

**To: New Jersey Law Revision Commission**  
**From: Samuel M. Silver, Veronica Fernandes**  
**Re.: Bias Intimidation Statute**  
**Date: April 06, 2020**

## MEMORANDUM

### Executive Summary

Some years ago, as a result of the monitoring of state judicial decisions calling for legislative action, Staff sought Commission authorization for a project concerning subsection (a)(3) of New Jersey's Bias Intimidation statute<sup>1</sup> as a result of the Appellate Division decision in *State v. Pomianek*.<sup>2</sup> Specifically, Staff sought to remove the language contained in subsection (a)(3) that permits the victim's perception of the alleged offense to serve as the basis for conviction. In its place Staff sought to add language that required the State to prove the defendant's intent to commit the offense.

The statute, which requires enhanced penalties, lacks a scienter requirement and Staff believed it would benefit from revision consistent with First Amendment safeguards for content-based speech. The continued monitoring of this area serves as the basis for the instant update.

### Background & Analysis

The defendant in *State v. Pomianek* was convicted in the Superior Court, Law Division, of harassment by communication, harassment by alarming conduct, bias intimidation, and official misconduct.<sup>3</sup> These convictions were related to an incident in which the victim was locked in an "equipment cage" on his employer's premises and mocked with a remark that the victim considered to be "racial" in nature.<sup>4</sup>

In January 2013, the Appellate Division affirmed part of the defendant's conviction, reversed the bias-harassment conviction and remanded the matter to the trial court.<sup>5</sup> The Appellate Division's decision formed the basis for Staff's presentation at the March 21, 2013, meeting of the Commission.<sup>6</sup> At that time, Commissioner Long observed that given the constitutional question involved, the State might seek certification to the New Jersey Supreme Court.<sup>7</sup> As a result, the

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<sup>1</sup> Memorandum from Jayne J. Johnson on New Jersey's Bias Intimidation Statute to the New Jersey Law Revision Commission 1 (Mar. 11, 2013) (on file with the Commission). See NEW JERSEY LAW REVISION COMMISSION (2013) 'Bias Intimidation Statute'. *Minutes of NJLRC meeting 21 Apr. 2013*, Newark, New Jersey.

<sup>2</sup> *State v. Pomianek*, 429 N.J. Super. 339 (App. Div. 2013).

<sup>3</sup> *State v. Pomianek*, 221 N.J. 66, 74 (2015).

<sup>4</sup> *Id.* at 72.

<sup>5</sup> *Pomianek*, 429 N.J. Super. 339.

<sup>6</sup> Memorandum from Jayne J. Johnson on New Jersey's Bias Intimidation Statute to the New Jersey Law Revision Commission 1 (Mar. 11, 2013) (on file with the Commission).

<sup>7</sup> NEW JERSEY LAW REVISION COMMISSION (2013) 'Bias Intimidation Statute'. *Minutes of NJLRC meeting 21 Apr. 2013*, Newark, New Jersey.

Commission declined to take further action on the project at that time and asked that Staff monitor the status of any appeal and provide that information to the Commission when it became available.<sup>8</sup> The State’s petition for certification was granted on October 25, 2013.<sup>9</sup>

On March 17, 2015, the New Jersey Supreme Court issued an opinion in the matter of *State v. Pomianek*.<sup>10</sup> The constitutionality of N.J.S. 2C:16-1(a)(3), a bias-crime statute, was the central issue of the appeal.<sup>11</sup> The Court stated that, “a defendant may be convicted of bias intimidation if the victim “reasonably believed” that the defendant committed the offense on account of the victim’s race.”<sup>12</sup> The statute does not focus on the defendant’s state of mind; rather, a conviction depends on whether the victim “reasonably believed” that racial bias served as the purpose for the commission of the crime.<sup>13</sup> The Court noted that, “[w]hether a victim reasonably believes he was targeted for a bias crime will necessarily be informed by the victim’s individual experiences and distinctive cultural, historical, and familial heritage – all of which may be unknown or unknowable to the defendant.”<sup>14</sup>

The Supreme Court determined that the section (a)(3) of N.J.S. 2C:16-1 was unconstitutional.<sup>15</sup> As written, that provision violates the Due Process Clause of the Fourteenth Amendment because it focuses on the victim’s perception and not the defendant’s intent.<sup>16</sup> The statute does not give a defendant sufficient guidance or notice on how to conform to the law.<sup>17</sup> As a result, the Court concluded that the statutory section in question is unconstitutionally vague.<sup>18</sup>

### Legislative Update

Shortly after the New Jersey Supreme Court issued its decision in *Pomianek*, the New Jersey Legislature began working in the area of bias intimidation once again.<sup>19</sup> During the 2020-2021 session, seven bills have been introduced in the New Jersey Legislature regarding the Bias Intimidation Statute – five in the Assembly and two in the Senate.<sup>20</sup>

Three of the five bills introduced in the New Jersey Assembly address the

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<sup>8</sup> *Id.*

<sup>9</sup> *State v. Pomianek*, 216 N.J. 363 (2013).

<sup>10</sup> *Pomianek*, 221 N.J. at 69.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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

<sup>14</sup> *Id.* at 69-70.

<sup>15</sup> *Id.* at 70.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> A4555, 217th Leg., 2017 Sess. (N.J. 2017) (striking section (a), paragraph (3) in its entirety).

<sup>20</sup> A682, 219th Leg., 2020 Sess. (N.J. 2020); A724, 219th Leg., 2020 Sess. (N.J. 2020); A863, 219th Leg., 2020 Sess. (N.J. 2020); A2732, 219th Leg., 2020 Sess. (N.J. 2020); A2745, 219th Leg., 2020 Sess. (N.J. 2020); S1265, 219th Leg., 2020 Sess. (N.J. 2020); S1265, 219th Leg., 2020 Sess. (N.J. 2020) (identical to A724); and, S1979, 219th Leg., 2020 Sess. (N.J. 2020) (identical to A682).

unconstitutionality of subsection (a), paragraph (3).<sup>21</sup> Two of the bills seek to eliminate the unconstitutional provision in its entirety.<sup>22</sup> The third bill, A2745, seeks to eliminate the provision in the statute concerning the victim’s perception of the defendant’s purpose.<sup>23</sup> The provision is replaced with language concerning a “reasonable” victim.<sup>24</sup>

Given the number of bills pending in the New Jersey Legislature, it is apparent that the Legislature is aware that N.J.S. 2C:16-1(a)(3) has been found unconstitutional and is working to correct this deficiency.

### **Conclusion**

Staff seeks authorization to conclude work in this area since the Legislature is aware of the problem posed by the statutory language and is actively working to address the issue.

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<sup>21</sup> A682, 219th Leg., 2020 Sess. (N.J. 2020); A2732, 219th Leg., 2020 Sess. (N.J. 2020); and, A2745, 219th Leg., 2020 Sess. (N.J. 2020).

<sup>22</sup> A682, 219th Leg., 2020 Sess. (N.J. 2020); and, A2732, 219th Leg., 2020 Sess. (N.J. 2020).

<sup>23</sup> A2745, 219th Leg., 2020 Sess. (N.J. 2020).

<sup>24</sup> *Id.* (providing that a person is guilty of bias intimidation under circumstances that would cause a reasonable individual [...] to be intimidated because of the individual’s race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity).