistleblower protection statute provides an opportunity to integrate those various elements in a single place, as well as give legislative status to the duty to report. Doing so would incorporate the full scope of New York City's anti-corruption whistleblower system into one comprehensive piece of legislation. It would also provide an opportunity to specify that the duty to report and duty to cooperate on matters relating to corruption or criminality applies to officers and employees of contractors with contracts above $100,000 with the City. Currently, a version of these duties is standard language in the City's contracts, but is not required by law. Under current law, employees and officers of contractors **are** protected by the whistleblower law if they report corruption or fraud in connection with their City contract, but they are not legally bound to report or to cooperate in any investigation. Including those duties alongside the protections would better mirror what we require and expect of City employees. The opportunity to create parity on these matters is particularly important as the City relies more each year on private entities to provide a variety of public services, and as we embark on several major infrastructure projects that will involve significant private contracts such as the construction of Borough-based Jails and the East Side Resiliency Project.

These proposed revisions would clarify for City employees and contractors that they have specific mandates to report corruption and cooperate with corruption investigations, and pair those duties in one statute with what is necessary to effectuate them, which are the legal protections when employees are retaliated against for reporting or cooperating. The duties and the protections go hand-in-hand, and placing them in the same piece of legislation would provide clarity as well as make any future needed revisions or amendments to the whistleblower rules easier and more comprehensive. Consolidating these existing concepts in the same piece of legislation would also support the addition of clear language in the statute requiring all City agencies and those City contractors subject to the law to notify their employees of this coherent set of duties, responsibilities, and protections.

Second, DOI would also recommend that the statute be revised in the relevant places to clarify that full whistleblower protections are afforded to those individuals who make reports to the Special Commissioner of Investigation for the New York City School District regarding matters within the school district. In a similar vein, DOI also does not object to the language in the proposed bill that extends whistleblower protection to those who are subject to workplace retaliation when they cooperate with the City Council as a

legislative or oversight body, regarding the type of complaints covered by the current law – in other words, those matters that relate to corruption, criminal activity, conflict of interest, gross mismanagement, or abuse of authority.

Third, DOI recommends that a time limitation be placed on when retaliation complaints can be made. The longer an allegation goes unreported, the harder it is to uncover the facts and ensure that valid claims are vindicated. Based on a review of similar state and federal statutes, and our own experience as the City's whistleblower investigator, DOI submits that the appropriate time period in which to report claims of retaliation should be two years from the date that the complainant was informed of the alleged adverse personnel action.

Fourth, DOI does not oppose the addition of some requirements that DOI provide regular updates regarding its whistleblower investigations to the complainant, and also to the Council Speaker where the claim of retaliation arises from cooperation with a Council investigation. However, we would recommend that the proposed language be revised to require only that whistleblower investigations be completed as promptly as practicable, and that the 90-day period apply only to the frequency at which DOI will provide required status updates. Based on our experience conducting these investigations, it is not realistic to assume as a default that such investigations can be completed in 90 days. As in all of our investigations, DOI is focused on finding the facts and leaving no stone unturned. However, we recognize the anxiety that workplace retaliation creates for whistleblower complainants, and do not oppose the transparency and increased sense of urgency that a 90-day status reporting requirement could bring.

Fifth, DOI supports the addition of language that establishes a clear plan of action when allegations of retaliatory action are made against the DOI Commissioner or executive-level DOI personnel. We agree with the proposed language that such allegations would be referred to the City's Corporation Counsel, but recommend including specific language that the Corporation Counsel would be empowered to hire a qualified outside attorney to serve as an acting deputy commissioner for the purposes of investigation and recommending action on the allegation, if the nature of the allegation warranted such appointment. We respectfully submit that this procedure should not apply to allegations that relate to adverse personnel action taken by DOI supervisors below the Commissioner-title executive level. DOI currently has its own internal IG who is capable of carrying out DOI's obligation to fairly investigate and take action on this type of lower-level retaliation complaint, as it would for any other City agency.

With the revisions and additions I have suggested here, the City's Whistleblower statute would be a robust, comprehensive law, one that could be a national model for what is expected of those who witness corruption and what is expected of government when whistleblowers step forward and suffer retaliation.

I cannot stress enough how important and distinctive New York City's overall whistleblower system is, composed of both strong obligations and robust protections. It has important symbolic value as a signal of the City's commitment to the ideal of honest government, and it also yields results. DOI regularly initiates important investigations based on public servants who heed their affirmative obligation to report corruption; and

our investigations into retaliation complaints have restored the livelihoods of those who honored that duty. A comprehensive and effective whistleblower statute is good government in action: holding public servants accountable and protecting them when they do the right thing, and fostering a culture that does not tolerate corruption, fraud, self-dealing, or waste of public funds.

Thank you again for the opportunity to comment on this important issue.

I am happy to answer any questions the Councilmembers have for me on this matter.