

**TO:** Executive Committee  
Health Law Section

**FROM:** HLS Special Committee on Constitutional Convention

**DATE:** June 13, 2017

**RE:** Report of the NYSBA Committee on the New York State Constitution;  
Recommendation of HLS position

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The NYSBA Committee on the New York State Constitution ( the “ComCon”) has now issued its report entitled “Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention”. The ComCon has recommended that NYSBA support the call for a State Constitutional Convention. The report will be considered by the NYSBA House of Delegates at its meeting on June 17<sup>th</sup>.

In anticipation of the issuance of the ComCon’ s report, Health Law Section Chairman Raul Tabora created this special committee to review the report and recommend a Section position. The special committee has met three times. It has reviewed the current provisions of the State Constitution related to health care, issues surrounding the calling of a constitutional convention, and reviewed the ComCon’ s report. The special committee has concluded that the Health Law Section should support the ComCon’ s report, and that the Executive Committee should direct the Section’s delegate to vote in favor of NYSBA endorsing the call for a constitutional convention.

### **Summary of the Report**

On Election Day this November 7<sup>th</sup>, the ballot will include this 13-word referendum question: “Shall there be a convention to revise the constitution and amend the same?” The New York State Constitution requires that the question of calling a constitutional convention be put before the voters at least once every 20 years.

N.Y. Const., art. XIX, § 2. The last State constitutional convention took place in 1967. That convention recommended a number of amendments to the State Constitution. It also directed that the recommended amendments be put before the voters as a package. Voters rejected the package. The State Constitution has been amended several times since then, but all through the legislative process followed by voter referendum.

The ConCom has been meeting since July 2015. That committee has undertaken a systematic review of each of the sections of the State Constitution. Various experts have made presentations to the committee. The presenters have ranged from experts on state constitutional processes to experts on particular subject areas. The ConCom has issued a number of reports on particular subject areas of the State Constitution.

The current report examines the pros and cons of a constitutional convention. Among the positive reasons identified in the report to have a constitutional convention are: the opportunity to modernize and streamline the State Constitution; the opportunity to enact court reform; the opportunity to address structural problems in State government; and the lack of better alternatives towards reform. Among the negative reasons identified in the report: established rights in the State Constitution could be removed; special interests could predominate; harmful provisions could be added; the expense of a convention; and issues with the delegate selection process.

The ConCom report concludes that despite the very real concerns regarding a constitutional convention, the State Bar Association should support the call for a constitutional convention. The State Bar has long endorsed amendments to the State Constitution to reform the New York Courts. Those endorsed amendments have not moved forward. Absent a constitutional convention, there appears to be little likelihood that they will. The report also concludes that there is a need to review the State Constitution in a

fundamental way, to determine if the Constitution continues to meet the needs of New York today.

Apart from endorsing the convening of a convention, the report also recommends that the State Bar renew its call for the creation of a preparatory commission, and, in the event the referendum approves the convening of a convention, unspecified reforms of the delegate selection process.

### **Current Provisions of the State Constitution Related to Health Law**

Current provisions in the State Constitution related to public health are primarily found in Article XVII of the State Constitution, entitled Social Welfare. Section 3 of that Article is entitled Public Health. It provides:

The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.

Section 4 of that Article is entitled Care and Treatment of Persons Suffering from Mental Disorder or Defect; visitation of institutions for. It provides:

The care and treatment of persons suffering from mental disorder or defect and the protection of the mental health of the inhabitants of the state may be provided by state and local authorities and in such manner as the legislature may from time to time determine. The head of the department of mental hygiene shall visit and inspect, or cause to be visited and inspected by members of his or her staff, all institutions either public or private used for care and treatment of persons suffering from mental disorder or defect.

Section 6 is entitled Visitation and Inspection. It provides:

Visitation and inspection as herein authorized, shall not be exclusive of other visitation and inspection now or hereafter authorized by law.

Section 7 is entitled Loan of Public Funds for Hospital Facilities. It provides:

Notwithstanding any other provision of this constitution, the legislature may authorize the state, a municipality or a public corporation acting as an instrument of the state or municipality to lend its money or credit to or in aid of any corporation or association, regulated by law as to its charges, profits, dividends, and deposition of its property or franchises, for the purpose of providing such hospital or other facilities for the prevention, diagnosis or treatment of human disease, pain, injury, disability, deformity or physical condition, and for facilities incidental or appurtenant thereto as may be prescribed by law.

In addition to those provisions that explicitly mention health care, § 1, commonly referred to as the Aid to the Needy clause, has been interpreted as requiring some minimum of public support for the provision of health care to the needy. See *Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 730 N.Y.S.2d 1 (2001).

Other provisions also address the delivery of health care. Article VII of the State Constitution, entitled State Finances, includes this language:

2. Subject to the limitations on indebtedness and taxation, nothing in this constitution contained shall prevent the legislature from providing for the aid, care and support of the needy directly or through subdivisions of the state; or for the protection by insurance or otherwise, against the hazards of unemployment, sickness and old age; or for the education and support of the blind, the deaf, the dumb, the physically handicapped, the mentally ill, the emotionally disturbed, the mentally retarded or juvenile delinquents as it may deem proper; or for health and welfare services for all children, either directly or through subdivisions of the state, including school districts; or for the aid, care and support of neglected and dependent children and of the needy sick, through agencies and institutions authorized by the state board of social welfare or other state department having the power of inspection thereof,

State Const., Art 7, § 8.

Article 8, governing local finances, includes this language:

§ 1. Subject to the limitations on indebtedness and taxation applying to any county, city, town or village nothing in this constitution contained shall prevent a county, city or town from making such provision for the aid, care and support of the needy as may be authorized by law, nor prevent any such

county, city or town from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions and of children placed in family homes by authorized agencies, whether under public or private control, or from providing health and welfare services for all children, . . . . Payments by counties, cities or towns to charitable, eleemosynary, correctional and reformatory institutions and agencies, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required, by the legislature. No such payments shall be made for any person cared for by any such institution or agency, nor for a child placed in a family home, who is not received and retained therein pursuant to rules established by the state board of social welfare or other state department having the power of inspection thereof.

### **Possible Health Issues for Consideration by a Constitutional Convention**

The select committee members have identified a number of health issues that could be considered of constitutional dimension, and thus worthy of discussion at a constitutional convention. As health lawyers, we are aware that since the 1938 convention there has been a significant growth in the administrative state. There are vast implications in that growth, both in the development of rules, and in their enforcement and impact. Other identified issues have already been recognized as constitutional rights by the courts, yet not specifically enumerated; some would be newly recognized as constitutional rights. Some would be controversial, some likely divisive. Some might be deemed more suitable to statutory enactment. Nevertheless, the issues mentioned were all worthy of discussion.

What follows is a list of the issues raised, in no particular order:

- Abortion
- Assisted suicide/right to die
- Civil confinement
- Private Right of Action
- Gun control
- Right of privacy/health care information/personal autonomy/internet of things
- Data ownership
- Genetic ownership

- Mental health care
- Administrative agency decision-making
- Least restrictive environment

### **Recommendation and Next Steps**

The Committee recommends that the Section Executive Committee support the ConCom report and instruct the Section's Delegate to support the report at the vote of the House of Delegates. The committee recognizes that there is no guarantee that a constitutional convention will be successful, or that a convention would even consider any or all of the significant health law issues having a constitutional dimension. Nevertheless, a constitutional convention provides an opportunity to consider these issues, most of which did not even exist in 1897 when the State Constitution was written, or in 1937 or 1967, when state constitutional conventions were last convened.

If the November referendum results in a yes vote, the select committee will reconvene to review and develop positions regarding health law issues that should be considered by the convention.

Respectfully submitted,

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