

**To:** New Jersey Law Revision Commission  
**From:** Mark J. Leszczyszak  
**Re:** Collateral Consequences of Conviction – Part I: Rehabilitated Convicted Offenders Act  
**Date:** November 10, 2014

## MEMORANDUM

### I. Background

Staff is pleased to have resumed work on a project concerning the collateral consequences of conviction that was originally brought to the Commission’s attention by *In re D.H.*,<sup>1</sup> a case that struggled to harmonize the statute addressing the effect of an order of expungement, *N.J.S. 2C:52-27*, with the statute mandating the forfeiture of public office upon a conviction for certain crimes, *N.J.S. 2C:51-2*.

In that case, D.H., a detective with the Monmouth County Prosecutor’s Office, performed an unauthorized criminal background check using a restricted law enforcement database. Several years after pleading guilty to the offense and consenting to the statutorily mandated forfeiture of her public employment, she petitioned for an expungement.<sup>2</sup> Both the trial court and the Appellate Division held that the permanent bar to holding public office, as a collateral consequence of D.H.’s conviction, was effectively erased by an expungement<sup>3</sup> since those courts reasoned that an expungement operates to make “the arrest, conviction and any proceedings related thereto ... deemed not to have occurred”—“[u]nless otherwise provided by law.”<sup>4</sup>

The New Jersey Supreme Court, however, held that the phrase, “[u]nless otherwise provided by law”, incorporates *all* other statutes, including the language of *N.J.S. 2C:51-2d*.<sup>5</sup> Thus, a public employee, even if entitled to certain advantages of expungement, shall never again hold public office. Dissenting, Justice Long interpreted the phrase, “[u]nless otherwise provided by law”, as referring only to exceptions stated *within the same chapter* of Title 2C, including the mandatory disclosure of expunged records to a parole board, *N.J.S. 2C:52-22*, or to a judge in conjunction with setting bail or sentencing, *N.J.S. 2C:52-21*.<sup>6</sup>

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<sup>1</sup> 204 N.J. 7 (2010).

<sup>2</sup> *D.H.*, 204 N.J. at 9-10. (Had D.H. been convicted of a *crime* touching on her office (rather than a disorderly persons offense, *see N.J.S. 2C:1-4*), the conviction would not have been eligible for expungement. *N.J.S. 2C:52-2b*. D.H., however, was convicted of a disorderly persons offense pursuant to a plea agreement. *D.H.*, 204 N.J. at 11.).

<sup>3</sup> *D.H.*, 204 N.J. at 13; *See, In re Forfeiture of Public Office of Nunez*, 384 N.J.Super. 345, 349 (App. Div. 2006).

<sup>4</sup> Effect of expungement, *N.J.S. 2C:52-27*(1981).

<sup>5</sup> *D.H.*, 204 N.J. at 24.

<sup>6</sup> *Id.* at 29.

Although it began with a review of *In re D.H.*, this project was later expanded by the Commission to include a review of the collateral consequences of criminal convictions imposed generally by New Jersey law. As this project has developed, it now consists of three parts.

The first part involves proposed modifications to the language of the RCOA to address the current “bifurcated” nature of the statute, which was enacted in 1968 and then modified in 2007. Although the result is a single statute, the component parts do not interact smoothly and additional revision appears to be warranted to consolidate them and make the interplay between the sections more coherent.

The second part of the project is the identification and classification of situations in which the issuance or denial of a license, employment, or other benefit is based a determination of “moral turpitude” or “good moral character”. It appears that it would be useful to revise the statutory language so that provisions that concern similar situations are interpreted and applied in a consistent manner.

The third part of this project involves an analysis of the statutory language and the cases that concern the forfeiture of public office. That part of the project will require a determination about whether it is appropriate to distinguish between different types of public employees and different types of offenses, and to treat them differently for purposes of forfeiture.

Staff’s work in this area has been aided by a compilation of ancillary sanctions prepared by the Criminal Justice Section of the American Bar Association<sup>7</sup> that identified more than 1,000 New Jersey statutes and regulations containing sanctions ancillary to a criminal conviction.<sup>8</sup> In addition, since the Commission began work in this area, the ABA’s Criminal Justice Section constructed an interactive website – the National Inventory of the Collateral Consequences of Conviction (“NICCC”) – that contains “each jurisdiction’s collateral consequences”.<sup>9</sup>

The NICCC website explains, in its Project Description, that

[s]ome collateral consequences serve an important and legitimate public safety or regulatory function, such as keeping firearms out of the hands of violent offenders, protecting children or the elderly from persons with a history of abuse, or barring people convicted of fraud from positions of public trust. Others are directly related to the particular crime, such as registration requirements for sex offenders, driver’s license restrictions for those convicted of serious traffic offenses, or debarment of those

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<sup>7</sup> <http://isrweb.isr.temple.edu/projects/accproject/pages/GetStateRecords.cfm?State=NJ>

<sup>8</sup> Court Security Improvement Act of 2007, *Pub. L. No.* 110-177, 110th Cong. § 510(d) (2008).

<sup>9</sup> National Inventory of the Collateral Consequences of Conviction, <http://abacollateralconsequences.org/description/> (last visited Nov. 6, 2014).

convicted of procurement fraud. But many others apply across the board to people convicted of crimes, without regard to any relationship between crime and consequence, and frequently without consideration of how long ago the crime occurred or what the individual has managed to accomplish since. Many consist of nothing more than a direction to conduct a criminal background check, and an unspoken warning that it is safest to reject anyone with a record. When convicted persons are limited in their ability to support themselves and to participate in the political process, this has both economic and public safety implications. When society is discouraged from recognizing and rewarding genuine rehabilitation, this has moral and social implications as well. When particular restrictions have no apparent regulatory rationale, and cannot be avoided or mitigated, they function as additional punishment, though without due process protections.<sup>10</sup>

Like the initial work done by the ABA's Criminal Justice Section, the NICCC searchable database identifies more than 1,000 collateral consequences of conviction for New Jersey (searchable by "consequence categories" like "Business license and other property rights", "Education", "Employment", etc. and by "offense categories").

In addition to these resources, *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* written by Margaret Colgate Love, Jenny Roberts, and Cecelia Klingele was published in early 2013 to serve as "a comprehensive resource for practicing civil and criminal lawyers, judges and policymakers on the legal restrictions and penalties that result from a criminal conviction over and above the court-imposed sentence."<sup>11</sup> Also, the 2014 New Jersey-specific practice guide *New Jersey Collateral Consequences*, was co-authored by John C. Lore, III, Clinical Professor and Director of Trial Advocacy at Rutgers School of Law – Camden.<sup>12</sup> This "comprehensive resource" was described as a first for New Jersey,<sup>13</sup> and the authors explained that "statutes have been located, analyzed, and summarized to include relevant information relating to the particular consequence at issue as well as any opportunities for rehabilitation that might exist under that particular statute."<sup>14</sup>

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<sup>10</sup> National Inventory of the Collateral Consequences of Conviction, <http://abacollateralconsequences.org/description/> (last visited Nov. 7, 2014).

<sup>11</sup> National Association of Criminal Defense Lawyers, <http://www.nacdl.org/News.aspx?id=26526> (last visited Nov. 7, 2014).

<sup>12</sup> Cathy K. Donovan, *Law Professor Co-authors Book on New Jersey Collateral Consequences, a First for the State*, Rutgers Today (Nov. 6, 2014, 1:41 PM), <http://news.rutgers.edu/news-release/law-professor-co-authors-book-new-jersey-collateral-consequences-first-state/20140225#.VFvEaPnF9qV>

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

## II. Legislative Developments

In addition to reviewing the resources described above, Staff also reviewed legislation introduced or enacted that might be relevant to the Commission's work in this area since the last memorandum was provided for Commission consideration.

Of the 23 bills reviewed that were introduced since the Commission last considered this project, three appeared to be the most significant, although none has a direct impact on the Commission's project. The three that Staff reviewed in detail were: A1999 "The Opportunity to Compete Act,"<sup>15</sup> which "[p]rohibits public and private employers from discriminating against ex-convicts";<sup>16</sup> and A1401, which "[a]ddresses various concerns affecting post-release employment."<sup>17</sup> The remaining bills either established criminal background checks for certain professions or provided certain crimes that appear closely related to the profession as grounds for disqualification.

A1999 ("The Opportunity to Compete Act" or "TOCA") was enacted as P.L.2014, c.32 on August 11, 2014. TOCA recognizes the obstacles and barriers to employment faced by those with a criminal history, and provides that employers may not require an applicant for employment – during the *initial employment application process* – to complete any application that inquires about the applicant's criminal history or to answer any questions about the applicant's criminal history. TOCA pertains to both public and private employers meeting the definition of "employer" contained in the act, and it contains provisions with regard to advertising as well as exceptions to its prohibitions. TOCA also provides, that

[n]othing set forth in this section shall be construed to prohibit an employer from requiring an applicant for employment to complete an employment application that makes any inquiries regarding an applicant's criminal record after the initial employment application process has concluded or from making any oral or written inquiries regarding an applicant's criminal record after the initial employment application process has concluded. The provisions of this section shall not preclude an employer from refusing to hire an applicant for employment based upon the applicant's criminal record, unless the criminal record or relevant portion thereof has been expunged or erased through executive pardon, provided that such refusal is consistent with other applicable laws, rules and regulations.<sup>18</sup>

"Initial employment application process" is defined as

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<sup>15</sup> A1999, 216th Leg., Reg. Sess. (N.J. 2014).

<sup>16</sup> A830, 216th Leg., Reg. Sess. (N.J. 2014).

<sup>17</sup> A1401, 216th Leg., Reg. Sess. (N.J. 2014).

<sup>18</sup> N.J.S. 34:6B-14.

the period beginning when an applicant for employment first makes an inquiry to an employer about a prospective employment position or job vacancy or when an employer first makes any inquiry to an applicant for employment about a prospective employment position or job vacancy, and ending when an employer has conducted a first interview, whether in person or by any other means of an applicant for employment.<sup>19</sup>

A830 was introduced and referred to committee this legislative session (and had been introduced last session as well), but there have been no other developments to this time. The goal of the bill is, as expressed in the Sponsor's Statement, to

prohibit all public and private employers from discriminating against ex-convicts. Public and private employers would be prohibited from denying a person a license or employment because the person has previously been convicted of a criminal offense or because the person has been determined to lack "good moral character" based on a previous conviction. The bill applies to current, as well as prospective employees.

A830 appears to be designed to work in conjunction with the RCOA since it directs employers to consider a certificate issued under section 2A:168A-7, et seq.

A1401 was introduced and referred to committee this legislative session (and had been introduced last session as well), but there have been no other developments to this time. A lengthier bill than the two described above, A1401 deals with multiple areas of the statute to address related goals and, as explained in the Sponsor's Statement, it provides that: (1) a person whose driver's license had been suspended for certain motor vehicle violations would be allowed to apply for a restricted use license; (2) the Chief Administrator of the Motor Vehicle Commission has discretion in deciding whether a person's license should be suspended for an out-of-state drug conviction; (3) a potential employee may affirmatively demonstrate rehabilitation when seeking employment at an airport; (4) an alcoholic beverage licensee may only use the results of a criminal history record background check as a factor in determining whether a person is qualified to be employed in the establishment; (5) State, county or municipal employers are prohibited from requiring a person to disclose criminal convictions on an application for employment; (6) all public and private employers are prohibited from discriminating against ex-convicts and provide for the Commission on Civil Rights to enforce the provisions of this bill and those employers would be prohibited from denying a person a license or employment because the person has previously been convicted of a criminal offense or because the person has been determined to lack "good moral character" based on a previous

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<sup>19</sup> N.J.S. 34:6B-13.

conviction. Like A830, A1401 appears to be designed to work in conjunction with the RCOA since it also refers to a certificate of rehabilitation.

The introduction of a number of bills addressing the impact of criminal convictions seems to indicate an ongoing legislative awareness of some of the issues relevant to the Commission's work.

### **III. Other Statutes and Cases**

In addition to the foregoing, Staff updated its review of the case law in this area (no relevant cases have been decided since the last Memorandum was provided) and also reviewed the law in other states and, the District of Columbia ("D.C."), as well as the territory of Puerto Rico in an effort to identify provisions similar in type to the RCOA. So far, it appears that only seventeen jurisdictions have RCOA-like provisions.<sup>20</sup> Of those seventeen, Staff reviewed the statutory language from Arkansas, Arizona, California, Colorado, Connecticut, the D.C., and Kentucky. Staff has not observed a consistent treatment of the issue among the states, but will continue to review the language in order to determine if there are any provisions not currently contained in New Jersey law that could enhance the existing language.

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<sup>20</sup> The seventeen (17) states include Arkansas, Arizona, California, Colorado, Connecticut, Kentucky, Louisiana, Michigan, Minnesota, Montana, New Mexico, New York, Pennsylvania, Tennessee, Texas, Virginia, and the District of Columbia.