



Making Occupational Licensing Reform in Pennsylvania a Reality: Coming Together to Ensure People Gain Entry to the Licensed Professions

Pennsylvania's Occupational Licensing Reform Law has potentially been undermined by the state occupational boards' overbroad proposed lists of what offenses are "directly related" to the performance of the licensed professions. This report shows how a diverse group of stakeholders have come together in the regulatory process to push back against the undercutting of the law.

April 4, 2023

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Making Occupational Licensing Reform in Pennsylvania a Reality: Coming Together to Ensure People Gain Entry to the Licensed Professions

On July 1, 2020, then-Governor Tom Wolf signed Act 53 of 2020, enacting occupational licensing reform in Pennsylvania and opening the doors to dozens of well-paying professions that had broadly rejected people with criminal records. *See* 63 Pa. C.S.A. Ch. 31. The law was celebrated as another triumph for bipartisan agreement in the criminal justice reform space. The bill enjoyed such broad support that even the tumult caused by the early days of the pandemic could not stop it.

However, the enactment of legislation is never the end of the story. If a new law is not implemented in a way that fosters both its terms and its intent, its power can be dissipated, or even lost. Unfortunately, Act 53 faced that danger when the boards and commissions that regulate the professions covered by the law published their proposed regulations. In Pennsylvania, the regulatory process for such proposed regulations features public comment and analysis before the Independent Regulatory Review Commission (the IRRC).

The primary problem with the Act 53 proposed regulations was their selection of “directly related” criminal offenses for each profession. The importance of these lists is that they create a presumption that a person who had been convicted of any one of them would pose a “substantial risk” to the health and safety of clients or of future offending.

These proposed lists suffer from two substantial flaws.

- The vast majority of the lists were overbroad, containing offenses that made no sense.
- Not a single offense was time-limited on how long a person would be presumed unfit.

As one of the primary advocates supporting the enactment of Act 53, Community Legal Services (CLS) led the efforts to oppose these “directly related” lists.

- With the financial support of Arnold Ventures, we commissioned expert reports explaining the flaws of the lists. Dr. Toni S. Locklear, an industrial-organizational psychologist, discussed the lack of job-relatedness of many of the exclusions that would occur based on the proposed lists. Dr. Kiminori Nakamura, a criminologist, explained research on redemption and recidivism that countered the life-long presumption of unfitness.
- In its preamble to the proposed regulations, the Bureau of Professional and Occupational Affairs (BPOA)(the umbrella agency for the board and commissions) expressed its view that the text of Act 53 does not allow time-limiting of the offenses on the “directly related” lists. CLS worked with the four bipartisan legislative sponsors of Act 53 to facilitate comments from them that they did not intend for the presumption to be lifetime.



- CLS prepared extensive analysis of the lists that was provided to BPOA and the IRRC. Our comments included a deep review of the legislative history of the law.
- CLS educated stakeholders about the proposed regulations and encouraged them to comment about the “directly related” lists. Through our efforts, opposition comments were submitted by:
 - American Civil Liberties Union & the ACLU of PA
 - City of Philadelphia
 - Eastern State Penitentiary Historic Site
 - Justice Action Network
 - Last Prisoner Project
 - PA Chamber of Business and Industry
 - PA Prison Society and 5 other coalition public interest groups
 - PA Workforce Development Assn
 - Philadelphia Lawyers for Social Equity
 - PLSE Pardon Project
- The worst “directly related” list was proposed by the Board of Nursing, which oversees almost three times as many licensees as the next biggest board (Medicine). The overbreadth of this list has implications well beyond the interests of people who want to be nurses, as the Commonwealth is suffering through a nursing shortage crisis that is exacerbated by the pandemic. CLS worked closely with the four lead nursing membership organizations in PA on their comments in opposition to the “directly related” list.
 - American College of Nurse-Midwives, PA Affiliate
 - PA Association of Nurse Anesthetists
 - PA Coalition of Nurse Practitioners
 - PA State Nurses Association

On January 18, 2023, the IRRC issued its comments on the proposed regulations, suggesting that significant changes are needed. Most notably, IRRC focused on the input of the legislators and instructed BPOA to consult the legislature on its intent and to seek consensus with stakeholders. These comments strongly support CLS’s position on time limits. It also required BPOA to explain the reasonableness of different “directly related” offenses between different health care professions. The ball is now in BPOA’s court to revise the proposed regulations.

As this summary is written, the ultimate form of the “directly related” lists has not yet played out. However, we hope that these materials will be helpful in Pennsylvania as we move towards resolution. We also offer this story to policymakers and advocates elsewhere so that their hard-won legislative changed to occupational licensing become reality. Continued vigilance and concerted stakeholder response during implementation is key to that outcome.





**Regulatory Package 16A-66 (Consideration of Criminal Convictions)
Violates the Letter and the Intent of Act 53 of 2020
With Its “Directly Related” Lists Leading to a Presumption of Unfitness**

Submitted by Community Legal Services, Inc., December 16, 2022

During the height of the pandemic in 2020, the Pennsylvania General Assembly made a priority of approving Act 53, known as the occupational licensing reform bill. The bill was guided to passage by bipartisan lead sponsors and supported by both conservative and liberal advocates, including the Pennsylvania Chamber. The goal of all concerned was obvious: to open occupational licensure to people with old and unrelated criminal convictions, helping both Pennsylvania families and businesses.

But the Bureau of Professional and Occupational Affairs (BPOA) and its boards and commissions, which were tasked with drafting implementing regulations and generating lists of “directly related” offenses, have missed the boat. In its regulatory package, the bureau repeatedly says that the purpose of Act 53 was to provide “transparency and clarity” about what crimes can be disqualifying. Given the bureau’s fundamental misconception of the point of the law, its proposed regulations undermine, rather than support, Act 53’s goal of opening the licensed occupations to people with unrelated criminal records.

The regulatory package includes “directly related” lists of criminal offenses that carry a presumption of unfitness of a license applicant. These lists are generally overbroad, and in no instance is any offense time limited. Although the presumption of unfitness may be overcome in an individualized assessment, that step will not occur until *after* completion of training. Few people will be able to devote the time and resources to a training program for a profession knowing that they face such a presumption at the end. In this way, the proposed regulations frustrate the purpose of Act 53 by deterring and excluding low-risk people with criminal convictions.

The proposed regulatory package must be revised before it can be approved.

- Its lists of “directly related” offenses must be revised.
- Each offense must have a time limit for how long the presumption continues.
- These changes must be made through an evidence-based process.

These recommendations by Community Legal Services, Inc. (CLS) are bolstered by two expert reports that we commissioned, with the support of funding by Arnold Ventures. The report of Dr. Toni S. Locklear, an Industrial-Organizational Psychologist whose expertise focuses on determining the job-relatedness of criminal offenses, reviews the “directly related” lists previously published by the boards and commissions and identified deficiencies. The report of Dr. Kiminori Nakamura, a criminologist, discusses redemption and recidivism research implications for Act 53. These reports are Appendices B and C, respectively.

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I. Background: The regulatory package undermines Act 53’s primary goal of removing barriers to the licensed professions for people with criminal records who present minimal risk of workplace misconduct

A. Scope and description of the population affected by Act 53

A 2018 report by the Department of State provides an informative snapshot of the scope of occupational licensure in the Commonwealth and the size of the licensed occupations.¹ The incidence of licensure is significant: 20.2% of Pennsylvania’s workforce has occupational licenses, comprising over one million people.²

Housed within the Department of State, BPOA in turn houses 29 boards and commissions to which it provides administrative, logistical and legal support.³ The boards and commissions that oversee the largest numbers of licensees are:

- Nursing (312,586 licensees)
- Medicine (135,995)
- Cosmetology (128,636)
- Real estate (65,877)
- Engineers/surveyors/geologists (53,109)
- Pharmacy (43,533)

By contrast, the State Navigation Commission regulates only 42 licensees.⁴

Other notable licensed occupations within BPOA include architects, accountants, barbers, dentists, massage therapists, occupational therapists, physical therapists, psychologists, social workers, vehicle dealers and salespersons, and veterinarians.⁵

However, not all regulated occupations are within the ambit of BPOA. Teachers and attorneys are regulated by the Pennsylvania Department of Education and the Supreme Court of Pennsylvania, respectively.⁶ Other professions are governed in some respect by statute (such as security guards, who generally are governed by the Private Detective Act)⁷ or have certifications instead of licenses (such as certified nursing assistants).

¹ Pa. Dept. of State, *Review of State Professional and Occupational License Requirements and Processes*, June 11, 2018, available at <https://www.dos.pa.gov/ProfessionalLicensing/Documents/EO2017-03-Executive-Report-Occupational-Licensing.pdf> (hereinafter “*Department Report*”).

² *Id.* at 16-17.

³ *Id.* at 14.

⁴ *Id.* at 17-18.

⁵ *Id.*

⁶ *Id.* at 14.

⁷ 22 P.S. §23.

In sum, BPOA's regulation of Pennsylvania workers is extensive. As a consequence, Act 53's rules regarding the consideration of criminal records have an outsized impact on job entrance in many of the most significant professions in the Commonwealth. Moreover, job entrance has even broader ramifications for the Commonwealth beyond just its workers. For instance, as noted in the Department's report, licensure-caused barriers to entry can make health care more expensive and less accessible.⁸

B. Act 53 was a bipartisan priority of the General Assembly

Along with the Justice Action Network (JAN), CLS was one of the original advocates for occupational license reform to address consideration of criminal records. These organizations had partnered on the state's groundbreaking Clean Slate automated sealing law several years earlier.

CLS has been a national leader in representation and advocacy for people with criminal records. It has advised and represented more than 10,000 Philadelphians whose criminal records presented barriers to employment.

Before Act 53 was passed, occupational licensing reform with respect to consideration of criminal records was needed for four reasons, the first of which was by far the most significant.

- **The law was overbroad.** It allowed the boards to reject anyone with a felony conviction, no matter how old the offense was.⁹ Thirteen boards were prohibited from issuing licenses to people with drug felony convictions until at least 10 years had passed.¹⁰ Many persons convicted of certain offenses, such as simple assault and theft by unlawful taking, were disqualified on the grounds that they had committed "crimes of moral turpitude."¹¹
- **Application of the law was inconsistent.** Discretion to apply these standards was invested in the boards and commissions, who are primarily comprised of practitioners in the occupations, along with some members of the public.¹² Few have expertise in criminal records issues.
- **The results were unpredictable for people seeking to enter a profession.** People with criminal records were forced to go through extensive and expensive training without knowing whether they would be excluded when it came time to be licensed. In CLS's experience, many of our clients gave up on their dream jobs because of this uncertainty.
- **The outcomes were susceptible to racially disparate results.** Because Blacks and Hispanics are convicted of crimes at disproportionate rates, consideration of criminal records tends to disproportionately keep them out of the licensed professions, as they have been shown to do in other employment situations.¹³

⁸ *Department Report*, *supra* note 1, at 18.

⁹ 18 P.S. §9124(c)(repealed as to BPOA boards and commissions by Act 53).

¹⁰ *Department Report*, *supra* note 1, at 24-25.

¹¹ *Id.* at 28-29.

¹² *Id.* at 15.

¹³ Equal Employment Opportunity Commission, Enforcement Guidance, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act* (April 25, 2012),

CLS's view of the need for occupational license reform was shared by legislators in both parties and in both chambers of the General Assembly. In the House, Rep. Sheryl DeLozier (R-Cumberland) and Rep. Jordan Harris (D-Philadelphia) were the lead sponsors on HB 1477. In the Senate, Sen. John DiSanto (R-Dauphin) and Sen. Judith Schwank (D-Berks) were the leads on SB 637.

In their co-sponsorship memorandum, Senators DiSanto and Schwank described their intended legislation as follows.

In the near future, we will introduce legislation to create a fair, modern set of rules for consideration of criminal records in occupational licensure, which will remove unnecessary barriers to employment and entrepreneurship.

Our legislation will require occupational licensure boards and commissions to apply one common set of rules when considering whether to deny, suspend, or revoke a license on the basis of a criminal conviction. It will amend the Criminal History Record Information Act (CHRIA) to require that boards only withhold a license for convictions which are directly related to the practice of the occupation, and that the boards consider the nature of the offense, the amount of time that has passed since conviction, evidence of the applicant's fitness to practice the occupation, and other relevant factors prior to withholding a license.

Over thirty occupational fields require a government license or registration in Pennsylvania and under current law, many people who have paid their debts to society after incarceration are hindered from reentering the workforce when boards deny licenses due to convictions unconnected to the practice of their desired profession. This wastes taxpayer dollars as state correctional institutions regularly train inmates in professional skills only for the person to be subsequently denied a license to practice.

Our legislation will also require that boards publish regulations to explain how the new CHRIA rules will be applied in the context of a particular profession and provide that interested persons can request pre-application notice of whether their criminal history records pose a potential barrier to licensure. This will ensure that boards use criminal records in a fair and consistent way, and that individuals considering a training program have a fair opportunity to learn in advance what types of criminal history can be expected to pose a barrier to licensure.¹⁴

available at: <https://www.eoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.

¹⁴ Memorandum from Senator John DiSanto and Senator Judith Schwank to All Senate Members on Occupational Licensure Reform, April 3, 2019, available at <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=29091>.

During the pendency of the bills, business also joined to support them. The Pennsylvania Chamber of Business and Industry praised the bills for adding suitable professionals to a tight Commonwealth workforce in an environment in which businesses struggled to fill vacancies.

Even with the emergence of the covid pandemic and the enormity of the challenges that it presented for state government, SB 637 quickly made its journey through the legislative process. On June 24, 2020, the Senate unanimously rendered its final concurrence with the bill as amended by the House. In his floor remarks, Sen. DiSanto said:

Today, we take a major step forward in overhauling our State's restrictive occupational licensure laws that deny many qualified residents the right to work because of an old or irrelevant criminal record. State licensing boards and commissions must now give applicants individualized consideration and review one's demonstrated rehabilitation and fitness for the job. Licensing entities will no longer be able to deny job licenses for vague and broad terms, such as moral turpitude, and must consider if an offense is directly related to the profession.

My legislation also requires licensing entities to develop clear and accessible guidelines for what crimes are directly job-related and will be applied in licensure decisions. The bill even allows for prospective applicants to petition for preliminary determinations so they do not waste time and money on training and education only to be later denied a job license. Senate Bill No. 637 provides much-needed balance, predictability, and transparency to a licensing process that has been a disservice to our entire Commonwealth and what its skilled workforce needs.

I thank my cosponsor, Senator Schwank, as well as Representative Delozier and Representative Harris, for making this proposal a bipartisan success.¹⁵

Senator Schwank added:

I had the opportunity, a few years ago, to visit the correctional institute at Muncy. It is one of the two women's correctional institutes in the Commonwealth, and I had the opportunity to watch a class where women were learning hairdressing skills. I did not have the opportunity to talk with them, but they were so engaged in the work that they were doing. I thought to myself how this is so beneficial, that these women are learning a skill, they can go back to their communities, have a career, have the ability to support their families, and become productive members of society. I did not realize at the time how difficult that is because of the outdated, archaic way that we provide licenses to individuals in careers that require them.

So, this legislation, I think, will take some of that subjectivity that Senator DiSanto talked about out of this process, give people more of a chance to be able to work in

¹⁵ 2020 Legislative Journal – Senate (June 24, 2020), page 662.

the fields that they want to, and fulfill their life's goals. We talk a lot about criminal justice reform, and we have made great strides. We also, by this bill, in a very important way, are helping those individuals who are returning to society to be able to work in the careers that they wish to. But not just them, because the way the system works right now, this could happen to anybody, and you just do not have much of a chance to overcome this process.¹⁶

On July 1, 2020, Governor Wolf signed SB 637, which became Act 53 of 2020. The Act went into effect on December 28, 2020.

C. Changes to consideration of criminal records made by Act 53

As Sen. DiSanto indicated, Act 53 substantially changed the consideration of criminal records by the BPOA boards and commissions. Gone are the boards' ability to disqualify applicants for all felonies without any time restrictions, the occupation-specific lists of disqualifying offenses in the "practice acts," and disqualifications for "crimes of moral turpitude" and similar concepts.

In their place is a new two-stage method of evaluating criminal records. Stage 1 involves a determination of whether an applicant's offense is on a published list of crimes as "directly related" to the profession applied for. If yes, then the board will then consider whether the person poses a "substantial risk" by conducting an individualized assessment."¹⁷ ***There is a presumption that the person would pose a substantial risk to the health and safety of clients or of future offending.*** The applicant is permitted to rebut this presumption with evidence of rehabilitation.¹⁸

Stage 2 requires that even if the offense is not on the board's "directly related" list, the board must determine whether the conviction, due to its nature, poses a substantial risk. If so, the board conducts an individual assessment, and the person can produce evidence of rehabilitation.¹⁹

The "directly related" lists for each profession were to be published by the Commissioner of BPOA, in consultation with its boards and commissions and the business community. Ultimately, the lists were required to be published for regulatory review, which is a major reason for the current regulatory package and the opportunity for public comment and review by the Independent Regulatory Review Commission (the IRRC).²⁰ Preliminary versions of these lists were developed and posted on the boards and commissions' websites, with notice given to the public on December 26, 2020.²¹

On the surface, this method for evaluating criminal records provides for a great deal of individualized consideration. However, the "directly related" lists have an outsized importance for a simple reason: the individualized analysis is only done after training has been completed and

¹⁶ *Id.* at 662-63.

¹⁷ The law sets out 11 factors to be considered in an individualized assessment. 63 Pa. C.S. §3113(c).

¹⁸ 63 Pa. C.S. §3113(b)(1).

¹⁹ 63 Pa. C.S. §3113(b)(2).

²⁰ 63 Pa. C.S. §3117.

²¹ Volume 50, *Pennsylvania Bulletin*, page 7316, December 26, 2020.

license applications are submitted. *Applicants will not know before entering training whether their conviction will be disqualifying or not after individualized consideration. They will only know whether their offense will be presumed to make them a substantial risk.* For this reason, the “directly related” lists must be appropriately tailored, in order to avoid presenting the barriers to occupational entry that were discussed so eloquently by Act 53’s sponsors.

D. BPOA and the boards’ “directly related” lists reflect their misunderstanding of the goals of Act 53

Notwithstanding the clear intentions of all who collaborated on Act 53, most notably the members of the General Assembly, the “directly related” lists promulgated by the boards and commissions are breathtaking in their scope, as is discussed in the next two sections of these comments. Perhaps this flaw follows from BPOA and the boards’ misunderstanding of the point of Act 53.

One searches in vain in the Notice of Proposed Rulemaking (NRP)(which is published in the *Pennsylvania Bulletin*) or the Regulatory Analysis Form (RAF)(which is not published but was submitted to the IRRC) for *any* indication that removing barriers to access to the professions for people with criminal records was *any goal*, much less *the primary goal*. Instead, these documents are replete with references to “transparency and clarity” as the primary goal, as if the General Assembly made a point of enacting occupational licensing reform during the height of an unprecedented pandemic just so ex-offenders could have clarity that their offenses were going to keep them out of their profession of choice.

The most notable discussion of the goals perceived by BPOA was in answer to Question #10 in the RAF, where they were asked to address why the regulation is needed and to explain the “compelling public interest.” The answer states in pertinent part:

The regulation is needed to provide transparency and clarity to applicants with criminal histories relating to the types of crimes that may be an impediment to licensure and the factors that the boards and commissions will consider in determining whether an applicant with a criminal conviction may be granted a license. It is also intended to level the playing field at application hearings, because all parties will be aware of which crimes are deemed to be directly related to the professions/occupations, resulting in a rebuttable presumption that licensure of the individual would pose a significant risk to the health and safety of the individual’s patients or clients or a significant risk of further criminal convictions. It will also assist applicants to determine what kinds of evidence they may need to bring forth at a hearing in an application case by providing the list of factors that the boards and commissions may consider in determining whether to grant a license notwithstanding the conviction.

Regulatory Analysis Form, at 2 (emphasis added).

This is not an isolated paragraph that has been cherry-picked. The NPR also explains:

This proposed rulemaking is *intended to provide transparency* to applicants with criminal histories relative to the types of crimes that may be an impediment to licensure and the factors that the boards and commissions will consider in determining whether an applicant with a criminal conviction may be granted a license....

52 Pa.B. 7108 (November 19, 2022)(emphasis added.) “Transparency and clarity” are also referenced in the RAF at pages 3, 12, and 13 (twice). Nowhere is access to the professions even mentioned.

Increasing clarity and transparency about the criminal record barriers to licensure, without lessening those barriers, will actually make the situation worse than it was before Act 53. This impact makes doubly clear that these regulations are inconsistent with the intent of Act 53.

BPOA and its boards and commissions either fail to understand or reject the actual primary purpose of Act 53. This misunderstanding must have led to the promulgation of “directly related” lists that overbroadly presume that formerly convicted persons present risk, as is discussed in the next two sections.

II. Proposed Lists of “Directly Related” Offenses Are Far Too Broad And Must Be Substantially Revised

The promulgated lists of “directly related” crimes are in many cases far too broad, encompassing many offenses which do not meet Act 53’s definition of the term. The statute defines this term of art:

“Directly relates.” The nature of the criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform one or more of the duties or responsibilities necessarily related to the profession, trade or occupation for which the individual seeks licensure.

63 Pa. C.S. §3102.

Offenses meet this definition if they satisfy two primary components.

1) They are related to *necessary* duties of the profession, not to duties that apply sometimes or are optional. To comply with the dictates of Act 53, the professional obligations to be considered must apply generally in all cases in which a particular profession might be practiced, rather than to concerns that might arise depending upon differing duties and job settings at various specific jobs. If a professional can practice their profession without meeting a particular duty, then that duty is not necessarily related to the profession. *For responsibilities unique to a particular job within the profession, suitability is decided by hiring employers, not licensure.*

2) They *directly* bear on whether someone is fit and able to do those necessary duties. Creation of the lists likewise requires consideration of whether various offenses in the crimes code bear a meaningful relationship to the work of the profession.

The “directly related” lists need to be revised so that all listed offenses actually meet this definition. This section of our comments analyzes in detail several reasons why the BPOA’s proposed lists are overbroad and must be revised. *Appendix A enumerates those offenses which must be deleted from the “directly related” lists for five boards: Barber Examiners; Cosmetology; Nursing; Occupational Therapy; and Physical Therapy.* CLS selected these lists for detailed analysis because these professions present particularly important employment options for our client population.

In the case of the Nursing Board, we strongly encourage the Board to pay particular attention to two sources of expertise. First, comments are being submitted by several professional organizations representing thousands of rank-and-file practitioners in the nursing field. These organizations are intimately familiar with the requirements of nursing, and they propose a much more narrowly tailored list of “directly related” offenses.

Second, Dr. Locklear conducted a demonstration exercise with an expert panel of nurses to review the Nursing Board’s proposed list, giving very careful attention to the professional requirements and the elements of numerous offenses on it. Under Dr. Locklear’s guidance, the nurses reached very thoughtful and nuanced conclusions about which offenses should or should not be on the “directly related” list. These results are discussed in the concluding section of Dr. Locklear’s report, found in Appendix B.

A. Offenses are included that do not meet Act 53’s definition of “directly related”

The promulgated lists for numerous boards fail to meet the standard set out in Act 53: they include many offenses which do not have any direct bearing on the applicant’s fitness or ability to perform duties necessarily related to the profession. This is true of, among others, the state boards of Nursing, Barber Examiners, Cosmetology, Physical Therapy and Occupational Therapy.

Perhaps the most obvious example of this overinclusion is the offense of driving under the influence (DUI), 75 Pa. C.S. §3802. A DUI conviction indicates that, on one occasion, the applicant for licensure was found to have been operating a motor vehicle while impaired by drugs or alcohol. The boards of Barber Examiners and Nursing have listed DUI as a directly related offense. However, safely operating a motor vehicle is not a duty which is necessarily related to either of these professions. Although sobriety while working is of course important to perform nursing or barbering, a DUI conviction, by itself, has no direct bearing on an applicant’s fitness to perform the duties of these professions. Simply having a DUI conviction does not prove that an applicant has an ongoing alcohol dependency, nor does a DUI have a bearing on the applicant’s ability to be sober while on the job.

Of course, the specific facts and circumstances of a particular applicant’s DUI offense might be relevant to their ability to perform the work of one of these professions. In such a case, the board would still have the full ability to consider that offense in connection with an application for

licensure, in the second stage of the analysis of the conviction. 63 Pa. C.S. §3113(b)(2). Moreover, boards will always retain the ability to discipline licensees who perform in an unprofessional manner as a result of alcohol dependency. What the boards of Nursing and Barber Examiners cannot do, consistent with Act 53, is to list DUI as one of the offenses which is automatically, by law, a “directly related” offense, and thereby creates a presumption of unfitness. In the relatively unusual circumstances that driving is a job duty, such as for a visiting nurse, the employer may consider the offense, but the person should not be barred from the entire nursing profession just because such jobs exist.

Another example of non-compliance with Act 53’s directive is the many crimes listed by the Board of Nursing under chapters 39, 41, 49, 51, 73 and 76 of the Crimes Code.²² These offenses encompass potential behaviors that are only distantly related to the work of nurses – and sometimes completely unrelated (such as “witness or informant taking bribe”). To the extent they suggest a generalized “tendency towards dishonesty,” that is the type of vague, overbroad category of crimes referred to as “lack of good moral character” or “crimes of moral turpitude.” Act 53 explicitly directs boards not to deny or revoke licensure on the basis of crimes that supposedly display a generalized character trait. 63 Pa. C.S. §3113(a)(1). Moreover, the Board is incorrect to assert that crimes of dishonesty have a special relationship to nursing. While we want all people, including nurses, to be honest, having unmonitored access to an incapacitated patient’s valuables is not an essential part of nursing – it is something that many nurses never experience.

B. Lists include offenses omitted from the lists for directly analogous professions

The need to revise the lists is especially evident in the obvious inconsistencies between the lists for professions which perform similar duties in similar settings with nearly identical patients or clients. The most striking example is the discrepancy between the lists for the boards of Nursing and Medicine. The Board of Medicine has, quite appropriately, drafted a much more limited set of offenses than the Board of Nursing, hewing much more closely to the definition of offenses that actually are “directly related” to the work of doctors. The Board of Medicine lists only 27 individual offenses as “directly related,” while the Board of Nursing lists at least 92 offenses, notwithstanding that nurses and doctors will generally perform very similar work and often have access to literally the same patients. The Board of Medicine does not list simple assault or harassment, any theft crimes, any forgery or similar fraudulent practices, or at least 11 of the falsification-related offenses that the Board of Nursing proposes to include.

The nursing board has published a “rationale” statement, available on the Department’s website,²³ setting forth a justification for keeping so many offenses on the list, but which does not meet the standard of Act 53. For instance, for crimes involving fraud or theft, the rationale statement indicates, “Nurses also provide around the clock care, working [in] settings where there is often no direct supervision of the nurse... *there may be periods* where the individual [dependent on a

²² Respectively, Chapter 39 - Theft; Chapter 41 - Forgery and Fraudulent Practices; Chapter 49 - Falsification and Intimidation; Chapter 51 - Obstructing Governmental Operations; Chapter 73 - Trade and Commerce; Chapter 76 - Computer Offenses.

²³ Available at

<https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Documents/Board%20Documents/Act-53-List-Rationale.pdf> (last visited Dec. 12, 2022).

nurse's care] is...incapacitated.” [Emphasis added.] This statement shows the lack of a true justification to keep so many theft offenses on the “directly related” list, because nurses generally will **not** have unfettered access to a patient’s valuables, and nurses generally work in settings where there **is** direct supervision. Thus, many theft offenses, especially less-serious misdemeanor offenses, do not have a direct bearing on the fitness to perform the duties necessarily related to nursing. Please see the full list in Appendix A for the offenses that should be deleted from the Nursing Board’s list.

This point is all the more glaring in that these offenses are not listed by the Board of Medicine. Some doctors work overnight shifts where they may sometimes have unfettered access incapacitated patients and their valuables, yet the Board of Medicine recognizes that many crimes of dishonesty are not actually directly related to the overall work of a healthcare practitioner.

Another glaring example is the disjuncture between the lists of the boards of Barber Examiners and Cosmetology. There is no logical reason why drug dealing felonies, 35 P.S. §780-113(a)(30), and DUI should be on the Barber Board’s list when the Cosmetology Board has correctly omitted them. Conversely, the Cosmetology Board has included seven different offenses from Chapter 41 of the Crimes Code (including forgery, receiving deposits in a failing financial institution, and misapplication of entrusted property and property of government or financial institutions) which were omitted by the Barber Examiners. Barbering and cosmetology are twinned professions -- the laws governing each one have typically been drafted with an eye to compatibility with the other, and they concern extremely similar activities which take place in extremely similar settings. Logically, crimes which are not directly related to cosmetology are not directly related to barbering either, and vice versa.

C. Lists include offenses which are not related to the respective professions under Pennsylvania law, as explained by Pennsylvania courts

Some boards have included offenses where the only possible justification is that the offense could be committed in some type of business establishment or committed against an individual victim. One prime example is recklessly endangering another person, a common misdemeanor which is included by the Boards of Barber Examiners, Cosmetology, and Physical Therapy. Pennsylvania law, however, has already established that this type of vague, unfocused, generalized concern does not qualify to make an offense legally “related” to a business or profession.

Pennsylvania courts have explained that, under Pennsylvania law, where the possibility of criminal activity arises only from the fact that the professional setting is a commercial establishment, not from the specific nature of the licensed profession, and would be equally present in other commercial establishments, that criminal activity is not related to the practice of the profession. See Fulton v. Commonwealth, 169 A.3d 718 (Pa. Commw. 2017). In Fulton, the Board refused to reinstate a barber license on the grounds of a conviction for selling drugs, but the Commonwealth Court reversed, since “[t]he possibility of drug sales... would be equally present in other commercial establishments, such as corner grocery or convenience stores, that are not subject to professional licensure requirements.” Id. at 726. Thus, selling drugs was not related to barbering as a profession.

Mere supposition that a licensee who had harmed someone in the past could, in theory, have access to and harm someone of a vulnerable population has been rejected by the courts as insufficient grounds to deny or revoke a license. See, e.g., King v. Bureau of Professional and Occupational Affairs, State Board of Barber Examiners, 195 A.3d 315, 329-330 (Pa. Commw. 2018). In King, the Commonwealth Court found that a conviction for involuntary deviate sexual intercourse was not sufficient grounds to deny barber license, because it bore no relation to the job; speculative concerns about King’s access to children arose from the simple fact that a barbershop is a commercial establishment, not from the nature of barbering as a licensed profession. Id. at 321, 330.

Finally, the inclusion of harassment as a “directly related” offense by the nursing board is yet more evidence that these lists were composed with little consideration of existing Pennsylvania law. Harassment is typically a summary-level offense, see 18 Pa. C.S. § 2709. By law, it is illegal for a board to use a summary offense in consideration of an application for a license. 18 Pa. C.S. §9124(b)(3). The nursing board lists purports to give the board authority to do something which is already illegal under state statute.

D. Crimes of violence are too broadly included on many lists

Act 53 already incorporates a catalog of crimes of violence which the General Assembly has determined are, by their very nature and severity, to be considered as automatically related to the conduct of all licensed professionals. 63 Pa. C.S. §3113(e). While these automatically related offenses include two particularly serious forms of aggravated assault, aggravated assault of less serious forms and reckless endangerment are not in the legislature’s catalog.

Where a crime of violence is not part of the Act 53 “automatically related” catalog, it must meet the definition of “directly related” in order to be included on a board’s individual crimes list. A simple generalized concern for the possibility of future aggression is too vague and unfocused to have a direct bearing on an applicant’s ability to perform a specific responsibility of the profession.

The boards that have included these less serious crimes have not actually provided any specific explanation of how they are directly related to the specific profession. Given that the legislature has decided which crimes of violence are directly related to all licensure by virtue of the inherent risk, when the boards lack any particularized justification for why a less serious offense is directly related to their profession, having that offense on the list violates both longstanding law on the relevance of criminal convictions to professional work and the letter and intent of Act 53. Thus, for example, it is not appropriate for the boards of barber examiners and cosmetology to include reckless endangerment and the less serious forms of aggravated assault, or for the board of nursing to include simple assault and harassment.

E. The severity of offenses was not sufficiently considered by the boards

The board’ lists include minor crimes and do not differentiate between minor and serious crimes, indicating that the boards have not properly considered the severity of the offenses. For example, as stated above, the Nursing Board included Harassment on their list, which is most commonly a very low-level summary offense. In another example, the Nursing Board has included a variety

of theft-related crimes without differentiating between major and minor thefts. Because all theft is treated the same, a theft of less than \$50 (misdemeanor of the third degree²⁴) creates the same presumption against licensure as a theft of \$100,000 (felony of the second degree²⁵).

Dr. Toni Locklear, an I-O psychologist and expert in the job-relatedness of criminal records, reviewed various boards' preliminary lists as part of a report applying her expertise to Act 53.²⁶ Her report is contained in Appendix B. Dr. Locklear faulted the boards' lists for failing to take the seriousness of offenses into account.²⁷ Dr. Locklear states, "the boards should have weighted the criminal code's designation of crimes as "minor" (i.e., misdemeanor or summary), together with the research related to the risk of re-offending when a crime is less severe."²⁸

As Dr. Locklear explains, recidivism research tells us that the risk of committing a future crime is lower if a person is convicted of a minor crime. For that reason, she suggests that minor crimes should be excluded from the directly related lists altogether and considered as part of the individualized assessment stage.

Individualized assessment allows for the thoughtful consideration of [factors that significantly decrease the risk of recidivism, including education and post-conviction employment]. Minor crimes should be evaluated as part of an individualized assessment so all factors relevant to recidivism can be assessed prior to making the high-stakes decision to presume risk and potentially exclude otherwise qualified applicants from licensure.²⁹

If minor crimes are included in the lists, Dr. Locklear opines that they must be coupled with short time parameters to reflect recidivism research.³⁰ Time parameters will be discussed in detail in Section III.

F. The boards' failure to apply an evidence-based approach resulted in the inclusion of offenses that are not "directly related"

The boards and BPOA should have considered an evidence-based approach in which they carefully examined the specific job duties of the profession, identified risk factors, identified related crimes, and determined suitable exclusionary time frames, according to Dr. Locklear. This section of our analysis implicates the first three of the four steps; the next section discusses the fourth.

The "directly related" lists in the proposed regulatory package hew closely to preliminary draft lists created by the boards and commissions and posted on their websites in December 2020. Dr.

²⁴ 18 Pa.C.S. §3903.

²⁵ Id.

²⁶ Toni S. Locklear, Ph.D., *Evaluation of Pennsylvania Bureau of Professional and Occupational Affairs Boards' Proposed "Directly Related" Crimes Lists under Act 53 of 2020* (hereinafter *Evaluation of BPOA Proposed Lists*), at 10-12 (Appendix B), also available at <https://clsphila.org/wp-content/uploads/2022/12/Toni-Locklear-PhD-Evaluation-of-BPOA-Directly-Related-Crimes-Lists-12.2.22-1.pdf>.

²⁷ Id. at 13.

²⁸ Id.

²⁹ Id.

³⁰ Id.

Locklear reviewed the preliminary lists – which do not differ markedly from those included in this regulatory packet – applying her evidence-based analysis for job relatedness.

Dr. Locklear concluded that the lists were defective in much the same ways that we have explained here:

- Failure to consider occupation-specific duties and responsibilities;
- Disregard of relevant court rulings;
- Different “directly related” crime lists for similar occupations; and
- Reliance on crime lists of boards in other states.³¹

The failure to take an evidence-based approach certainly contributed to lists of offenses that are so overbroad. Dr. Locklear’s report will be discussed in more detail in Section 4 of these comments.

III. “Directly Related” Lists Create a *Lifelong* Presumption Against Licensure; Time Since Conviction Must Be Considered When Determining Relatedness So That People with Old Convictions Do Not Face a Presumption of Unfitness

A. Proposed regulations frustrate the intent of Act 53 by excluding and deterring low-risk people with old convictions

The proposed regulations frustrate the purpose and intent of Act 53 of 2020 by creating lifetime barriers to licensure. The intent of Act 53 is to open the licensed professions to people with criminal convictions who do not pose a “substantial risk” if licensed and who are “fit” for licensure. People with old criminal convictions are part of this low-risk group. In fact, as explained in detail below, one of the primary factors that determines whether a convicted person poses a risk is the amount of time that has passed since conviction. A person with a recent conviction may pose a heightened risk of committing a crime at work, but a person with an old conviction does not. But while the legislature intended to help people with old criminal convictions, the Department’s regulations do the opposite.

By not having time limits, the boards’ proposed lists of “directly related” crimes do not distinguish between old convictions and recent ones, creating a lifetime barrier to licensure. A 20-year-old conviction to a crime is treated like a conviction from last week: both create a presumption that the convicted person poses a “substantial risk” if licensed, and therefore should not be licensed. As discussed below, this conclusion is factually untrue.

³¹ Toni S. Locklear, Ph.D., *Evaluation of Pennsylvania Bureau of Professional and Occupational Affairs Boards’ Proposed “Directly Related” Crimes Lists under Act 53 of 2020* (hereinafter *Evaluation of BPOA Proposed Lists*), at 10-12 (Appendix B), also available at <https://clsphila.org/wp-content/uploads/2022/12/Toni-Locklear-PhD-Evaluation-of-BPOA-Directly-Related-Crimes-Lists-12.2.22-1.pdf>.

B. To be consistent with the text of Act 53, the time since conviction must be considered when determining whether a crime is “directly related”

Lifetime barriers to licensure are inconsistent with Act 53’s definition of “directly related.” Old, stale convictions cannot be deemed “directly related” to professions because they do not *directly bear* on the *fitness* to do a job and do not create a *substantial risk*.

Again, when considering this issue, it is worth returning to the statutory text. Under Act 53, a crime is directly related if:

The nature of the criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform one or more of the duties or responsibilities necessarily related to the profession, trade or occupation for which the individual seeks licensure.³²

The concepts of “directly related,” “fitness or ability,” and “substantial risk” are closely connected in Act 53. If a person has a “directly related” conviction, that person is presumed to be “a substantial risk to the health and safety of the individual’s patients or clients or the public or a substantial risk of further criminal convictions.”³³ Act 53 seeks to prohibit individuals who pose a substantial risk from being licensed – these are the individuals who are deemed *unfit* under the Act. In other words, the “fitness or ability” requirement must be read in terms of the Act’s intent of avoiding “substantial risk” and protecting patients, clients, and the public.

Thus, under Act 53’s definition of “directly related,” a person is unfit for a profession if the person poses a “substantial risk”. A conviction should be considered “directly related” under the Act only if it has a direct bearing on a necessary duty of the profession and *makes a person unfit for the profession due to substantial risk*.

Relatedness depends on fitness, which is tied to risk. As is explained in detail in the next section, research tells us that risk level is tied to the recency of a conviction. An old, stale conviction ceases to meaningfully predict future offense. Therefore, relatedness is tied to recency.

Because the risk posed by a person with a conviction decreases over time, convictions cease to be “directly related” to jobs over time. Time since conviction is a primary factor determining whether a conviction makes a person unfit due to risk level, and therefore is a primary factor in determining whether a crime is “directly related” to a job. In the words of Act 53, an old conviction that does not meaningfully predict future behavior no longer has a “direct bearing on the fitness or ability to perform” duties of a job, and therefore is not “directly related.”

³² 63 Pa. C.S. §3102.

³³ 63 Pa. C.S. §3113(b).

C. Lifetime barriers to licensure are inconsistent with recidivism research, which establishes that risk decreases over time

Criminologist researchers studying the level of risk of committing a future crime posed by people with convictions have found that risk level is tied to the recency of a conviction.³⁴ The risk of committing a future crime presented by a person with a conviction decreases as years pass without another conviction. More specifically, research shows that recidivism risk drops significantly after a short time, and then drops so low after four to seven (4 – 7) years that a convicted person poses nearly the same risk as a person without a record.

A new report by Dr. Kiminori Nakamura, attached as Appendix C, applies research about “redemption” to the context of Act 53. Redemption is the process by which the risk of recidivism declines over time and a criminal record no longer meaningfully predicts future reoffending. Professor Nakamura’s research has been funded by the National Institute of Justice, has appeared in leading criminology journals, and has been cited in the Equal Employment Opportunity Commission’s enforcement guidance on the use of criminal history records in employment. In his report, Professor Nakamura states,

[T]he research has found that the recidivism risk of those with a prior criminal record falls below the risk of arrest for the general population approximately after four to seven years for violent offenders, four years for drug offenders, and three to four years for property offenders... [F]or those who are concerned about the risk of individuals with a criminal record, the value of the criminal record in predicting future criminality diminishes with time and likely becomes virtually irrelevant for many purposes after approximately seven years or even less.³⁵

Professor Nakamura faults the boards’ “directly related” lists because they are “not consistent with the recidivism and redemption research... Recidivism risk is not static, as the list presumes; rather, risk is variant and declines considerably even within a few years of the last conviction.”³⁶ Professor Nakamura recommends that a “time-limited use of criminal records based on the length of recidivism-free time should be applied to as many offense types that are currently on the ‘directly related’ list as possible.”³⁷

D. I-O psychologist Dr. Locklear explains that the time since conviction must be considered as part of a job-relatedness analysis

Dr. Locklear, the expert in determining job-relatedness of criminal offenses, agrees that the time since a conviction is a necessary component of relatedness analysis. She states:

³⁴ See, e.g., Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology & Pub. Pol’y* 483 (2006); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *Criminology* 327 (2009).

³⁵ Kiminori Nakamura, *Redemption and Recidivism Research Implications for Act 53 of 2020* (2021), at 3 (internal citations removed), (Appendix C), also available at <https://clsphila.org/wp-content/uploads/2022/11/Kiminori-Nakamura-PA-Occupational-Licensing-and-Redemption-10-28-21.pdf>.

³⁶ *Id.*

³⁷ *Id.*

Since crimes' ability to predict re-offense decreases as time passes, setting exclusionary time frames is necessary to ensure job-relatedness. A crime that fails to predict re-offense within a given time period can no longer be considered "directly related."³⁸

Similarly, she explains:

To be considered job-related in the context of occupational licensure, crimes must 1) have a direct relationship with common work activities, common work settings, and shared job characteristics (such as level of supervision and work site security measures), and 2) *be committed recently enough to predict the likelihood of re-offense.*³⁹

Because of the close connection between relatedness, recidivism risk and recency, Dr. Locklear emphasizes that boards must determine appropriate time frames for otherwise-related crimes as part of the process of determining job-relatedness under Act 53. According to Dr. Locklear, boards should:

[L]everage the recidivism research to set suitable time frames for the crimes identified as "directly related." Only crimes that have occurred within that period would be considered job-related. ... According to the recidivism research, the time period since a crime was committed is an important determinant of its ability to predict the likelihood of re-offending.... there is a point in time – generally six to seven years since an individual's offense – at which they pose no greater risk than those without criminal records.⁴⁰

E. The Department of State's arguments against including time limits are unconvincing

1. The Department of State ignores their primary mandate: to promulgate regulations consistent with the intent of Act 53

The Department of State has chosen not to include time limits in the proposed regulations because "the definition of 'directly relates' in Act 53 is not time-bound, nor has the General Assembly placed time limits on which crimes ... may be considered ... it is the nature of the criminal conduct that dictates whether a crime directly relates to a profession, and not when the crime occurred."⁴¹ It is true that Act 53 does not explicitly specify that the Department must promulgate regulations with time limits. But the Act does mandate that the Department promulgate lists of "directly related" crimes that are consistent with the intent of the General Assembly. The only way the regulations can be consistent with this intent is to avoid excluding and discouraging people with old convictions.

³⁸ *Evaluation of BPOA Boards' Proposed Lists*, *supra* note 24, at 3.

³⁹ *Id.* at 2 (emphasis added).

⁴⁰ *Id.* at 9 (internal citations removed).

⁴¹ Regulatory Analysis Form, at 16.

2. The Department’s interpretation of Act 53’s definition of “directly related” is unnecessarily narrow

The Department interprets the definition of “directly related” in Act 53 inappropriately narrowly, as if it requires that crimes be analyzed absent all important context. The Department proposes that the term “nature of the criminal conduct” cannot include a consideration of the time that a crime was committed. But there is no reason to believe this is true. Webster’s Dictionary defines “nature” as “the particular combination of qualities belonging to a person, animal, thing or class by birth, origin or constitution.”⁴² How long ago a crime was committed is one of the fundamentally important characteristics of a crime, especially when we are analyzing the risk presented by a conviction, so the age of a conviction can be considered as part of the “nature of the criminal conduct.” In fact, because the definition of “directly related” hinges on the “fitness” of a person to do a job, and because an old conviction cannot bear on a person’s fitness to do a job, the text of Act 53 requires that the determination of relatedness include an analysis of the age of the conviction.

3. The Department’s interpretation of “directly related” runs contrary to other Pennsylvania law

The Department argues that time parameters cannot be added to lists of “directly related” crimes because Act 53 did not explicitly specify that the Boards should add these parameters. However, the Department’s position ignores the existing landscape in Pennsylvania law, where lists of crimes that create barriers to employment regularly include time parameters, and where lifetime barriers to employment have been invalidated. The General Assembly designated to the boards the responsibility of developing lists of directly related crimes. It is completely reasonable to expect the Boards to create lists following the norms established in Pennsylvania law by adding time parameters.

Pennsylvania courts have long and repeatedly held that lifetime criminal record bans to employment violate the Pennsylvania state constitution.⁴³ For example, the lifetime criminal record bans in the Older Adult Protective Services Act (OAPSA) were found unconstitutional because they excluded workers with convictions that were too old to present a risk.⁴⁴ The Commonwealth Court held that OAPSA’s employment restriction:

[M]ust be ‘fine-tuned’ to relate the particular criminal conviction to particular employment. [OAPSA]’s current blanket prohibition lacks fine-tuning because it

⁴² Random House Webster’s College Dictionary (Random House, Inc. 2000).

⁴³ See, e.g., Peake v. Com., 132 A.3d 506 (Pa. Commw. 2015); Warren Cnty. Human Servs. v. State Civil Service Comm’n (Roberts), 844 A.2d 70 (Pa. Commw. 2003); Nixon v. Commonwealth, 789 A.2d 376, 382 (Pa. Commw. 2001), aff’d sub nom., Nixon v. Dep’t of Pub. Welfare, 576 Pa. 385, 404 (2003); Megraw v. Sch. Dist. of Cheltenham Twp., No. 577 C.D. 2017, 2018 WL 2012130 at *1-3, (Pa. Commw. May 1, 2018); Johnson v. Allegheny Intermediate Unit, 59 A.3d 10 (Pa. Commw. 2012); Jones v. Penn Delco School Dist., No. 294 M.D. 2012, 2012 WL 8668277 (Pa. Commw. Dec. 13, 2012); Croll v. Harrisburg School District, No. 210 M.D. 2012, 2012 WL 8668130 (Pa. Commw. Dec. 13, 2012).

⁴⁴ See Peake, 132 A.3d at 522-23.

treats all the enumerated crimes, regardless of their vintage or severity, as the same even though they present very different risks of employment.⁴⁵

Similarly, lifetime criminal records bans related to employment in the Child Protective Services Act (CPSL) have been found unconstitutional.⁴⁶ The Commonwealth Court reviewed the law as applied to a caseworker with a conviction that was over twenty years old, stating that his “remote conviction does not reflect upon his present abilities to perform the duties of a caseworker.”⁴⁷ The lifetime criminal record ban imposed on the plaintiff “creates limitations that have no temporal proximity to the time of hiring, [and therefore] it does not bear a real and substantial relationship to the Commonwealth’s interest in protecting children and is unconstitutional.”⁴⁸

In another example, a bus driver, a school custodian, and a teacher challenged the constitutionality of the lifetime employment bans in the Pennsylvania Public School Code of 1949, which were imposed upon them due to decades-old convictions.⁴⁹ The Commonwealth Court found that the statutory lifetime employment ban “ha[d] no temporal proximity to [the plaintiffs’] present ability to perform the duties of [their jobs], and...[did] not bear a real and substantial relationship to the Commonwealth’s interest in protecting children....”⁵⁰ On that basis, the court held that the lifetime bans violated the Pennsylvania constitutional, as applied to the plaintiffs.⁵¹

It comes as no surprise, then, that Pennsylvania laws containing lists of crimes which create barriers to employment also include temporal limitations to those barriers. Pennsylvania’s Ridesharing law⁵², which imposes criminal record bans on Uber and Lyft drivers, is one such example. It contains temporal tiers, and the enumerated convictions create bans for different numbers of years.⁵³ Another example is the Medical Marijuana Act (MMA), which contains a five (5) year ban for some drug-related convictions for caregiver licenses⁵⁴, and a ten (10) year employment-related ban for some drug-related convictions.⁵⁵ Likewise, the Mortgage Licensing Act contains a seven (7) year employment-related ban for certain convictions.⁵⁶

In sum, Pennsylvania law, both statutory and judicial, regularly rejects across-the-board lifetime bans on criminal records. It would be odd indeed if the General Assembly were envisioning something different in the “directly related” lists to be promulgated by the boards and commissions.

⁴⁵ *Id.*

⁴⁶ Warren Cnty. Human Servs., 844 A.2d at 74.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Croll v. Harrisburg School Dist., No. 210 M.D. 2012, 2012 WL 8668130, *1–*2 (Pa. Commw. Dec. 13, 2012);

Jones v. Penn Delco School Dist., No. 294 M.D. 2012, 2012 WL 8668277, *1–*2 (Pa. Commw. Dec. 13, 2012).

⁵⁰ Croll, 2012 WL 8668130 at *7; Jones, 2012 WL 8668277 at *7.

⁵¹ Croll, 2012 WL 8668130 at *7; Jones, 2012 WL 8668277 at *7.

⁵² 53 Pa. C.S. § 57A12.

⁵³ This statute includes three temporal tiers: 7 years, 10 years and lifetime. While, to our knowledge, no legal challenges have been brought, it is important to note that the lifetime bans are constitutionally suspect under the caselaw previously cited.

⁵⁴ 35 P.S. §10231.502(b).

⁵⁵ 35 P.S. §10231.614.

⁵⁶ 7 Pa. C.S. §6133(d)(1).

F. Considering the age of a conviction at the second stage, after imposing a presumption against licensure, is insufficient

Under the proposed regulations, a person with a 20-year-old record and a person with a recent record stand on the same footing. Both face a presumption against licensure; both are disadvantaged and discouraged. People with old, irrelevant criminal records must bear the burden of trying to prove that they are worthy of licensure, contrary to the very goal of Act 53.

The Department asks us to be satisfied with their proposed regulations despite the imposition of a presumption against people with old convictions, because they will consider the age of the conviction at a later stage.⁵⁷ Under the proposed regulations, if the applicant presents evidence to overcome the presumption, the boards will start the “second stage,” where they will consider the time that has passed since the conviction as part of an 11-factor individualized assessment.⁵⁸

However, the fact that the board will consider time along with other factors at a later stage does not correct the problem. A person with an old, irrelevant conviction should not face a presumption and the procedural requirement of presenting evidence of rehabilitation. To be consistent with research and the intent of Act 53, the regulations must include time limitations, so that an old criminal conviction does not create a presumption of substantial risk in the first place.

Perhaps most importantly, a lifelong presumption against licensure will deter many people from pursuing the licensing professions. Few people can put years and thousands of dollars into studying nursing, for instance, if they know they are presumed unfit and might not be licensed.

The mere existence of a procedural hurdle will prove daunting to many. Being forced to present evidence before a licensure board is intimidating, especially for someone who is not represented by counsel. Applicants may choose to abandon the process.

Even if an applicant presents evidence at a board hearing, there is no guarantee that the Boards will properly weigh the age of the conviction amongst 10 other factors. The intent of Act 53 is that more people with criminal records can gain licensure – not to allow the boards to discourage and reject people with irrelevant criminal records. If we are forced to trust in the benevolence of the boards, it is as if Act 53 never became law, and the intent of the law has not been accomplished.

IV. The Boards Should Employ an Evidence-Based Process to Develop “Directly Related” Lists with Time Parameters, Following the Methodology Outlined by Dr. Locklear

To accomplish the intent of Act 53, the lists of “directly related” crimes must include only those crimes that have a direct bearing on the ability to perform necessary duties of the profession and must identify the length of time that each crime, or each such crime type, is “directly related” to the professions regulated. The lists and time periods should be determined utilizing expertise from

⁵⁷ Regulatory Analysis Form, at 16.

⁵⁸ See proposed 49 Pa. Code §43b.404, published at Title 52, *Pennsylvania Bulletin*, page 7112, November 19, 2022.

within the professions, from criminal law experts and from criminology experts or criminology research. The time periods must be supported by relevant recidivism research.

Dr. Toni Locklear’s report, included in Appendix B, provides a demonstration of this process. Dr. Locklear is an Industrial-Organization psychologist and Chief Technical Officer and Litigation Practice Leader for APTMetrics. Industrial-Organizational psychologists use scientific methods to analyze jobs, identify related job requirements, and create selection procedures – such as criminal background checks – tied to job requirements. Dr. Locklear has over 25 years’ experience in the fields of I-O psychology and Human Resources Management and has served as a settlement expert reviewing and modifying the companies’ approach to criminal history screening to ensure fair and equitable screening practices that focus on job-related crimes.

At CLS’s request, Dr. Locklear prepared a report where she analyzed the preliminary lists of “directly related” crimes which were later published in the proposed regulations.⁵⁹ She used her expertise in determining the job-relatedness of criminal records. In her report, Dr. Locklear evaluates the “directly related” crimes lists and lays out a systematic and evidence-based methodology that the boards should use to develop appropriately tailored lists.

In her report, Dr. Locklear analyzes “directly related” crimes lists in the proposed regulations. She also proposes a systematic, evidence-based methodology for creating a “directly related” crimes list.⁶⁰ She designed this methodology based on the definition of “directly related” in Act 53 and on evidence-based methods for identifying job-related criminal history screening criteria.⁶¹ The steps that she identified were:

- 1) Specify job duties;
- 2) Identify risk factors;
- 3) Identify related crimes; and
- 4) Determine suitable exclusionary time frames.⁶²

Dr. Locklear conducted a demonstration exercise with experts in the nursing field to illustrate her methodology and show what boards should do to ensure that their lists are “directly related” to the occupations they regulate.⁶³ She led a focus group of nursing experts that reviewed the job-relatedness of 18 crimes included on the Board of Nursing’s “directly related” list. After hearing from a criminal law expert and discussing each of the crimes, the group determined that only 6 of the 18 crimes created a substantial risk related to nursing.⁶⁴

After developing this list, the focus group considered generally accepted recidivism research. Because “directly related” crimes are ones that make a person *unfit* and create a presumption of

⁵⁹ These preliminary lists were published on the websites of the boards and commissions around December 2020. The proposed lists at issue in this regulatory package differ little from the preliminary lists, despite stakeholder input, including from CLS. Where boards removed offenses from those preliminary lists, we are removed those offenses from our critique.

⁶⁰ *Evaluation of BPOA Boards’ Proposed Lists*, *supra* note 24, at 3.

⁶¹ *Id.* at 5-9.

⁶² *Id.* at 8-9.

⁶³ *Id.* at 14.

⁶⁴ *Id.* at 18.

risk under the Act, crimes should be considered directly related only for that period when they create a substantial risk, rather than acting as a lifetime ban. Based on recidivism research, the focus group determined that 4 of the 6 crimes were directly related for up to 3 years after the conviction, while the other two crimes were directly related for up to 6 years.⁶⁵

V. Conclusion

In the context of occupational licensing, a presumption matters, a lot. Being presumed unfit is not only insulting to people with a criminal record who have struggled to rebuild their lives and redeem themselves. In this context, the presumption creates doubt about ultimate success in a licensure proceeding that would lead many, if not most, rationale people not to invest the time and money in training for a profession. This scenario was exactly what Act 53 was enacted to reform.

The proposed regulatory package must be revised before it can be approved.

- Its lists of “directly related” offenses must be revised.
- Each offense must have a time limit for how long the presumption continues.
- These changes must be made through an evidence-based process.

For more information, contact Brendan Lynch (215-981-3713; blynch@clsphila.org); Katie Svoboda-Kindle (215-981-3708; kkindle@clsphila.org); or Sharon M. Dietrich (215-981-3719; sdietrich@clsphila.org).

⁶⁵ Id. at 18-19.

Appendix A
Offenses which Must Be Deleted from the “Directly Related” Lists for Five Boards
(Barbering, Cosmetology, Nursing, Occupational Therapy, Physical Therapy)

State Board of Barber Examiners – proposed § 43b.506

The essential work of barbering involves cutting and styling hair. There is no specific concern for vulnerable clients. Barbers do not assume position of special trust over property. Customers are not more vulnerable to theft, violence or fraud than in any commercial establishment. Barbering doesn’t involve driving or access to controlled substances. For these reasons the following crimes are not “directly related” to barbering.

- Chapter 27. Assault⁶⁶
 - 18 Pa. C.S. § 2702. Aggravated Assault
 - 18 Pa. C.S. § 2705. Recklessly endangering another person.
- Chapter 39. Theft and Related Offenses
 - 18 Pa.C.S. §3921. Theft by unlawful taking or disposition
 - 18 Pa.C.S. §3922. Theft by deception
 - 18 Pa.C.S. § 3924. Theft of property lost, mislaid, or delivered by mistake
 - 18 Pa.C.S. § 3926. Theft of Services
- Chapter 41. Forgery and Fraudulent Practices
 - 18 Pa.C.S. §4107. Deceptive or fraudulent business practices
 - 18 Pa.C.S. §4115. Falsely impersonating persons privately employed
- Additional Drug and Alcohol Offenses⁶⁷,
 - 35 P.S. § 780-113(a)(30). The manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered [.]⁶⁸
 - 75 P.C.S.A. § 3802. Driving under the influence of alcohol or controlled substance (felony only)

State Board of Cosmetology – proposed § 43b.509

The essential work of cosmetology involves cutting and styling hair. There are no specific concerns for vulnerable clients. Stylists are not entrusted to care for personal property or sensitive information. Their customers are not more vulnerable to theft, violence or fraud than in

⁶⁶ Act 53 incorporates list of directly related crimes of violence set out at 42 Pa.C.S. § 9714(g). Aggravated assault (all types) and reckless endangerment are not on the 9714(g) list. Courts have held that far more serious crimes are not related to barbering. See, e.g., King v. Bureau of Professional and Occupational Affairs, State Board of Barber Examiners, 195 A.3d 315, 329-330 (Pa. Commw. 2018) (involuntary deviate sexual intercourse); Kirkpatrick v. BPOA, 117 A.3d 1286, 1294 (Pa. Commw. 2015) (indecent assault).

⁶⁷ Possession with intent to deliver, 35 P.S. 780-113(a)(30) [“PWID”] and DUI are omitted by Cosmetology Board. Logically, crimes not directly related to cosmetology are not directly related to barbering either.

⁶⁸ Courts have already held: PWID not related to barbering. Fulton v. Commonwealth, 169 A.3d 718, 726 (Pa. Commw. 2017).

any commercial establishment. Indeed, Pennsylvania courts have already ruled that the Board of Cosmetology is wrong to automatically presume that Cosmetology involves driving or access to controlled substances. For these reasons, the following crimes are not “directly related” to cosmetology.

- Chapter 27. Assault⁶⁹
 - 18 Pa. C.S. § 2702. Aggravated Assault
 - 18 Pa. C.S. § 2705. Recklessly endangering another person.
- Chapter 39. Theft and Related Offenses
 - 18 Pa. C.S. § 3921. Theft by unlawful taking or disposition
 - 18 Pa. C.S. § 3922. Theft by deception
 - 18 Pa. C.S. § 3924. Theft of property lost, mislaid, or delivered by mistake
 - 18 Pa. C.S. § 3926. Theft of Services
- Chapter 41. Forgery and Fraudulent Practices⁷⁰
 - 18 Pa. C.S. § 4101. Forgery
 - 18 Pa. C.S. § 4104. Tampering with records or identification
 - 18 Pa. C.S. § 4107. Deceptive or fraudulent business practices
 - 18 Pa. C.S. § 4108. Commercial bribery and breach of duty to act disinterestedly
 - 18 Pa. C.S. § 4112. Receiving deposits in a failing financial institution
 - 18 Pa. C.S. § 4113. Misapplication of entrusted property and property of government or financial institutions
 - 18 Pa. C.S. § 4114. Securing execution of documents by deception
 - 18 Pa. C.S. § 4115. Falsely impersonating persons privately employed
 - 18 Pa. C.S. § 4120. Identity theft

State Board of Nursing – proposed § 43b.518

Nursing means diagnosing and treating human responses to actual or potential health problems through case-finding, teaching, counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens.⁷¹ Nurses are not specially entrusted to care for personal property; patients and subordinates are encountered in a wide variety of settings, and are not more vulnerable to theft or fraud than in any commercial establishment. Nurses’

⁶⁹ Act 53 incorporates list of directly related crimes of violence set out at 42 Pa. C.S. § 9714(g). Aggravated assault (all types) and reckless endangerment are not on the 9714(g) list. Courts have held that far more serious crimes are not related to barbering – and, therefore, logically, not to cosmetology either. See, e.g., King v. Bureau of Professional and Occupational Affairs, State Board of Barber Examiners, 195 A.3d 315, 329-330 (Pa. Commw. 2018) (involuntary deviate sexual intercourse); Kirkpatrick v. BPOA, 117 A.3d 1286, 1294 (Pa. Commw. 2015) (indecent assault).

⁷⁰ Chapter 41 Fraud and forgery offenses (other than §§ 4107 & 4115) are omitted by Barbering Board. Logically, crimes not directly related to barbering are not directly related to cosmetology either. The Board previously recognized this: in the past, since the Beauty Culture Law only permitted discipline for *related* convictions, the Board cited only 18 Pa.C.S. § 9124(c) (permitting revocation for *unrelated* felonies) as grounds to discipline for forgery – but Act 53 revokes application of § 9124(c) to BPOA, see 63 Pa. C.S. § 3113(a)(2). The Board cannot now pretend that forgery and related crimes were ‘directly related’ for all of this time.

⁷¹ These duties are enumerated in the definition of the “Practice of Professional Nursing” in the Professional Nursing Law. 63 P.S. §212(1).

involvement in billing and reimbursement will vary based on professional setting. In a large health practice, involvement may be minimal – and will often involve oversight by numerous colleagues. It is incidental, rather than essential, to the work of therapy. Nurses have no special connection to the administration of law. For these reasons, the following crimes are not “directly related” to nursing.

- Chapter 27. Assault⁷²
 - 18 Pa. C.S. § 2701. Simple assault
 - 18 Pa. C.S. § 2706(a)(1). Terroristic threats.
 - 18 Pa. C.S. § 2709. Harassment.
- Chapter 39. Theft⁷³
 - 18 Pa. C.S. § 3921. Theft by unlawful taking or disposition (misdemeanor).
 - 18 Pa. C.S. § 3922. Theft by deception.
 - 18 Pa. C.S. § 3923. Theft by extortion.
 - 18 Pa. C.S. § 3925. Receiving stolen property.
 - 18 Pa. C.S. § 3929. Retail theft (misdemeanor).
- Chapter 41. Forgery and Fraudulent Practices
 - 18 Pa. C.S. § 4101. Forgery.
 - 18 Pa. C.S. § 4104. Tampering with records or identification.
 - 18 Pa. C.S. § 4106. Access device fraud (misdemeanor).
 - 18 Pa. C.S. § 4114. Securing execution of documents by deception.
 - 18 Pa. C.S. § 4117. Insurance fraud.
 - 18 Pa. C.S. § 4121. Possession and use of unlawful devices
- Chapter 43. Offenses Against the Family
 - 18 Pa. C.S. § 4304. Endangering welfare of children.⁷⁴
- Chapter 49. Falsification and Intimidation
 - 18 Pa. C.S. § 4902. Perjury.
 - 18 Pa. C.S. § 4903. False swearing.
 - 18 Pa. C.S. § 4904. Unsworn falsification to authorities.
 - 18 Pa. C.S. § 4905. False alarms to agencies of public safety.
 - 18 Pa. C.S. § 4906. False reports to law enforcement authorities.
 - 18 Pa. C.S. § 4909. Witness or informant taking bribe.
 - 18 Pa. C.S. § 4910. Tampering with or fabricating physical evidence.
 - 18 Pa. C.S. § 4914. False identification to law enforcement authorities.
 - 18 Pa. C.S. § 4952. Intimidation of witnesses or victims.
 - 18 Pa. C.S. § 4953. Retaliation against witness, victim or party.

⁷² Act 53 incorporates list of directly related crimes of violence set out at 42 Pa.C.S. § 9714(g). These offenses are not on the 9714(g) list. There are no grounds to go beyond the violent crimes enumerated by the legislature, where there is no direct link between the offense and the occupation. Moreover, harassment is a mere summary offense, the lowest level of offense in Pennsylvania. Simple assault is a misdemeanor.

⁷³ Chapters 39, 41, 49, 51, 73, 76: Many of the crimes listed by the Board under chapters 39, 41, 49, 51, 73 and 76 encompass potential behaviors that are only distantly related to the work of nurses – and sometimes completely unrelated. Moreover, the Board is incorrect to assert that crimes of dishonesty have a special relationship to nursing. It is true that we want all people, including nurses, to be honest, but having unmonitored access to an incapacitated patient’s valuables is not an essential part of nursing – it is something that many nurses never experience at all.

⁷⁴ Endangering the welfare of children is a very commonly charged crime that typically involves an act of omission – something any caregiver could do - not an affirmative commission of abuse.

- 18 Pa. C.S. § 4953.1. Retaliation against prosecutor or judicial official.
- Chapter 51. Obstructing Governmental Operations
 - 18 Pa. C.S. § 5105(a)(3) and (5). Hindering apprehension or prosecution.
 - 18 Pa. C.S. § 5123. Contraband.
- Chapter 73. Trade and Commerce
 - 18 Pa. C.S. § 7313. Buying or exchanging Federal Supplemental Nutrition Assistance Program (SNAP) benefit coupons, stamps, authorization cards or access devices.
 - 18 Pa. C.S. § 7314. Fraudulent traffic in Supplemental Nutrition Assistance Program (SNAP) benefits.
- Chapter 76. Computer Offenses
 - 18 Pa. C.S. § 7611. Unlawful use of computer and other computer crimes
 - 18 Pa. C.S. § 7613. Computer theft.
 - 18 Pa. C.S. § 7615(a)(3). Computer trespass.
- Drug Act Crimes⁷⁵
 - 35 P.S. §§ 780-113(a)(1), (16)[if marijuana], (31), (32)
- Vehicular Crimes⁷⁶
 - 75 Pa. C.S.A. § 3802. Driving under influence of alcohol or controlled substance

State Board of Occupational Therapy – proposed § 43b.520

Occupational therapy is the evaluation, analysis, selection and adaptation of activities for individuals whose abilities to cope with the activities of daily living, or perform normal tasks or essential vocational tasks, are threatened or impaired. Therapists are not entrusted to care for personal property; customers not more vulnerable to theft or fraud than in any commercial establishment. Therapists' involvement in billing and reimbursement will vary based on professional setting, and may be minimal – and involve oversight by numerous colleagues - in a large health practice; it is incidental, rather than essential, to the work of therapy. Therapists have no special connection to the administration of law or submission of tax forms. For these reasons, the following crimes are not “directly related” to occupational therapy.

- Chapter 39. Theft and Related Offenses
 - 18 Pa. C.S. §3921 Theft by unlawful taking or disposition
 - 18 Pa. C.S. §3922 Theft by deception
 - 18 Pa. C.S. §3926 Theft of Services

⁷⁵ Administering medicines is a central aspect of nursing, so a recent drug addiction or drug crime may be directly related to nursing. However, the minor drug crimes of simple possession of marijuana and possession of drug paraphernalia (e.g. a pipe) are not directly related. These crimes are minor and do not by themselves indicate drug addiction, especially if they are not recent or repeated.

⁷⁶ As noted above, a DUI conviction – especially if it is not recent or repeated – does not by itself indicate alcoholism. Moreover, alcoholism is not especially related to nursing since nurses do not administer alcohol to patients. A DUI conviction certainly does not indicate drug addiction, as most DUIs involve alcohol rather than drugs. The Board can, of course, evaluate the facts underlying a particular DUI case to determine whether it indicates a recent addiction to drugs, which would make the offense related to nursing. The fact that an offense *could in some circumstances* be related to an occupation does not mean it is “directly related.”

- 18 Pa. C.S. §3927 Theft by Failure to Make Required Disposition of Funds
- Chapter 41. Forgery and Fraudulent Practices⁷⁷
 - 18 Pa. C.S. §4101 Forgery
 - 18 Pa. C.S. §4104 Tampering with Records and Identification
 - 18 Pa. C.S. §4106 Access Device Fraud
 - 18 Pa. C.S. §4107 Deceptive or fraudulent business practices
 - 18 Pa. C.S. §4108 Commercial Bribery
 - 18 Pa. C.S. §4114 Securing execution of documents by deception
 - 18 Pa. C.S. §4117 Insurance fraud
 - 18 Pa. C.S. §4120 Identity Theft
- Chapter 49. Falsification and Intimidation⁸
 - 18 Pa. C.S. §4902 Perjury
 - 18 Pa. C.S. §4903 False Swearing
 - 18 Pa. C.S. §4904 Unsworn Falsification to Authorities
 - 18 Pa. C.S. §4911 Tampering with Public Records
 - 18 Pa. C.S. §4952 Intimidation of witnesses or victims
 - 18 Pa. C.S. §4953 Retaliation against witness, victim or party
- Chapter 51. Obstructing Governmental Operations
 - 18 Pa. C.S. §5101 Obstructing administration of law or other governmental function
 - 18 Pa. C.S. §5105 Hindering apprehension or prosecution.
 - 18 Pa. C.S. § 5111 Dealing in proceeds of unlawful activity
- Federal offenses
 - 18 U.S.C. §1341 Mail fraud
 - 26 U.S.C. §7206 Filing fraudulent tax returns

State Board of Physical Therapy – proposed § 43b.524

The essential work of physical therapy involves the evaluation, treatment, and therapeutic management of disabling physical conditions in the general population. Therapists are not entrusted to care for personal property; customers are not more vulnerable to theft, violence, trafficking, or fraud than in any commercial establishment; therapy is not especially focused on children or care-dependent people, when a typical patient is an able-bodied adult with a temporary ailment. Therapists’ involvement in billing and reimbursement will vary based on professional setting, and may be minimal – and involve oversight by numerous colleagues - in a large health practice; it is incidental, rather than essential, to the work of therapy. For these reasons, the following crimes are not “directly related” to physical therapy.

⁷⁷ Chapters 41 & 49: These fraud/forgery/falsification crimes encompass potential behaviors that are only distantly related to the work of many occupational therapists. To the extent they suggest a generalized “tendency towards dishonesty,” that is the type of vague, overbroad category of crimes referred to as “lack of good moral character” or “crimes of moral turpitude” – Act 53 explicitly directs boards not to deny/revoke licensure on the basis of crimes that supposedly display a generalized character trait.

Also, several of these offenses (including §§ 4108, 4114, 4117) are omitted by the State Board of Physical Therapy. Logically, crimes not directly related to authorization/billing requirements of physical therapy are not directly related to occupational therapy either.

- Chapter 27. Assault⁷⁸
 - 18 Pa. C.S. § 2705 (Recklessly endangering another person)
- Chapter 39. Theft and Related Offenses
 - 18 Pa. C.S. § 3921 (Theft by unlawful taking or disposition)
 - 18 Pa. C.S. § 3922 (Theft by deception)
 - 18 Pa. C.S. § 3923 (Theft by extortion)
 - 18 Pa. C.S. § 3927 (Theft by failure to make required disposition of funds received)
- Chapter 41. Forgery and Fraudulent Practices⁷⁹
 - 18 Pa. C.S. § 4101 (Forgery)
 - 18 Pa. C.S. § 4104 (Tampering with records or identification)
 - 18 Pa. C.S. § 4106 (Access device fraud)
 - 18 Pa. C.S. § 4107 (Deceptive or fraudulent business practices)
 - 18 Pa. C.S. § 4117 (Insurance Fraud)
- Chapter 43. Offenses Against the Family⁸⁰
 - 18 Pa. C.S. § 4304 (Endangering the welfare of children)
- Chapter 49. Falsification and Intimidation
 - 18 Pa. C.S. § 4904 (Unsworn falsification to authorities)
 - 18 Pa. C.S. § 4952 (Intimidation of witnesses or victims)

⁷⁸ Act 53 incorporates list of directly related crimes of violence set out at 42 Pa.C.S. § 9714(g). Reckless endangerment is not on the 9714(g) list. It is inappropriate to go beyond the violent crimes enumerated by the legislature, where there is no direct link between the offense and the occupation.

⁷⁹ Chapters 41: These fraud/forgery crimes encompass potential behaviors that are only distantly related to the work of many physical therapists. To the extent they suggest a generalized “tendency towards dishonesty,” that is the type of vague, overbroad category of crimes referred to as “lack of good moral character” or “crimes of moral turpitude” – Act 53 explicitly directs boards not to deny/revoke licensure on the basis of crimes that supposedly display a generalized character trait.

⁸⁰ Endangering the welfare of children is a very commonly charged crime that typically involves an act of omission – something any caregiver could do - not an affirmative commission of abuse.

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House of Representatives

Commonwealth of Pennsylvania
 Harrisburg

December 19, 2022

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 Independent Regulatory
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Children and Youth
 Consumer
 Rules
 Policy, Deputy Chair

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Re: Regulatory Package 16A-66 (Consideration of Criminal Convictions)

Dear Ms. Montgomery:

We were the prime sponsors of SB 637 and HB 1477, the legislation that ultimately was enacted as Act 53 of 2020, more commonly known as “occupational licensing reform.” We are writing to raise concerns about the regulatory package that has been proposed by the Department of State to implement the law, as we believe that the Department and its boards and commissions have misconstrued the intent of Act 53.

We are Republicans and Democrats from both chambers of the General Assembly. We spearheaded reform of occupational licensure because of our view that too many Pennsylvanians who do not present risk were being excluded from the licensed professions. The overbroad exclusions of prior law were bad for both workers and business. Occupational licensing reform was important enough to us and our colleagues that we passed Act 53 in June 2020, even while the pandemic otherwise dominated the General Assembly’s work.

Act 53 was drafted and amended with the objective of offering a pathway to licensure for those with criminal convictions who have paid their debt to society. The legislation we passed was structured in such a way as to require licensing boards and commissions to consider prior criminal convictions of an applicant for licensure in a fair, consistent, and common-sense manner. As you are undoubtedly aware, under the prior laws of this Commonwealth, many individuals who had paid their debt to society were being hampered in their attempts to reenter the workforce by licensing boards and commissions that were denying licenses on the sole basis of old convictions that, in many instances, no reasonable person could argue were related or connected to the

profession for which licensure was sought. Denying reformed convicted persons the prospect of meaningful employment does little to protect the safety and wellbeing of society. In fact, the denial of such opportunities could contribute to these individuals choosing to reoffend.

The general theme of Act 53 was that applicants can be presumed unfit only for convictions that are *directly related* to the practice of the profession in which they seek to practice. The boards and commissions that operate under the umbrella of the Bureau of Professional and Occupational Affairs (BPOA) were charged with determining what offenses are “directly related” to their practice areas.

But the lists of “directly related” offenses proposed by the licensing boards and commissions are overly broad and are in direct contrast to the spirit of this legislation and the intentions of its makers. For example, the Barber Board’s list includes convictions for the possession of a controlled substance with the intent to deliver and felony DUI. Unequivocally, these offenses were not what the General Assembly envisioned as being “directly related” to the profession of barbering when approving this language. Indeed, it compels one to suspend all logic and sense to understand the reasoning underlying the inclusion of these offenses, knowing that such convictions result in the presumption that the applicant poses a “substantial risk” if licensed.

Even under prior statutes, our courts held that the Barber License Law did not provide for the denial of licensure as a result of criminal convictions unrelated to the practice of barbering. In *Fulton v. Bureau of Professional and Occupational Affairs*,¹ the court noted that the Barber License Law required applicants to be at least 16 years of age, have at least an eighth-grade education, have a specified amount of barber training and experience, and pass the applicable barber examinations. The law did not require applicants to demonstrate that they are of good moral character and did not permit the denial of licensure based on prior criminal convictions. Significantly, the court noted that the Department of Corrections has established a barber program for inmates to allow inmates to learn the vocational skill of barbering and obtain a license to practice that vocation. In sum, absent evidence that a person’s criminal conviction “has some effect on [his] work as a barber or use of his barber license[.]” a board could not deny that person a license.

In other examples, the Board of Nursing has listed as “directly related” 92 separate offenses beyond violent, sexual, and drug trafficking offenses. Many of the boards include garden variety drug offenses on their lists, seemingly for only a general feeling that drugs are bad.

Moreover, none of the lists contain time limits on how long an offense is “directly related.” As a result, anyone who ever in their lives was convicted of a listed offense is presumed unfit, no matter how many years have passed. These lifetime bans look remarkably similar to the prior law that we replaced with Act 53, which permitted exclusion of people with felony convictions for their

¹ 169 A.3d 718 (Pa. Cmwlth. 2017).

entire lives. A regulatory package that creates lists of lifetime bans is not consistent with the intent of Act 53, which was to open the licensed professions to people with criminal records if they are fit to do the work and do not pose a heightened risk.

The regulatory package frequently discusses “transparency” as if it were the goal that drove Act 53. While transparency was certainly a goal of the legislation, the primary objectives, as we have said, were to open the professions more widely to rehabilitated people with old and unrelated criminal records and to provide relief to businesses struggling to find qualified workers.

We urge the Department to thoroughly review and revise with the boards and commissions the “directly related” lists before resubmission of the package to the Independent Regulatory Review Commission, based upon the intent of the law.

Sincerely,



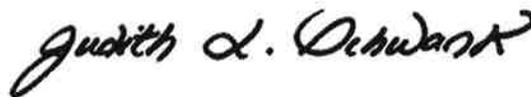
Sheryl M. Delozier
State Representative
88th Legislative District



John DiSanto
State Senator
15th Senate District



Jordan A. Harris
State Representative
186th Legislative District



Judith L. Schwank
State Senator
11th Senate District

cc: Michelle L. Elliott, Regulatory Analyst
Independent Regulatory Review Commission
Via email: melliott@irrc.state.pa.us

House Professional Licensure Committee
Senate Consumer Protection and Professional Licensure Committee



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16 December 2022

Department of State
Bureau of Professional and Occupational Affairs
Attention: Cynthia Montgomery
Counsel to the Department of State
P.O. Box 69523
Harrisburg, PA 17106-9523
RA-STRegulatoryCounsel@pa.gov

Subject: 16A-66 (Consideration of Criminal Convictions)

Dear Ms. Montgomery,

I am writing on behalf of the Legislative Committee of the PA Affiliate of the American College of Nurse-Midwives' (PA-ACNM), which represents certified nurse-midwives (CNM) in the Commonwealth, to strongly urge the Independent Regulatory Review Commission to reject the proposed Consideration of Criminal Convictions (16A-66) regulations and urge their revision. The proposed regulations do not accomplish the goal of the legislature when Act 53 was passed in 2020, to open the licensed professions to qualified people with old and unrelated criminal convictions, benefitting workers, patients, and employers alike.

I am an Assistant Professor at the University of Pennsylvania School of Nursing, the Nurse Scientist at Pennsylvania Hospital in Philadelphia, PA, and the Secretary of the PA-ACNM. In PA, CNM licenses are issued by the Board of Medicine, but we also hold registered nursing licenses, issued by the Board of Nursing. The proposed regulations will unjustly prohibit people from becoming CNMs who would meet the Board of Medicine's criteria but not the Board of Nursing's.

CNMs are more likely to serve in underserved areas – rural and urban – and are critical primary care clinicians, providing direct patient care across the lifespan. Midwifery-led care is associated with decreased cost for birth hospitalizations, increased patient satisfaction with the care provided, and lower rates of pre-term birth and cesareans. CNMs are also federally recognized as appropriate providers of medication-assisted therapy for opioid-use disorder. In other words, CNMs are essential care providers for supporting and improving the health of Pennsylvanians. The proposed regulations do not carry out the intent of the law and they effectively prevent the necessary increase of our healthcare workforce by providers who would meet the Board of Medicine's criteria, thereby creating barriers to healthcare access and health equity. As an advocate for Pennsylvania's midwives, I am particularly concerned that these regulations will prevent qualified people from becoming CNMs – an unacceptable outcome at a time when we are facing a shortage of healthcare providers, especially a declining obstetric workforce, and increasing maternity care deserts.

The proposed regulations should be revised in two ways. First, the proposed lists of “directly related” crimes must be shortened. Ideally, the proposed regulations would 1) not expand on the lists of sexual crimes, crimes of violence and drug trafficking that already apply to Nursing Board professions under Act 53, and 2) would be consistent with the Board of Medicine’s list of 34 crimes. Second, the proposed regulations should not create lifelong barriers to licensure. To accomplish the intent of the law, the lists of “directly related” crimes must include time limits so that people with old convictions are not presumed “unfit.”

I strongly urge the Department to address the issues and concerns identified in this comment. If you have any questions or need further clarification, please do not hesitate to contact me.

Sincerely,



Rebecca R. S. Clark, PhD, MSN, RN, CNM, WNHP-BC
Secretary, PA-ACNM
Assistant Professor, University of Pennsylvania School of Nursing
Core Faculty, Center for Health Outcomes and Policy Research
Nurse Scientist, Pennsylvania Hospital
Senior Fellow, Leonard Davis Institute of Health Economics

Cc: Michelle Elliot, IRRC Regulatory Analyst, melliott@irrc.state.pa.us



Pennsylvania Association of Nurse Anesthetists



December 19, 2022

Fiona E. Cormack
 Independent Regulatory Review Commission
 333 Market Street
 13th Floor
 Harrisburg, PA 17101

Re: Regulation #16A-66: Consideration of Criminal Convictions
 Bureau of Professional and Occupational Affairs

Dear Ms. Cormack,

The Pennsylvania Association of Nurse Anesthetists (PANA) represents over 3,500 certified registered nurse anesthetists and students throughout the Commonwealth. PANA and its members appreciate this opportunity to address and comment on the proposed regulations, which seek to update occupational licensing.

PANA has reviewed the proposed language and has concerns it does not meet the intent of Act 53 of 2020. Specifically, the proposed language does not, and will not, remove unnecessary barriers to licensure and employment. The proposed language will result in unreasonable barriers to licensing, which will inhibit the intent of Act 53, which was to remove unnecessary barriers to employment and entrepreneurship in the Commonwealth.

What is most concerning to PANA is that the proposed extensive list of crimes is contrary to the clear intent of this legislation. The language of the bill and the intent is to create a modern set of rules for consideration of a conviction regarding the licensing or revocation of a license of an individual. The Act is clear convictions should only be considered which are *directly related* to the practice. It was further clear that consideration of the nature of the offense as well as the time that has passed since the conviction was to be part of the decision-making process. The current regulations as drafted contain no language regarding the time parameters.

Most egregious is the over-inclusive list of crimes, many of which are not directly related to the Nursing Profession. The Board of Nursing lists over 90 crimes to be considered, yet the Board of Medicine only lists 34. An example of the overly broad list of crimes for nurses is the inclusion of DUI offenses. No other health care practitioner board includes DUI offenses. The only board or commission which includes DUIs are the State Board of Crane Operators and the Navigation Commission for the Delaware River and its Navigable Tributaries. Also, twenty-one

(21) offenses under the Controlled Substance, Drug, Device and Cosmetic Act are listed by the State Board of Nursing, whereas only eight (8) are listed by the State Board of Medicine.

A Coalition of Pennsylvania Nursing Associations sent a letter to the State Board of Nursing and Pennsylvania Department of State in 2020 addressing concerns about the extensive list of crimes, specifically advising the Board of Nursing the proposed list of crimes would lead to a system in which the issuance, suspension, or revocation of a license to practice the profession of nursing would be frustrated.

PANA respectfully requests these proposed regulations be revised in two ways:

- 1) The list of crimes should only include those crimes *directly related* to the practice of the nursing profession. The current list is overly broad and any crimes that do not relate to practice of the profession should be removed. An expert report was submitted by Community Legal Services of Philadelphia evaluating the boards “directly related” lists and detailing an alternative systematic, evidence-based approach to develop such lists.
- 2) Time parameters should be added. Without consideration of the length of time since conviction, these regulations will create a lifetime barrier to license. Not only is this contrary to the language and the intent of Act 53, but it also further fails to consider a proven evidence-based approach to the consideration of those directly related offenses.

If a criminal conviction is remote in time and applicants have no subsequent convictions, why should they have to go through the second stage of the assessment to prove fitness for licensure? Expert literature on an evidence-based approach to identify job-related crimes, stresses the importance of not only the severity of the crime, but also excluding those which occurred long before the application,

Convictions for crimes, other than sexual offenses, crimes of violence and drug trafficking, could be excluded during the first stage of review if an appropriate period of time has elapsed. Criminology research on recidivism indicates that there is a point in time – generally six or seven years since the individual’s offense – at which they pose no greater risk than those without criminal records.

As an Association whose core values include leadership and integrity in this advanced profession, we support and encourage the need to protect the public health and welfare, as well ensure Act 53 is implemented as intended to provide transparency and clarity to licensing in Pennsylvania. We believe the language can be amended to reach these goals and ensure qualified individuals will not be barred from entered the nursing profession.

Thank you for your time and consideration of PANA's position on these proposed Regulations.

SINCERELY,

A handwritten signature in black ink, appearing to read "Laura Wiggins". The signature is fluid and cursive, with the first name "Laura" written in a larger, more prominent script than the last name "Wiggins".

Laura Wiggins, President
Pennsylvania Association of Nurse Anesthetists

cc: Michelle L. Elliot
Cynthia K. Montgomery
Jacqueline A. Wolfgang

From: [Tom Dougherty](#)
To: [ST, RegulatoryCounsel](#)
Subject: [External] BPOA PROPOSED regulation #16A-66 (IRRC #3361): "Consideration of Criminal Convictions"
Date: Monday, December 19, 2022 3:08:09 PM



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To whom it may concern:

Pennsylvania State Nurses Association (PSNA) is opposed to the most recent list of crimes proposed by the Board in relation to rulemaking for Regulation #16A-66. The Board's current list of crimes is neither equitable nor are many of the crimes directly related to the practice of the profession. PSNA and our allies believe that the Board, in publishing the list in its current form, has misinterpreted the intent of Act 53. Senator John DiSanto, the prime sponsor of the legislation, wrote in a memo that the purpose of his bill was to "require that boards only withhold a license for convictions which are **directly related** to the practice of the occupation." With this in mind, PSNA encourages the Board to consider that crimes such as writing bad checks or threatening to use weapons of mass destruction are neither directly related to the profession nor remotely related to nursing.

The most concerning aspect of this process has been that our colleagues who are licensed under the State Board of Medicine are being held to a different set of standards, even though the nature of our work is similar. The lists for the State Boards of Medicine, Osteopathic Medicine, and Nursing should be very similar due to the similar nature of our work. Applicants for licenses under the State Board of Nursing should not be held to a different standard than their colleagues seeking licensure from the State Board of Medicine.

While the initial list of crimes proposed by this Board was concerning, there is still an opportunity to make this right. I urge this Board to create a subcommittee, comprised of both stakeholders and Board members, to collaborate with the Commonwealth's nursing organizations on a list of crimes that genuinely relate **directly** to the profession of nursing. We hope the Board will work with stakeholders on this issue and others in the future.

Deborah Cardenas, DNP, MSN, RN, Paralegal, CPHQ
President, Pennsylvania State Nurses Association (PSNA)



**PENNSYLVANIA COALITION OF
NURSE PRACTITIONERS**

2400 Ardmore Blvd
Pittsburgh, PA 15221



**Executive
Committee**

**Cheryl Schlamb, DNP,
CRNP**
PCNP President

**Amanda Laskoskie,
MSN, DNP**
PCNP President-Elect

Renee Orris, CRNP
PCNP Treasurer

**Mary Jo Cerepani, DNP,
FNP-BC, ENP-C,
FAANP, FAEN**
PCNP Secretary

Peggy Pearl
PCNP Executive Director

December 16, 2022

Department of State
Bureau of Professional and Occupational Affairs
Attention: Cynthia Montgomery
Counsel to the Department of State
P.O. Box 69523
Harrisburg, PA 17106-9523
RA-STRegulatoryCounsel@pa.gov

Subject: 16A-66 (Consideration of Criminal Convictions)

Dear Ms. Montgomery,

We respectfully submit this comment from the Pennsylvania Coalition of Nurse Practitioners, who represent over 17,900 Nurse Practitioners in the Commonwealth, to assist in the Independent Regulatory Review Commission's review of the above-referenced proposed rulemaking submitted by the Department of State. Nurse Practitioners are Advanced Practice Registered Nurses who are licensed Registered Nurses. The proposed regulations **do not** accomplish the goal of the legislature when passing Act 53 of 2020. The intent of Act 53 was to open licensed professions to qualified people with old and unrelated criminal convictions, benefitting workers and employers alike.

The proposed regulations do not accomplish the intent of Act 53; in fact, they do the opposite. The proposed regulations will deter and exclude persons with old and unrelated convictions, even though they do not pose a risk. As an advocate for all Pennsylvania's nurses, our organization is very concerned that these regulations will prevent qualified people from becoming or remaining licensed nurses which is an unacceptable outcome at a time when we are facing a nursing shortage and an unprecedented workforce shortage which will impact the wellbeing of Pennsylvanians.

The proposed regulations should be revised in two ways: first, the proposed lists of "directly related" crimes must be shortened. The list of "directly related" offenses promulgated by the Board of Nursing is especially overbroad. There are over 90 crimes on their list, added on top of the lists of sexual crimes, crimes of violence and drug trafficking that already apply to Nursing Board professions under Act 53. In contrast, the Medical Board's list has 34 crimes. Under this unreasonable structure, theft-related crimes of all grades (even values less than \$50), DUI, possession of a small amount of marijuana, and lower-level crimes like simple assault are related to RNs (inclusive of Nurse Practitioners) and LPNs, but not related to Physician's Assistants or Physicians.

The “**directly related**” crimes lists must be more narrowly drawn because they create substantial barriers to licensure. People with convictions on the list are much less likely to pursue a nursing career, knowing that they are presumed to be a “substantial risk” if licensed. This overbroad list will deter and exclude people from entering the nursing profession, leading to greater nursing shortages, without making patients any safer.

Second, the proposed regulations should not create lifelong barriers to licensure. According to research, people with old convictions are no more likely to commit a crime than anyone else. People with old convictions are not “unfit” for licensure and should not face a barrier that will deter and exclude them. To accomplish the intent of the law, the lists of “directly related” crimes must include time limits so that people with old convictions are not presumed “unfit.”

On behalf of the Pennsylvania Coalition of Nurse Practitioners, we strongly urge the Department to address the issues and concerns identified in this comment. If you have any questions or need further clarification, please do not hesitate to contact our office. We are attaching our letter that we previously submitted to the PA SBON for your review as well.

Sincerely



Cheryl Schlamb, DNP, CRNP
PA Coalition of Nurse Practitioners, President

Cc: Michelle Elliot, IRRC Regulatory Analyst, melliott@irrc.state.pa.us



December 19, 2022

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Regulation No. 16A-66: Consideration of Criminal Convictions

To the Honorable Members of the Independent Regulatory Review Commission:

I write on behalf of the Pennsylvania Chamber of Business and Industry (PA Chamber) in response to the Pennsylvania Department of State's (the Department) Nov. 4, 2022 Proposed Regulation to implement Act 53 of 2020, known as the Occupational Licensing Reform law. Thank you for the opportunity to submit these comments.

The PA Chamber is Pennsylvania's largest broad-based employer advocacy association. Our membership comprises around 10,000 employers of all sizes and industries throughout the Commonwealth – from sole proprietors to Fortune 100 companies – representing nearly 50 percent of the state's private workforce.

The PA Chamber advocates for policies to improve Pennsylvania's business climate, attract investment, and strengthen our communities. We strive to address myriad challenges that impede the ability of employers to succeed and hold back Pennsylvania's economy. One such challenge that incumbers employers of all sizes from seemingly every sector of the economy is the inability to recruit or hire individuals to fill open positions.

Employers' struggles with a tight labor market and misalignment between their needs and applicants' qualifications existed prior to the pandemic, but have been exacerbated over the last few years and slowed recovery. Other strains on the business community, from inflation to supply chain disruptions, either added to or were made worse by workforce shortages.

Addressing the workforce crisis will require activism from and coordination among all stakeholders, and a multi-pronged public policy strategy, including a

focus on encouraging employment for Pennsylvanians who are too often marginalized.

The PA Chamber's commitment to improving the Commonwealth's workforce, particularly by supporting Pennsylvanians stuck on the economic sideline, has led us to support multiple criminal justice reform measures to help facilitate employment for reentrants and individuals with a criminal record. This advocacy included working on and supporting Senate bill 637, the Occupational Licensing Reform legislation, during the 2019-2020 legislative session.

The Commonwealth oversees 29 boards and commissions that administer over 250 types of professional licenses; and their rules varied in terms of when a criminal record could factor into decisions for granting licenses. S.B. 637 was a workforce bill and included a number of provisions we believed would not only help address the workforce crisis, but would also benefit individuals, families and communities.

The legislation sought to establish a more uniform standard and process for agencies considering criminal history in the context of an occupational license application, including providing that a license may only be denied if the record is related to the occupation. Employers follow a similar standard if a job applicant has a criminal record and we believed it made sense to be applied in this context as well.

The bill required agencies to determine and publicize the types of criminal records that directly relate to particular licenses and specifically provided a process for the employer community's perspective to be considered when agencies develop these policies. Importantly, S.B. 637 allowed potential applicants to receive a ruling ahead of time on whether their criminal record is disqualifying for a particular license, giving individuals the ability to make more informed decisions related to education and training opportunities.

We were proud to support S.B. 637 and pleased it was passed unanimously by both the House and Senate and signed by Gov. Wolf as Act 53 of 2020. The reforms in this law were intended to both add much needed transparency and predictability to this process, and to help encourage employment for the individuals impacted.

We appreciate the work of the Department and Bureau of Professional and Occupational Affairs to develop regulations to implement Act 53. These

regulations are critical to achieving the complementary goals of the law focused on both transparency and clarity, *and* encouraging employment.

We understand that concerns have been raised by a number of stakeholders that the proposed regulations do not yet strike the right balance in pursuit of these two goals. According to advocates, the regulations are too broad in its approach to determining what criminal history is directly related to the particular occupational license, and further concerns have been raised that offenses may be considered for the entirety of someone's life, creating long-term barriers to employment.

Licensing agencies should not screen out potential applicants if their criminal records are not related to the profession and do not create a risk. This would be contrary to our understanding of the intent of the law and does not help employers or the public. Our members take seriously their responsibility to screen job applicants to protect their workforce, customers and the public. Employers diligently consider the risks and safeguards that apply to a particular job, and carefully consider what criminal is related and may create risk.

We appreciate that the Department has multiple interests and considerations to factor when developing these important regulations. We urge the Department to work closely with the stakeholders to ensure that reasonable concerns are addressed and that the final regulations truly achieve the goals of Act 53 of 2020.

Thank you for considering our views on this important matter.

Sincerely,

A handwritten signature in black ink that reads "Alex J. Halper". The signature is written in a cursive, slightly slanted style.

Alex Halper
Vice President, Government Affairs

cc: Cynthia Montgomery, Counsel, PA Department of State
Michelle Elliott, Regulatory Analyst, Independent Regulatory Review
Commission



PA Workforce Development Association

205 House Avenue, Suite 101, Camp Hill, PA 17011 | info@pawork.org | www.pawork.org



December 19, 2022

**Public Comment: Regulation #16A-66 – Consideration of Criminal Convictions
IRRC Number 3361**

Bureau of Professional and Occupational Affairs

Published Date: November 19, 2022 Close of Public Comment: December 19, 2022

Pennsylvania is in a workforce crisis. Employers are desperately seeking to fill vacant positions and connect to available workers. Pennsylvania workers seek access to family-sustaining employment and life changing opportunities. Pennsylvania’s economy relies on maximizing a competitive and available labor force – every potential worker matters.

The proposed regulations (#16A-66) fall short of the legislative intent of Act 53 for standardizing decision-making and allows the very same loophole that existed prior to Act 53 to remain in licensing board and commission processes. By clarifying proposed regulations and establishing uniform timelines, Pennsylvania employers will have access to more qualified applicants to fill the many quality job opportunities available in Pennsylvania.

Act 53 of 2020 was established to provide transparency and clarity under [“one common set of rules” for all licensing boards and commissions by removing “unnecessary barriers to employment and entrepreneurship”](#).

Specifically, PWDA asks for the proposed regulations **to include uniform time limits in the schedules for how long a particular crime is to be “directly related” to a particular profession or occupation.** Within its proposal, the Agency counters this recommendation by stating the legislative definition doesn’t require such a limit. [Volumes of research has been conducted](#) that prove recidivism risk reduction is a real thing and it is bound by time. Ignoring real-world evidence-based research for vague policy counters the purpose of occupational license reform and the intent of Act 53. In addition, the lists of “directly related” offenses are overly broad and contract the legislative intent.

Pennsylvanians on a path to productive employment requiring forms of licensures, registration or certification often pay for education, training, and related career readiness development even before seeking approval from licensing boards. To then be determined unfit to be licensed resulting from subjective opinions, leaves them in debt without the license, certificate, registration, or permit and even deeper depths to climb out of. PWDA asks for the proposed regulations to **account for the indebtedness resulting from career readiness activities such as education and training to be factored into the decision-making processes of board and commission denials**; even go so far as exploring opportunities for reimbursement and waivers.

In a time when Pennsylvania employers are experiencing critical workforce shortages, pathways to family-sustaining employment and productive tax-paying citizenship must be afforded to all able-bodied Pennsylvanians. **We oppose the proposed regulations in their current form.**

Sincerely,

Carrie Amann, Executive Director

Comments of the Independent Regulatory Review Commission



Bureau of Professional and Occupational Affairs Regulation #16A-66 (IRRC #3361)

Consideration of Criminal Convictions

January 18, 2023

We submit for your consideration the following comments on the proposed rulemaking published in the November 19, 2022 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Bureau of Professional and Occupational Affairs (Bureau) to respond to all comments received from us or any other source.

1. Legislative intent; Clarity; Reasonableness.

Act 53 of 2020 (Act 53) (63 Pa.C.S. §§ 3112—3118) set forth a new paradigm for the Bureau’s various professional and occupational licensing boards and commissions in considering the impact of criminal convictions on a board or commission’s decision whether to refuse to issue or renew, suspend, revoke, or otherwise limit a license, certificate, registration, or permit. This proposed regulation is the Bureau’s enactment of the provisions and requirements of Act 53. The Bureau states,

This proposed rulemaking is intended to provide transparency to applicants with criminal histories relating to the types of crimes that may be an impediment to licensure and the factors that the boards and commissions will consider in determining whether an applicant with a criminal conviction may be granted a license. This proposed rulemaking accomplishes these ends by promulgating schedules of criminal convictions that may constitute grounds to refuse to issue, suspend or revoke a license, certificate, registration or permit for each of the 29 professional and occupational licensing boards/commissions as required under 63 Pa.C.S. § 3117. As required under 63 Pa.C.S. § 3117, the Acting Commissioner [of Professional and Occupational Affairs (Commissioner)] consulted with each of the professional and occupational licensing boards, as well as representatives of the business community with knowledge of the respective professions and occupations in developing these schedules.

In determining whether a proposed, final-form, final-omitted, or existing regulation is in the public interest, the Independent Regulatory Review Commission (IRRC) shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation

and whether the regulation conforms to the intent of the General Assembly in the enactment of the statute upon which the regulation is based. In making its determination, IRRC shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General. 71.P.S. § 745.5b.

Representatives Sheryl Delozier and Jordan Harris and Senators John DiSanto and Judith Schwank, prime sponsors of the legislation that ultimately was enacted as Act 53, more commonly known as "occupational licensing reform," submitted comments raising concerns about the proposed regulation. The legislators state that they believe that the Bureau and its boards and commissions have misconstrued the intent of Act 53. The legislators write,

The general theme of Act 53 was that applicants can be presumed unfit only for convictions that are directly related to the practice of the profession in which they seek to practice. The boards and commissions that operate under the umbrella of the [Bureau] were charged with determining what offenses are "directly related" to their practice areas.

But the lists of "directly related" offenses proposed by the licensing boards and commissions are overly broad and are in direct contrast to the spirit of this legislation and the intentions of its makers. For example, the Barber Board's list includes convictions for the possession of a controlled substance with the intent to deliver and felony DUI. Unequivocally, these offenses were not what the General Assembly envisioned as being "directly related" to the profession of barbering when approving this language. Indeed, it compels one to suspend all logic and sense to understand the reasoning underlying the inclusion of these offenses, knowing that such convictions result in the presumption that the applicant poses a "substantial risk" if licensed.

* * * *

In other examples, the Board of Nursing has listed as "directly related" 92 separate offenses beyond violent, sexual, and drug trafficking offenses. Many of the boards include garden[-]variety drug offenses on their lists, seemingly for only a general feeling that drugs are bad.

Moreover, none of the lists contain time limits on how long an offense is "directly related." As a result, anyone who ever in their lives was convicted of a listed offense is presumed unfit, no matter how many years have passed. These lifetime bans look remarkably similar to the prior law that we replaced with Act 53, which permitted exclusion of people with felony convictions for their entire lives. A regulatory package that creates lists of lifetime bans is not consistent with the intent of Act 53, which was to open the licensed professions to people with criminal records if they are fit to do the work and do not pose a heightened risk.

The regulatory package frequently discusses "transparency" as if it were the goal that drove Act 53. While transparency was certainly a goal of the legislation, the

primary objectives, as we have said, were to open the professions more widely to rehabilitated people with old and unrelated criminal records and to provide relief to businesses struggling to find qualified workers.

We urge the Department [of State] to thoroughly review and revise with the boards and commissions the “directly related” lists before resubmission of the package to [IRRC], based upon the intent of the law.

Commenters agree with and echo concerns raised by the legislators. Commenters state that the proposed regulation includes directly related lists of criminal offenses which are generally overbroad and include no time limits for consideration of offenses. Commenters emphasize the concern that the regulations effectively create lifetime bans on pursuing certain occupations if the individual was convicted of one of the listed crimes at some point – even decades in the past. The co-sponsorship memo from Senators DiSanto and Schwank states that the legislation “will remove unnecessary barriers to employment and entrepreneurship” by requiring occupational licensure boards and commissions to consider, among other factors, “the amount of time that has passed since conviction.” Further, Sen. DiSanto remarked on the Senate floor that the legislation overhauls the State’s “restrictive occupational licensure laws that deny many qualified residents the right to work because of an old or irrelevant criminal record.”

Commenters raise additional concerns that although the presumption of unfitness may be overcome in an individualized assessment which is provided for in Section 43b.404 (relating to consideration of criminal convictions), the individualized assessment does not occur until after completion of training. One commenter notes that “[f]ew people will be able to devote the time and resources to a training program for a profession knowing that they face such a presumption at the end. In this way, the proposed regulations frustrate the purpose of Act 53 by deterring and excluding low-risk people with criminal convictions.”

The Bureau addresses the concept of placing time limits in the proposed schedules in response to Regulatory Analysis Form (RAF) Question #26 relating to alternative regulatory provisions. The Bureau explains that the definition of “directly relates” in Act 53 is not time-bound, nor has the General Assembly placed time limits on which crimes or categories of crimes may be considered by boards/commissions in making licensure determinations. Citing the definition of “directly relates” as taken from Act 53, the Bureau states in the RAF that a crime directly relates to a particular profession or occupation where “[t]he nature of the criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform one or more of the duties or responsibilities necessarily related to the profession, trade or occupation for which the individual seeks licensure.” Thus, the Bureau explains, it is the nature of the criminal conduct that dictates whether a crime directly relates to a profession, and not when the crime occurred. The Bureau states that it believes that the inclusion of time limits would be inconsistent with the legislative intent of Act 53 and amounts to a basic policy decision that is best left to the General Assembly. The Bureau concludes its response by stating that the Commissioner and the boards/commissions believe that the proposed regulation represents the least restrictive, acceptable alternative consistent with the legislative intent of Act 53.

Section 2(a) of the RRA, pertaining to legislative intent, provides the following direction: “To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among [IRRC], the standing committees, interested parties and the agency.” 71 P.S. § 745.2(a). As it prepares the final-form regulation, we ask the Bureau to consult the legislature to clarify the legislative intent of Act 53 and to engage stakeholders to reach consensus where possible. Additionally, we ask the Bureau to explain in the Preamble how the final-form regulation is reasonable and consistent with the General Assembly’s intent.

2. Protection of the public health, safety, and welfare; Reasonableness.

The Bureau proposes a schedule of criminal convictions that may constitute ground to refuse to issue, suspend, or revoke a license, certificate, registration, or permit for each of the 29 professional and occupational licensing boards and commissions in proposed Sections 43b.423—43b.451. The Bureau states, “Each schedule indicates which offenses are those that the applicable licensing board or commission deems as directly related to the occupations or professions regulated by that board or commission, that is, those offenses where the nature of the criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform one or more of the duties or responsibilities necessarily related to the profession or occupation for which the individual seeks a license, registration, certificate, or permit.”

The PA Chiropractic Association (Association) opposes the proposed regulation as relates to doctors of chiropractic, stating that there are at least 27 crimes and offenses considered to be directly related to the chiropractic profession that are not considered to be directly related to the medical profession. Conversely, the Association points out that there are at least 15 crimes and offenses considered to be directly related to the medical profession that are not considered to be directly related to the chiropractic profession.

Similarly, several nursing associations raise concerns over inconsistency among health care professionals, noting that there are over 90 crimes on the list of directly related offenses under the Board of Nursing, whereas the Medical Board’s list has 34 crimes. One association points out that theft-related crimes of all grades, DUI, possession of a small amount of marijuana, and lower-level crimes like simple assault are included as directly related to Registered Nurses (inclusive of Nurse Practitioners) and Licensed Practical Nurses, but not included as directly related to Physician’s Assistants or Physicians.

Commenters assert that crimes that are designated as directly related should be uniform across all health care professions and occupations except where the listed offenses are specific to the scope of practice. Did the health care licensing boards consult with one another in determining which offenses to include in their schedules? We ask the Bureau to explain the reasonableness of and any impact on the public health, safety, and welfare of inconsistency among the schedules of health care professionals.

3. Section 43b.201. Fees for services. – Clarity

This section establishes a fee for a preliminary determination application. While the Bureau addresses the process for qualifying for a waiver of the fee in the Preamble, the proposed regulation itself is silent on the existence of a waiver and the process for obtaining one. We ask the Bureau to add language to this section in the final regulation clarifying the availability of and process for seeking a waiver of the fee for a preliminary determination application.

4. Section 43b.404. Consideration of criminal convictions. – Clarity.

The Pennsylvania Society of Health-System Pharmacists requests clarification relating to drug trafficking offenses, stating that Subparagraph (d)(2)(ix) also should pertain to pharmacy interns and their registration process. We ask the Bureau to include pharmacy interns in this provision in the final regulation.

5. Schedules of criminal convictions. – Reasonableness.

Related to Section 43b.423 (relating to schedule of criminal convictions—State Board of Accountancy), the Pennsylvania Institute of Certified Public Accountants (PICPA) provides a list of other crimes, such as theft of trade secrets and mail fraud, which PICPA believes directly relate to the duties necessary to ensure the public's trust and confidence in the profession. PICPA asserts that these convictions should be added to the final regulation. We ask the Bureau to amend the final regulation to include the directly related convictions or explain in the Preamble to the final regulation the reasonableness of excluding them.

Based on the insights provided by this commenter, we ask the Bureau to consider whether additional offenses specific to other boards/commissions were omitted. A thorough reevaluation of all offenses and practices is therefore encouraged to ensure that the final list is appropriate, reasonable, and neither overly-broad nor under-inclusive.