



## NEW JERSEY LAW REVISION COMMISSION

### Revised Tentative Report Relating to the Definition of Marital Status within New Jersey's Law Against Discrimination (N.J.S. 10:5-5 *et seq.*)

**September 19, 2019**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **November 04, 2019**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

Samuel M. Silver, Deputy Director  
New Jersey Law Revision Commission  
153 Halsey Street, 7th Fl., Box 47016  
Newark, New Jersey 07102  
973-648-4575  
(Fax) 973-648-3123  
Email: [sms@njlrc.org](mailto:sms@njlrc.org)  
Web site: <http://www.njlrc.org>

## Executive Summary<sup>1</sup>

In the case of *Smith v. Millville Rescue Squad*, the New Jersey Supreme Court examined the meaning of the phrase “marital status” in New Jersey’s Law Against Discrimination (LAD), N.J.S. 10:5 et seq., and determined that the phrase included those who are single or married and those who are in transition from one state to another.<sup>2</sup>

The Commission authorized Staff to conduct further research and outreach to determine whether it would be appropriate to amend the LAD to incorporate the definition of “marital status” identified by the New Jersey Supreme Court in *Smith v. Millville Rescue Squad*.<sup>3</sup>

In response to its outreach, Staff was advised that the Commission’s proposed definition of “marital status” is the appropriate way in which to define the term.<sup>4</sup> Stakeholders cautioned, however, that the codification of this term could inadvertently adversely impact the broad protections currently afforded by the LAD to members of a protected class and those transitioning within or between protected classes.<sup>5</sup>

In direct response to the concerns expressed by stakeholders, Staff proposes modifications to the “general construction” statutory section<sup>6</sup> of the LAD to ensure that the comprehensive protections contained in this Title are not compromised.

## Background

This Report addresses the definition of the term “marital status” in the LAD, as distinct from the definition of the term “marriage.” The New Jersey LAD prohibits discrimination based on, among other things, an individual’s marital status. The LAD provides in pertinent part:

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the... marital status... of any individual ...to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment....<sup>7</sup>

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<sup>1</sup> Original work was performed on this project by Timothy J. Prol, during his tenure with the New Jersey Law Revision Commission.

<sup>2</sup> *Smith v. Millville Rescue Squad*, 225 N.J. 373 (2016).

<sup>3</sup> NEW JERSEY LAW REVISION COMMISSION (2018) ‘Definition of Marital Status’. *Minutes of NJLRC meeting 19 April 2018*, Newark, New Jersey.

<sup>4</sup> See generally letter from Rachel Wainer Apters, Director, New Jersey Division on Civil Rights to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (June 27, 2019) (on file with the NJLRC).

<sup>5</sup> *Id.*

<sup>6</sup> N.J.S. 10:5-2.1.

<sup>7</sup> N.J.S. 10:5-12a.

The term “marital status” is not defined in the LAD. In addition to prohibiting discrimination on the basis of an individual’s marital status in the context of employment, the LAD contains separate statutory provisions which prohibit marital status discrimination in the context of labor organizations, employment agencies, businesses, real estate agents, lessees and lessors, and banking.<sup>8</sup> These provisions impact a wide cross-section of the everyday lives of a multitude of New Jersey residents.

### Analysis

The New Jersey Supreme Court, in the case of *Smith v. Millville Rescue Squad*, 225 N.J. 373 (2016), examined the New Jersey Law Against Discrimination and determined that the phrase “marital status” includes individuals who are single, married, divorced, widowed, or are in transition between those states of being.

In *Smith*, Plaintiff was a certified emergency medical technician and paramedic working with Defendant Millville Rescue Squad (MRS).<sup>9</sup> At the time of his termination the Plaintiff served as the Director of Operations, and had been in that position since June 1998.<sup>10</sup> His wife at the time was also employed by MRS along with her mother and two sisters.<sup>11</sup> In 2005, Plaintiff began an extramarital affair with an MRS volunteer, who he directly supervised.<sup>12</sup> In June 2005, Plaintiff’s wife learned of the Plaintiff’s affair and reported it to Plaintiff’s direct supervisor.<sup>13</sup> Shortly thereafter, Plaintiff reported the affair to his supervisor as well.<sup>14</sup> During their conversation, Plaintiff’s supervisor told Plaintiff that he could not promise that the affair would not affect his continuing employment with MRS.<sup>15</sup>

While the MRS volunteer left on June 2005, the affair continued, causing irreconcilable discord between Plaintiff and his wife.<sup>16</sup> Plaintiff moved out of the marital home on January 2006, and informed his supervisor at MRS that his marriage had collapsed.<sup>17</sup> According to the Plaintiff, his supervisor thanked Plaintiff for keeping him informed and asked he keep him updated on any developments regarding his marital status.<sup>18</sup> Plaintiff and his supervisor met again, and according to Plaintiff, his supervisor informed him that he “did not think there was any chance of reconciliation between [the Plaintiff] and his wife and that the supervisor believed there would be an ‘ugly divorce’.”<sup>19</sup> Plaintiff testified that the supervisor informed him that “if there had been

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<sup>8</sup> N.J.S. 10:5-12(b)-(o).

<sup>9</sup> *Smith*, 225 N.J. at 380.

<sup>10</sup> *Id.*

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

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

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

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

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

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

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

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

<sup>19</sup> *Id.*

even the slightest chance of reconciliation, [the supervisor] would not have to take the issue to the MRS Board of Directors.”<sup>20</sup> According to Plaintiff, the supervisor also “indicated that he should not have met with [Plaintiff] and that he was only supposed to meet with [Plaintiff] the next day to terminate his employment,” and that, “if anyone learned that they had met, he would deny it.”<sup>21</sup>

Later, Plaintiff learned that the Board held a meeting on February 7, 2006, which the supervisor attended.<sup>22</sup> The meeting minutes talked of restructuring which would hurt Plaintiff’s position, and that Plaintiff’s “work performance has been very poor for some time,” and “all efforts to remediate have failed.”<sup>23</sup> Plaintiff testified that the MRS Employee Information Manual provided that Plaintiff was an “at will” employee who could resign or be terminated at any time with or without cause or notice.<sup>24</sup>

The Manual also include a sexual harassment policy, but Plaintiff testified that “he did not believe that having a relationship with a subordinate was a problem because two other supervisors at MRS had dated employees who they supervised.”<sup>25</sup> Plaintiff also testified that while phone records indicated he used his business phone to speak with the MRS volunteer after hours, which was prohibited, no one ever complained to him about it.<sup>26</sup> In addition, he testified that during his formal employment he was never subject to formal discipline, and emphasized that he was promoted twice and received raises annually, even after the supervisor learned of the affair.<sup>27</sup>

In March 2006, Plaintiff and his wife filed for divorce, which was finalized in September, 2006, and which Plaintiff testified was “amicable.”<sup>28</sup> Plaintiff then filed a complaint against MRS, the supervisor, and unnamed “John Does” who were involved in Plaintiff’s termination.<sup>29</sup> The complaint asserted wrongful discrimination on the basis of sex and marital status in violation of LAD, N.J.S. 10:5-1 to -42<sup>30</sup>, and the State Constitution, and common law wrongful discharge.

After hearing oral argument, the trial court dismissed the Plaintiff’s gender and marital status LAD claims. The Court explained that Plaintiff,

“was required to establish four elements to succeed on his LAD claim: 1) that Plaintiff is a member of a protected class; 2) that he was performing his job at a level that met his employer's legitimate expectations prior to his termination; 3) that he was fired nevertheless; and 4) that he was replaced by someone not in the same

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<sup>20</sup> *Id.* at 381.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 382.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 383.

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

<sup>30</sup> N.J.S. 10:5-1 *et seq.*

protected class, that non-protected-class workers with comparable work records were retained, or that he was terminated under circumstances giving rise to an inference of discrimination.”<sup>31</sup>

The Court found that Plaintiff failed to satisfy factor two and factor four of the four elements required to succeed on a LAD claim.<sup>32</sup> The Court also found that he failed to present evidence that he was fired because he was “single, married, separated, or divorced”, and instead found that he presented proof that he was terminated because management was concerned about “the likelihood of an ugly or messy divorce”, which the Court held did not give rise to a marital-status-discrimination claim.<sup>33</sup> Plaintiff appealed.

The Appellate Division affirmed the dismissal of Plaintiff’s gender-discrimination claim but reversed the dismissal of Plaintiff’s marital-status-discrimination claim.<sup>34</sup> In reversing, they noted that this case raised the issue of the scope of the marital-status protection under LAD, and interpreted “marital status” to include “the states of being divorced, engaged to be married, separated, and involved in divorce proceedings.”<sup>35</sup> They also found the comment “that [the Plaintiff] was being terminated because he was going to go through an ‘ugly divorce’ constituted direct evidence of discrimination that [Plaintiff] had established a *prima facie* case of discrimination based on a change in the status of his relationship “from married to soon-to-be-divorced[.]”<sup>36</sup> The Defendants appealed, and the Supreme Court of New Jersey granted the Defendants’ petition for certification.

The Supreme Court affirmed the Appellate Division’s determination, stating that “[b]ecause this case involves LAD, special rules of interpretation also apply,” and that “the LAD is a remedial legislation intended to ‘eradicate the cancer of discrimination’ in our society, and should therefore be liberally construed ‘in order to advance its beneficial purposes.’”<sup>37</sup> The Court also emphasized that marital status was not defined in N.J.S. 10:5-5.

The Court explained that when LAD was initially enacted, it only protected individuals from discrimination based on “race, creed, color, national origin, or ancestry.”<sup>38</sup> Discrimination based on marital status did not appear in the LAD as a prohibited employment practice until 1970, part of a comprehensive amendment to the LAD.<sup>39</sup> The “inclusion of marital status in the LAD coincided with the attention that discrimination against women based on their marital status was receiving, including the commencement of legal proceedings in various courts challenging the

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<sup>31</sup> *Smith*, 225 N.J. at 384.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 385.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 390.

<sup>38</sup> *Id.* at 388.

<sup>39</sup> *Id.*

employment practices of some companies that conditioned hiring and continued employment for women in certain positions on being single.”<sup>40</sup>

New Jersey is not the only state that bars discrimination based on marital status. Twenty-one states and the District of Columbia bar discrimination based on marital status.<sup>41</sup> Some states, like Hawaii and Nebraska, define “marital status” in a limited manner, meaning “the state of whether someone is married or single,” while other states like Colorado, define marital status in a more complex way.<sup>42</sup> Colorado defines marital status as “a relationship or a spousal status of an individual, including but not limited to being single, cohabitating, engaged, widowed, married, in a civil union, or legally separated, or a relationship or spousal status of an individual who has had or is in the process of having a marriage or civil union dissolved or declared invalid.”<sup>43</sup> The District of Columbia defines marital status as “the state of being married, in a domestic partnership, single, divorced, separated, or widowed and the usual conditions associated therewith, including pregnancy or parenthood.”<sup>44</sup>

The Court considered the legislative intent in order to determine the “scope and limits of the protection of the protections afforded by the LAD”.<sup>45</sup> The Court concluded that “marital status should be interpreted to include those are single or married and those who are in transition from one to another”<sup>46</sup> stating that no employee should fear that their marriage ceremony, a divorce, or the death of their spouse will lead to termination or disciplining at work, while at the same time ensuring that the interpretation doesn’t disrupt an “employer’s legitimate business judgment and policies regarding its workforce.”<sup>47</sup>

## ***Outreach***

### ***• Initial Outreach***

Staff conducted preliminary outreach to various individuals, including practicing attorneys and academic faculty in an effort to obtain comment regarding the issue of whether to codify the New Jersey Supreme Court’s definition of “marital status” in the New Jersey Statutes.

Professor Stacy Hawkins, Associate Professor at the Rutgers University School of Law, noted that the New Jersey Supreme Court reached a decision which was in line with the purpose behind the New Jersey Legislature's enactment of the LAD. She indicated that the definition of "marital status" as laid out by the Court is currently the law in New Jersey. Codification of that definition in the statute would not change that, but could result in more consistent interpretations

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 388-389.

<sup>42</sup> *Id.* at 389.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 392.

<sup>47</sup> *Id.*

of the term moving forward. Professor Hawkins also noted that incorporating the definition in the statute could make the law more accessible to *pro se* litigants, or individuals who might not have ready access to the case law.

Representatives of the Labor and Employment Law Section of the New Jersey State Bar Association (LAELS) indicated that the LAELS considers the *Smith* decision clear and recommended against codification of this term.

- *Subsequent Outreach*

While the initial outreach did not result in a universal consensus regarding the codification of the New Jersey Supreme Court’s definition of “marital status” in the LAD, proposed language was transmitted to stakeholders for their consideration.

Professor Katie Eyer, Professor of Law at the Rutgers University School of Law, concurred with Professor Hawkins’ perspective that “codification would be useful....”<sup>48</sup> In addition, Professor Eyer opined that “if the state is going to codify a definition, it should probably expand the definition to include Civil Unions and Domestic Partnerships.”<sup>49</sup> The addition of these arrangements would eliminate any ambiguity as to whether they were covered by the proposed definition.

The Division on Civil Rights (DCR) is the agency that is charged by the Legislature with enforcing the LAD.<sup>50</sup> The DCR, “...agrees substantively that the definition of marital status proposed by the Commission is the appropriate way in which to define the term....”<sup>51</sup> The DCR, however, believes that the codification of the term is not necessary for several reasons.<sup>52</sup>

Preliminarily, the DCR observed, “[w]hile the proposed definition provides more examples of marital states, it does not substantively change the definition set out by the Court in *Smith*.”<sup>53</sup> Additionally, the DCR advised the Commission that as the agency responsible for enforcing the LAD, it was “...not aware of any confusion by the public in construing the term under the LAD....”<sup>54</sup> The DCR cautioned the Commission that there was a potential danger in codifying the definition of marital status. The DCR warned, “if the Legislature codified a definition of marital status that incorporates the concept of transitioning between states, a court could make an improper

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<sup>48</sup> E-mail from Katie Eyer, Professor, Rutgers University School of Law to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (May 17, 2019, 2:14 EST) (on file with the NJLRC).

<sup>49</sup> *Id.*

<sup>50</sup> Letter from Rachel Wainer Apter, Director, New Jersey Division on Civil Rights to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (June 27, 2019) (on file with the NJLRC).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

inference that the Legislature intended this concept to apply to marital status *only*, and not [to] other protected classes.”<sup>55</sup>

Staff agrees with the observation of the Director that, “...marital status is not the only LAD-protected class where an individual may transition from one state to another but stay within the protected class.”<sup>56</sup> It is conceivable that an individual may be of one religion (or none) and be in the process of transitioning to another religion. Further, an individual may transition between genders.<sup>57</sup> In both instances, the individual is entitled to be protected by the LAD’s prohibition against discrimination.<sup>58</sup> Finally, LAD protection also extends to individuals who are associated with someone in a protected class or are perceived as part of a protected class and should be reflected in the LAD statutes.<sup>59</sup>

The response of the Director brought into specific relief the importance of outreach to knowledgeable and interested individuals. In addition, the Director’s comments provided Staff with an opportunity to review the LAD with her concerns in mind.

### **Conclusion**

The Commission is mindful that its projects must “promote and encourage the clarification and simplification of the law... and its better adaptation to present social needs [in order to] secure the better administration of justice....”<sup>60</sup>

According to the DCR, the term “marital status” does not appear to have created any confusion by the public in construing the term.”<sup>61</sup> The codification of a definition for this term, without addressing its impact on members of other protected classes, could have unintended negative consequences.

To better adapt the law to present social needs and secure the better administration of justice Staff has incorporated language into the LAD, set forth in Appendix II, that ensures that

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Electronic Mail from Rachel Wainer Apters, Director, New Jersey Division on Civil Rights to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (July 10, 2019) (on file with the NJLRC) *citing e.g., O’Lone v. New Jersey Dep’t of Corrections*, 313 N.J. Super. 249 (App. Div. 1998) (finding that individual facing discrimination based on close association with member of minority class is the “functional equivalent of being a member of the protected group”); *Craig v. Suburban Cablevision*, 140 N.J. 623 (1995) (friends and family associated with individual who complained of sexual harassment are also protected against retaliation); *Cowher v. Carson & Roberts*, 425 N.J. Super. 285 (2012) (plaintiff can demonstrate that the discrimination that he claims to have experienced would not have occurred but for the perception that he was Jewish, even though perception was incorrect); *Rogers v. Campbell Foundry*, 185 N.J. Super. 109 (App. Div. 1982) (discrimination based on perception of a disability covered by LAD).

<sup>60</sup> N.J.S. 1:12-8.

<sup>61</sup> *See* n.4, *supra*.



the broad protections of the Act are extended to members of every protected class, those transitioning among and between every protected status, and those associated with or perceived to be part of a protected class.

## Appendix I

The proposed definition of “marital status” (shown with underlining and italics<sup>62</sup>), to be added to **N.J.S. 10:5-5**, follows:

vv. “Marital Status” [means][includes]<sup>63</sup> the state of being single, married, *in a civil union or domestic partnership*, engaged, separated, divorced, widowed, or being in transition from one such state to another.

## Appendix II

The proposed modifications to **N.J.S. 10:5-2.1** (General Construction) are shown with underlining and ~~strike through~~ are as follows:

Nothing contained in this ~~a~~Act or in P.L.1945, c. 169 (C. 10:5-1 et seq.) shall be construed to require or authorize any act prohibited by law nor:

(a) ~~not~~ to prevent the award of a contract to a small business enterprise, minority business enterprise or women’s business enterprise under P.L.1985, c. 490 (C. 18A:18A-51 et seq.);

(b) ~~not~~ to conflict with the provisions of chapter 2 (child labor) of Title 34 of the Revised Statutes;

(c) ~~not~~ to require the employment of any person under the age of 18;

(d) ~~not~~ to prohibit the establishment and maintenance of bona fide occupational qualifications or the establishment and maintenance of apprenticeship requirements based upon a reasonable minimum age;

(e) ~~not~~ to prevent the termination or change of the employment of any person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment;

(f) ~~not~~ to preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standards;

(g) ~~not~~ to interfere with the operation of the terms or conditions and administration of any bona fide retirement, pension, employee benefit or insurance plan or program, including any State or locally administered public retirement system, provided that the provisions of those plans or programs are not used to establish an age for mandatory retirement;

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<sup>62</sup> *Italics* indicate the addition of language received from a commenter.

<sup>63</sup> The bracketed terms are possible word choices for the proposed definition.

(h) be construed to permit discrimination against an individual who is a member of a protected class, as described in this Act, or who is:

(1) associated with an individual who is in a protected class;

(2) perceived to be an individual who is in a protected class;

(3) in transition from one state to another within a protected class; or,

(4) in transition from one protected class to another protected class.

### COMMENT

On April 19, 2018, the New Jersey Law Revision Commission released a Tentative Report relating to the definition of marital status within New Jersey’s Law Against Discrimination (LAD), N.J.S. 10:5 *et seq.* On May 14, 2019, the Commission sought the comments from a wide array of stakeholders who were interested in this subject matter, including the Attorney General’s Division on Civil Rights.

On June 27, 2019, Staff received a response from the Division on Civil Rights (DCR) in response to its May 14, 2019 request for comments on a proposal to amend the LAD to add a definition of “marital status” that was consistent with the opinion of the New Jersey Supreme Court in *Smith v. Millville Rescue Squad*, 225 N.J. 373 (2016).<sup>64</sup> Although the definition of “marital status,” as set forth in the Tentative Report was consistent with the definition set forth by the Court in *Smith*, the Director of the Division on Civil Rights expressed concern that the proposed definition may have unintended consequences in future cases concerning inferences courts might make in defining other terms in the LAD.<sup>65</sup>

The Director informed Staff that, “...marital status is not the only LAD-protected class where an individual may transition from one state to another but stay within the protected class.”<sup>66</sup> It is conceivable that an individual may be of one religion (or none) and be in the process of transitioning to another religion.<sup>67</sup> Further, an individual may transition between male and female or female to male.<sup>68</sup> In both instances, each individual is at all times entitled to be protected by the LAD’s prohibition against discrimination. The Director expressed concern that if the term marital status was codified, in a way that incorporated the concept of transitioning between statuses then a court could infer that this concept *only* applied to marital status and not to other protected classes.<sup>69</sup>

The response of the Director brought into specific relief the importance of outreach to knowledgeable and interested individuals. In addition, the Director’s comments provided Staff with an opportunity to review the LAD and incorporate language to preserve the broad protections of the Act as set forth in Appendix II.

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<sup>64</sup> See generally letter from Rachel Wainer Apters, Director, New Jersey Division on Civil Rights to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (June 27, 2019) (on file with the NJLRC).

<sup>65</sup> *Id.* at \*1.

<sup>66</sup> *Id.* at \*2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

On July 10, 2019, the DCR expressed support for the modifications set forth in Appendix II.<sup>70</sup> The DCR asked Staff to consider codifying the protections for those who are associated with someone in a protected class or perceived as part of a protected class.<sup>71</sup>

The proposed modifications set forth in what would be subsections (a) – (g) of N.J.S. 10:5-2.1 do not affect the substance of the statute as originally written. The addition of these subsections is an attempt to clarify and simplify the statute.

A newly drafted subsection (h) has been added to N.J.S. 10:5-2.1. This subsection has been added to the general construction statute to eliminate the possibility that a court could infer that the protection of the LAD only applies to individuals who are transitioning between the different states of marriage.

The proposed modifications to this statute were drafted in direct response to the recommendations of the DCR to ensure that the protections of the LAD are afforded to the members of every protected class, as well as, those who are transitioning within a protected class or from one protected class to another.

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<sup>70</sup> Electronic Mail from Rachel Wainer Apters, Director, New Jersey Division on Civil Rights to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (July 10, 2019) (on file with the NJLRC).

<sup>71</sup> *Id.*