

MINUTES OF COMMISSION MEETING

November 16, 2023

Present at the meeting of the New Jersey Law Revision Commission, held remotely, were: Chairman Vito A. Gagliardi, Jr.; Vice-Chairman Andrew O. Bunn; Commissioner Virginia Long; Professor Edward Hartnett, of the Seton Hall University School of Law, attending on behalf of Interim Dean John Kip Cornwell; Professor Bernard W. Bell, of the of Rutgers University Law School, and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Dean Johanna Bond.

Minutes

On the motion of Vice-Chairman Bunn, seconded by Commissioner Long, the Minutes of the October 19, 2023, were unanimously approved by the Commission.

Interpretation of the Vote by Mail Law in N.J.S. 19:63-26

Whitney Schlimbach discussed with the Commission a Revised Draft Tentative Report proposing modifications to New Jersey's Election Law. She explained that in New Jersey, an election may be contested by asserting one of the grounds in N.J.S. 19:29-1, but that the Vote by Mail Law directs that an election "shall not" be held invalid due to irregularities or failures in preparation or forwarding of mail-in ballots in N.J.S. 19:63-26.

In the *In re Election for Atlantic County Freeholder District 3 2020 General Election* case, the Appellate Division held that N.J.S. 19:63-26 establishes a presumption of validity when there is an irregularity or failure in the preparation or forwarding of mail-in ballots that may be rebutted by asserting one of the grounds in N.J.S. 19:29-1 as a basis to invalidate the election. The Commission released a Tentative Report in October 2022 proposing modifications that reflected this holding. A response to Commission outreach was received from Scott Salmon, Esq., who represented the prevailing candidate in the *Atlantic County Election* matter. Mr. Salmon suggested alternative language and pointed out additional issues regarding the statutory language of N.J.S. 19:29-1.

Following the presentation of an Update Memorandum to the Commission in April 2023, the Commission authorized further research and outreach into issues related to the jurisdiction of the Election Law Enforcement Commission (ELEC) as provided in the Campaign Contributions and Expenditures Reporting Act (Reporting Act). Ms. Schlimbach explained that appellate courts have held that ELEC has primary jurisdiction over Reporting Act violations not brought pursuant to N.J.S. 19:44A-21 (criminal complaints) or N.J.S. 19:44A-22.1 (summary actions prior to election), and exclusive jurisdiction over violations of the Reporting Act's reporting requirements.

During the October 2023 Commission meeting, Staff requested guidance on two issues with respect to the proposed modifications. The Commission agreed to retain the modifications made to subsection (a)(7) in N.J.S. 19:29-1, which expanded that section to reach public questions as well as election results. The Commission also determined that the proposed modification to the

Reporting Act, which reflected the scope of ELEC’s jurisdiction over Reporting Act violations, should be contained in a new freestanding statute.

The Commission raised three additional issues during the October meeting. Vice-Chairman Bunn pointed out that adding language addressing the jurisdiction of ELEC to N.J.S. 19:29-1, which focuses on the grounds for challenging an election, might be confusing because the proposed language addresses jurisdiction over election contest claims. Commissioner Long noted that despite the language employed by the *Atlantic County Election* Court, the principle that an election by mail can be contested pursuant to N.J.S. 19:29-1 is not actually a rebuttable presumption. Finally, Commissioner Bell proposed modifications to subsection (a) of N.J.S. 19:29-1 related to the number of voter signatures required to contest an election and also proposed a word change in subsection (a)(2) of the statute.

Ms. Schlimbach explained that with respect to N.J.S. 19:63-26, the revised modifications eliminate proposed subsection (b), which articulated the “rebuttable presumption” referred to in the *Atlantic County Election* decision. The modifications add the language “unless one or more of the grounds set forth in N.J.S. 19:29-1 is established” to the end of subsection (a). Commission guidance was requested with respect to the inclusion of the word “solely,” as it conveys a similar meaning as newly proposed language, specifically that a vote by mail election cannot be contested based on mail-in ballot errors alone (unless a ground for contesting the election is established).

In N.J.S. 19:29-1(a), the revised modifications incorporate Commissioner Bell’s proposal that the language setting forth the requirements for commencing an election contest should be modified to read: “requisite number of voters of this State . . . as specified by N.J.S.A. 19:29-2.” The revised modifications also replace the word “to” with “for” in subsection (a)(2). In subsection (a)(8), the language referencing jurisdiction over Reporting Act violations was eliminated. Finally, subsection (c) was eliminated since it referenced the rebuttable presumption language eliminated from N.J.S. 19:63-26.

In N.J.S. 19:29-2, the revised modifications add language in a new subsection articulating the scope of ELEC’s jurisdiction over Reporting Act violations arising in election contest claims. The language was added to this statute because it addresses the requirements for filing an election contest petition. The language closely tracks the proposed language in the Reporting Act, which the Commission concluded (during the October 2023 meeting) should appear as a freestanding new statute in the Reporting Act.

Commissioner Hartnett suggested that another aspect of New Jersey case law may be worth trying to codify. He explained that the kind of problems with mail in ballots that prompted this project fall neatly into N.J.S. 19:29-1. The case law has made it clear that a “legal vote rejected” is interpreted broadly. If someone doesn't vote because the ballot instructions were confusing, for example, that qualifies as a “legal vote rejected.” He noted that this is not clear from the statutory text and, since the project is codifying important case law, he suggested attempting to codify that aspect of the case law, as well.

Vice-Chairman Bunn agreed with Commissioner Harnett. Commissioner Long also agreed with Commissioner Harnett but questioned what the Commission is trying to capture with the proposed modifications: that “irregularities in mailing will never be a ground to invalidate an election,” that “irregularity in mailing can be a factor that may be considered in connection with 19:29-1,” or that “only 19:29-1 can justify setting aside in the election”? Vice-Chairman Bunn said that in a previous meeting, the decision to add the word “solely” was intended to make clear that mail issues alone are not enough, but they can be raised in conjunction with other legitimate grounds. Chairman Gagliardi agreed. The Commission directed that Staff incorporate the proposed revisions into a Revised Draft Tentative Report to be discussed at a future meeting.

Juvenile Justice – State Home for Boys and Girls as used in N.J.S. 30:4-85

Samuel Silver discussed with the Commission a Draft Tentative Report proposing the removal of anachronistic references to the “State Home for Boys” and the “State Home for Girls” from the statutes. He explained that Christina Broderick, Chief of Legal & Regulatory Affairs, New Jersey Juvenile Justice Commission, confirmed that references to the State Home for Boys and State Home for Girls are no longer appropriate because these titles are not employed by the Juvenile Justice Commission (JJC). In October 2023, the Commission authorized Staff to prepare a Draft Tentative Report setting forth proposed modifications to N.J.S. 30:4-85 and N.J.S. 48:12-109.

Consistent with contemporary drafting practices, Mr. Silver proposed that the undesignated paragraphs be revised to provide each distinct provision with a letter designation from (a) – (g) to promote accessibility. He also noted that the proposed modifications incorporate the Commission’s previous recommendations regarding the replacement of the word “inmate” in the New Jersey statutes with person-first references. Those references are seen in subsections (a)-(c), and (e)-(f) and in proposed subsection (d).

Mr. Silver explained that in subsection (a), the proposed changes are limited to replacing the term “inmate” with person-first language. In addition to the replacement of “inmate,” subsection (b) calls for the replacement of anachronistic references to the State Home for Boys and the State Home for Girls with a reference to a state juvenile facility falling under the purview of the JJC. In subsection (c), the outdated references to the State Home for Boys and the State Home for Girls have been updated to reflect the current names of the designated correctional facilities. The proposed modifications introduce a separate subsection (d) to address references to female transfers and update the name of the State’s correctional facility for women.

Regarding N.J.S. 48:12-109, Mr. Silver explained that the proposed modifications remove outdated references to the chief parole officer of the State Home for Boys and the parole officer for the State Home for Girls and replace them with a reference to the Director of Juvenile Parole and Transition Services.

Finally, with regard to the term State Home for Boys and Girls in the “Acts Saved From Repeal,” Mr. Silver advised the Commission that these statutes remain superseded or repealed and have no further or additional effect because of their inclusion in the Revised Statutes.

Commissioner Harnett expressed concern regarding the age difference between males and females and asked whether this posed an equal protection problem. He said that if there is a constitutional issue, it might help to clarify the gender identification issues, because if there are no gender-based differences in the statute then the issue is moot.

Vice-Chairman Bunn referred to Commissioner Bell’s emailed comment concerning gender identification in N.J.S. 30:4-85(c) and (d) and asked whether those sections are necessary. He observed that removing those sections would allow judges the discretion to recognize issues concerning gender identification.

Chairman Gagliardi noted that, although the concerns raised by both Commissioner Harnett and Vice-Chairman Bunn are valid, the project was undertaken to address the outdated references to State Homes for Boys and Girls. He suggested circulating a Tentative Report to individuals who work in this area of law for feedback. Vice-Chairman Bunn and Commissioner Bertone agreed. Commissioner Harnett also agreed and suggested flagging the issues discussed by the Commission in the Report.

Commissioner Hartnett also suggested further research into N.J.S. 48:12-109 to determine whether it is anachronistic, preempted, or unconstitutional. He explained that it is at least anachronistic regarding the titles of the members of the courts and asked about the impact of the Hepburn Act, noting also that federal law has a general non-discrimination clause. He said that since the Commission is already addressing a small anachronistic piece of the statute, it would make sense to address the other anachronistic pieces as well.

Chairman Gagliardi indicated that, while he has no objection to changing outdated titles, with respect to the statutory sections that determine which state officials or employees are entitled to free transportation, any changes are well beyond the mandate and role of the Commission. Commissioner Long agreed with Chairman Gagliardi, and proposed expanding the project to revise all titles that have been changed or that no longer exist. Vice-Chairman Bunn stated that the statute does contain anachronistic language and it is within the Commissions mandate to address that. He suggested making N.J.S. 48:12-109 a separate project focusing on whether the statute has been found unconstitutional and whether it should be repealed. If not, the Commission should work on clarifying the language.

The Commission directed that Staff revise the Report with the proposed modifications discussed by the Commissioners to be presented at a future meeting.

N.J. First Act – Residency Requirement

Prior to Carol Disla-Roa’s presentation regarding the New Jersey First Act, the Commission discussed a recusal issue raised by Commissioner Bell in advance of the meeting.

Commissioner Bell explained he initially raised a concern that his position with Rutgers University Law School, which was a party to the underlying case, could give the appearance of impropriety. In light of the fact that although the project arose as a result of an issue pertaining to Rutgers, Commission work in this area would not uniquely impact or benefit Rutgers, Commissioner Bell indicated that unless any Commissioners objected, he did not plan to recuse himself from the discussion. The Commission agreed that Commissioner Bell's recusal was not necessary.

Vice-Chairman Bunn, however, due to his current residency in Florida, recused himself from the discussion, given that the statutory requirements, and any proposed modification, could potentially impact him personally.

Ms. Disla-Roa then discussed with the Commission a Memorandum concerning the residency requirement of the New Jersey First Act as it applies to volunteers as well as the statute's timing limitations for the filing of complaints. She explained that pursuant to N.J.S.A. 52:14-7, the New Jersey First Act requires that every person holding an office, employment, or position within state or local government reside in the State. Subsection (d) of the statute authorizes citizens to bring a complaint for the ouster of any individual covered by the Act who fails to reside in the State for any 365-day period, which action must be brought within one year.

Ms. Disla-Roa said that the Act was expanded in 2011 to cover a broad class of persons, seemingly in response to the 2008 recession, with the intent to boost employment opportunities for residents and to ensure that salaries paid by the State to public employees contribute to New Jersey's economy. She explained *Kratovil v. Angelson* considered, as a matter of first impression, an ouster complaint against four members of the Rutgers University Board of Governors who resided out of state. The Court, relying on the legislative history and statutory language, concluded that the New Jersey First Act did not apply to volunteers. It also determined that the period within which a complaint could be filed was "rolling" or successive, and allows for the filing of a complaint corresponding to each period of non-compliance.

Ms. Disla-Roa explained that with regard to the Act's applicability to unpaid or volunteer State position holders – in this case, the Rutgers Board of Governors Members – the Court looked to definitions of the terms, "office, employment, or position," and found that in other cases and statutory contexts, these terms were interpreted as synonymous with "employee."

Regarding timing of ouster complaints, the Court considered whether the statute intended to allow for rolling or successive periods given the statute's language of "any 365-day period." The Court found that limiting the ouster window to just one 365-day period of noncompliance could allow for lengthy periods of noncompliance, undercutting the purpose of the statute.

Ms. Disla-Roa explained that there are three bills pending that pertain to the Act. Only one bill addresses the issue in *Kratovil* and it seeks to significantly narrow the class of persons covered by the Act to the Governor, the Legislature, the head of each principal department of the Executive Branch of state government, every Justice of the Supreme Court, every judge of the Superior Court, and every Judge of any inferior court established under the laws of the state.

Ms. Disla-Roa requested authorization to conduct further research and outreach to determine whether the New Jersey First Act would benefit from clarification.

Commissioner Bell stated that the project seems reasonable, but he noted that the Commission's work in the area may be overtaken by the pending bill that would significantly narrow the scope of the statute. He questioned whether Staff had any information on the progress of the bill.

Ms. Tharney indicated that she and Ms. Disla-Roa had reviewed the history of the pending bill and found that it was introduced in this Legislative session and had been referred to committee, but that no further action was taken. It appears that identical versions of the bill were introduced during the 2020-2021 and 2018-2019 Legislative sessions, and that Senate bill had been introduced in each session beginning in the 2014-2015 Legislative session.

Chairman Gagliardi noted that, despite the potential legislative action, the project seemed to be worthwhile. Commissioner Bell agreed but advised that the Commission move expeditiously. It was the consensus of the Commission to proceed with this project.

Expungement – Examination of N.J.S. 2C:52-5.3 to Determine whether the “Clean Slate” Provision Includes Local Ordinance Violations

Meyarah Jabarin discussed with the Commission a Memorandum concerning expungement pursuant to N.J.S. 2C:52-5.3, focusing on whether the “Clean Slate” provision includes the expungement of local ordinance violation convictions.

Ms. Jabarin stated that the purpose of the New Jersey expungement statute is to “eliminate the collateral consequences imposed upon otherwise law-abiding citizens who had a . . . brush with the criminal justice system.” The “Clean Slate” expungement statute was enacted with the intent of offering petitioners a “broad form of expungement relief,” allowing individuals who previously expunged a criminal conviction to also file for “clean slate” expungement relief. Historically, the expungement of a prior conviction would have rendered a person ineligible for expungement pursuant to N.J.S. 2C:52-14.

Ms. Jabarin explained that in *State v. R.O.-S*, two petitioners sought “Clean Slate” relief for multiple convictions (including local ordinance violations) and the Court considered as a matter of first impression “whether the recently enacted statute, N.J.S.A. 2C:52-5.3, includes violations of local ordinances.” The Court examined the general intent and purpose of the expungement statute and noted that the charges faced by each petitioner were typically accompanied by “police and arrest reports, fingerprint cards, ‘mug shots,’ complaint warrants or summonses and most importantly, they are included on an individual’s criminal case history or “RAP” sheet.” The Court reasoned that “[t]his persistent criminal history is not what the ‘clean slate’ statute intended. . . and [would] undermine the very purpose and intent of N.J.S.A. 2C:52-5.3.26.”

Ms. Jabarin indicated that the Court granted the Petitioners’ motion for expungement of their criminal histories, including violations of any local ordinance that originated from a Title 2C violation. She added there are no bills pending seeking to amend the language of N.J.S. 2C:52-5.3.

Vice-Chairman Bunn asked whether *R.O.-S* had been appealed. Ms. Jabarin and Mr. Silver responded they were not certain whether the matter had any appeals pending but would check and advise the Commission.

Commissioner Bell indicated he had no objection to the project and Chairman Gagliardi agreed that the project was interesting and worthwhile to determine whether it was the Legislature's intent to exclude local ordinance violations. It was the consensus of the Commission to proceed with this project.

Title 39: Windshield Statute – N.J.S. 39:3-74 – Window Tint Traffic Stops

Commissioner Hartnett advised the Commission that in the case that formed the basis for this potential project, Professor Jonathan Romberg submitted a brief on behalf of amicus curiae Seton Hall University School of Law, Center for Social Justice. Commissioner Hartnett asked whether he should recuse himself from the discussion by virtue of his colleague's participation in the underlying case. After a discussion, the Commission concluded that Commissioner Hartnett's participation would be appropriate.

Christopher Camaj, Esq., a pro bono volunteer with the Commission, explained the basis for the potential project concerning amendment of N.J.S. 39:3-74, commonly known as the "windshield statute," to provide clarity.

In *State v. Smith*, 251 N.J. 244 (2022), the defendant was subject to a traffic stop predicated upon a tinted rear window. The tinting was not sufficient to obstruct the officer's view of the defendant inside the car. The defendant was arrested for possession of a firearm and contended that the traffic stop was unjustified, asserting that the officer did not possess reasonable and articulable suspicion that the tinting on defendant's rear window violated the windshield statute.

New Jersey's windshield statute prohibits the operation of a motor vehicle with any "non-transparent material" on the windshield or side windows. Mr. Camaj explained that this statute was enacted in 1921 and last amended in 1937. While the statute predates automotive window tinting, it frequently serves as the statutory foundation for traffic stops and citations related to tinted windows.

The *Smith* Court scrutinized the window treatment statutes and pertinent provisions of the New Jersey Administrative Code. The Court found that neither explicitly prohibited tinted rear windows. The plain language of the windshield statute specifically addresses front windshields and side windows. The Court found that the defendant's tinted rear window did not fall within the scope of the statute.

The Court expressed the view that its responsibility was to interpret the statute established a century ago and noted that the Legislature has the authority to modify the text of the statute. Laura Tharney mentioned that the Court reached its conclusion even though the issue was resolved

by a limited remand, because it noted that the underlying issue was of public importance and likely to recur, warranting a decision even in the absence of an actual controversy.

Vice-Chairman Bunn stated that he agreed with the Court's interpretation based upon the plain reading of the statute and asked what work there is for the Commission to do in this area. Commissioner Hartnett suggested that the concern is not the statute's inapplicability to rear windows, but how to regulate window tinting. He pointed out that certain states quantify window tint levels that enable police to observe a vehicle's interior and acknowledged the challenge posed by the existing standard of "see in clearly," noting its complexity for both shops, buyers, and law enforcement to comprehend.

Commissioner Bell observed that the Commission should consider whether the statute should be revised to include rear windows, given the extant practice of law enforcement officers apparently considering the opaqueness of rear windows as a statutory violation. Commissioner Bell also noted the competing interests at stake in any rear-window legislation. Such regulations would lead to more traffic stops and more police-citizen interactions. Such interactions at least inconvenience motorists and could lead to more significant consequences. On the other hand, such regulations may further the safety of law enforcement officers when they approach cars from the rear during a traffic stop, by allowing such officer to look into the car sufficiently to alert them to any dangers posed by the occupants.

Chairman Gagliardi directed Staff to examine other state's approaches to window tinting. Depending upon what this examination reveals, this project may not end with a recommendation, but the Commission may wish to bring this issue to the attention of the Legislature.

Retroactive Modification of Child Support in N.J.S. 2A:17-56.23a: Exceptions for Emancipation and Adult Adoption

Nicole Sodano, a pro bono volunteer with the Commission, discussed a Memorandum concerning the retroactive modification of child support obligations. She explained that New Jersey prohibits retroactive reductions in child support obligations that predate the application for modification, except in very limited circumstances. That the relevant statute, N.J.S. 2A:17-56.23a, provides that child support payments shall not be retroactively modified by the court except that they may be modified for the period during which an application for modification was pending. New Jersey courts have defined emancipation and adult adoption as exceptions to the prohibition on retroactive modification prior to the date of application, but neither term is included in the express language of the statute.

In *K.A. v. F.A.*, a married couple with three children divorced and K.A. remarried. Subsequently, the divorced couple's two oldest children, both over eighteen, were adopted by their stepfather. F.A. then requested termination of child support for his two oldest children and the modification of his child support obligation for his youngest child retroactive to the date of adoption. K.A. objected, arguing that because the child support obligation was unallocated

between the unadopted youngest child and the adopted middle child, the modification may only be retroactive to the date of the application.

The Court recognized that child support orders may be modified due to a substantial, permanent change in circumstances, but that the statutory prohibition on retroactive modification is firmly enforced and applied rigidly. The *K.A.* Court observed, however, that New Jersey courts have carved out limited exceptions to avoid possible inequitable effects of the statute, including exceptions for a child's emancipation and a child's death.

The Court explained that emancipation is most analogous to the circumstances in *K.A.*, since it involves a termination of parental rights and duty to support, and an adult adoption terminates all rights, privileges, and obligations due from the natural parents to the person adopted. In addition, an adult adoption does not require notice to the natural parent. Finally, although the child support was unallocated, courts had previously allowed a modification of unallocated child support to be modified back to the date of a child's emancipation. Therefore, the *K.A.* Court held that retroactive modification of child support is not barred when the substantial, permanent change in circumstances is an adult adoption because, on adoption, as on emancipation, any on-going financial support obligation is extinguished.

Ms. Sodano stated that, although there are two pending bills that concern N.J.S. 2A:17-56.23a, neither address the issue of retroactive modification discussed in *K.A. v. F.A.*

Commissioner Long said that although she has no objection to this project, adding emancipation and adult adoption exceptions to the statute has the potential to constrain the development of case law. She also noted that including the exceptions in the statute may give rise to an argument that other unique circumstances do not justify retroactive modification simply because the statute does not articulate them.

Vice-Chairman Bunn agreed with Commissioner Long's concern but indicated that he would like Staff to conduct research and outreach in this area. Commissioner Bertone agreed. It was the consensus of the Commission to proceed with this project.

Miscellaneous

Carol Disla-Roa briefly mentioned to the Commission a potential project concerning sentencing guidelines based on an issue addressed in *State v. Torres*. While working in this area, she noted that the Supreme Court, in *Torres*, indicated that it was awaiting action on sentencing guidelines from the New Jersey Criminal Sentencing and Disposition Commission (CSDC). She reviewed the CSDC's recent annual reports, and noticed that they referred to *State v. Torres* in 2022, but not in 2023. Ms. Disla-Roa reached out to the CSDC and spoke with Carolyn Roscoe Wright, Counsel to the CSDC, to ask whether their work with *Torres* was ongoing. It seems that CSDC work in the area is a possibility, and Staff and the CSDC will be in touch if there is an opportunity for both Commissions to work collaboratively in this area.

Laura Tharney then briefly mentioned that Staff had positive and useful interactions with all three law school campuses recently, attending practice area fairs and engaging with various deans. She also said that she was very pleased to have Carol working with the Commission, noting

that Carol began doing valuable work immediately after joining the Commission's staff. Ms. Tharney also mentioned that she participated in the Seton Hall Law School's on campus interviewing program for the Commission's 2024-2025 Legislative Fellowship position, and that a candidate had been hired to fill that position. Finally, she explained that she had preliminary conversations regarding the undergraduate pre-law program at Rutgers University in Newark to see if there might be opportunities to engage with their students.

Adjournment

On the motion of Commissioner Bertone, seconded by Vice-Chairman Bunn, the meeting was unanimously adjourned. The next meeting of the Commission is scheduled for December 21, 2023, at 4:30 p.m., at the office of the New Jersey Law Revision Commission.